Restraining Multiple Bites at the Class Certification Apple: May a Federal Court Enjoin a State Court from Relitigating Class Certification Denial?

CASE AT A GLANCE

In 2001, Keith Smith and Shirley Sperlazza filed a class action lawsuit against Bayer Corporation in West Virginia state court in connection with their use of the prescription drug Baycol. In 2008, a federal district court overseeing the massive Baycol products multidistrict litigation denied federal class certification to a proposed class of West Virginia consumers alleging economic-loss injury. The *Smith* class then moved for class certification in state court. In response, Bayer sought a permanent injunction enjoining the West Virginia class certification hearing, which the federal district court granted. This appeal involves the issue of whether a federal court can enjoin a state court from certifying a class action after a federal court previously denied class certification in a virtually identical class action.

Smith v. Bayer Corporation
Docket No. 09-1205

Argument Date: January 18, 2011
From: The Eighth Circuit

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ISSUES

When a federal court in a multidistrict litigation (MDL) proceeding denies certification of a statewide class action, may the court pursuant to the All Writs Act and the Anti-Injunction Act enjoin putative class members who were represented in the federal hearing from seeking class certification in state court for the same class action?

When a federal court in an MDL proceeding denies certification of a statewide class action, is it impermissible for the federal court to issue an injunction restraining absent class members from seeking state class certification, where those absent class members were not afforded the due process protections required if certification had been granted?

FACTS

The *Smith* appeal arises in the context of massive litigation over the prescription drug Baycol, manufactured and distributed by the Bayer Corporation from 1997 to 2001. Baycol is a "statin" drug that physicians prescribed to lower cholesterol. After its introduction to the market, Baycol became associated with an array of patient side effects, ranging from mild muscle aches and pains to more severe medical conditions such as rhabdomyolosis, an extreme breakdown of muscle tissue that compromises kidney function. After numerous adverse event reports, Bayer voluntarily withdrew Baycol from the market in August 2001.

After Baycol's withdrawal from the market, plaintiffs filed thousands of lawsuits in federal and state courts. In December 2001, the federal Judicial Panel on Multidistrict Litigation established a Baycol multidistrict litigation (MDL) in the United States District Court for the District of Minnesota. Between 2001 and 2010, the Minnesota Baycol MDL consolidated all federal Baycol cases for coordinated discovery and other pretrial proceedings. In addition, the federal court worked cooperatively with state judges supervising or managing state Baycol litigation. As part of the MDL proceedings, the district court supervised a settlement program for Baycol claimants with the most severe rhabdomyolosis claims. Through 2010, Bayer has paid $1.17 billion to resolve 3,144 rhabdomyolosis claims.

Bayer also vigorously defended lawsuits by plaintiffs with all other claims, including economic-loss claims, who were not personally injured by their use of Baycol. In these lawsuits, Baycol won defense victories in six jury trial cases. Of approximately 40,000 cases filed in federal and state court, fewer than 80 Baycol cases are still pending.

Against this backdrop, in 2001 George McCollins brought a lawsuit on behalf of a class of West Virginia Baycol purchasers, in West Virginia state court, asserting claims for economic loss caused by Bayer's alleged breach of warranty and violation of the West Virginia Consumer and Credit Protection Act. In August 2001, that case was removed to federal court on diversity grounds, and transferred to the Minnesota Baycol MDL.

McCollins did not allege any claims for personal injury, nor did he claim that the drug had not worked as intended. He merely sought a refund for the amount he had paid for Baycol, or statutory damages, because class members had not received a product of the quality, nature, and fitness as represented by Bayer.

In August 2008, the Minnesota federal district court, in a series of rulings, denied McCollins's request that the case be remanded back to West Virginia state court, granted Bayer's motion to deny class certification, and then entered a summary judgment against McCollins. *McCollins v. Bayer Corp.,* 265 F.R.D. 453 (D. Minn. 2008). In opposition to Bayer's class certification motion, McCollins argued that class certification was appropriate because common questions predominated over any individual issues.

The federal district court held that class certification was inappropriate because McCollins's economic-loss claims were not suitable for certification under Rule 23(b)(3). Construing the underlying West Virginia law on economic loss, the court held that in order to prevail, a plaintiff would have to show injury proximately caused by the defendant. Because this inquiry was inherently individual as to each class member, the court determined that individual issues predominated and the class was not suitable for certification. Neither McCollins nor any class member appealed the denial of the class certification, and this judgment became final on September 25, 2008.

On September 30, 2008, five days after the Minnesota judgment denying federal class certification became final, Keith Smith and Shirley Sperlazza, as class representatives, sought class certification of their West Virginia state court class action seeking compensation for economic loss. This West Virginia Baycol case had not been removed to federal court because the plaintiffs had added two West Virginia defendants to the lawsuit, who were later dismissed after the one-year deadline for removal.

When the West Virginia plaintiffs sought class certification, Bayer moved the Minnesota federal district court to enjoin Smith and Sperlazza from relitigating the certification of a West Virginia economic-loss class. In 2009, the Minnesota federal district court granted the motion under the relitigation exception to the federal Anti-Injunction Act, 28 U.S.C. § 2283. This order is not officially reported, but is available at *In re Baycol Prods. Litig., Smith v. Bayer Corp.,* 2008 WL 7425712 (D. Minn. Dec. 9, 2008).

The court held that the West Virginia economic-loss class was identical to the class denied in *McCollins,* the West Virginia class presented the same substantive issues, the plaintiffs had not identified any substantive or procedural differences between the federal and West Virginia class action rules, the order denying class certification was final, and that the plaintiffs' interests in obtaining class certification of a West Virginia economic-loss class had been adequately represented in the federal proceedings.

The Eighth Circuit affirmed in January 2010, emphasizing the importance of the finality of judgments to the just and efficient administration of justice through federal MDL proceedings. *In re Baycol Prods. Litig., Smith v. Bayer Corp.,* 593 F.3d 716 (2010). The Eighth Circuit chiefly relied on a Seventh Circuit decision upholding the issuance of an injunction against state class certification of similar proposed nationwide class actions that a federal court previously had denied class certification. *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.,* 288 F.3d 1012 (2002).

In reaching this conclusion, the appellate court held that the certification issue in *Smith* was identical to that in *McCollins* and was enmeshed in the same substantive law. In addition, the Eighth Circuit held that there was no substantive or procedural difference between the federal and West Virginia standards for class certification that would justify allowing the plaintiffs to relitigate the federal district court's finding of a lack of predominance. Finally, the Eighth Circuit agreed that the West Virginia plaintiffs' interests had been adequately protected in *McCollins* because they had the right to appeal denial of that class certification, as well as the right to pursue their individual claims.

CASE ANALYSIS

The *Smith* appeal implicates the scope of federal injunctive power over state court proceedings to restrain potential relitigation of federal class certification decisions. In a litigation landscape that permits both federal and state class litigation, the Court's resolution of this injunction could have wide repercussions for plaintiffs seeking class certification in state court where a federal court previously has denied class certification to a virtually identical class.

The federal Anti-Injunction Act, 28 U.S.C. § 2283, embodies a fundamental principle of federal noninterference with state court proceedings. The statute generally prohibits federal courts from enjoining parallel state proceedings, with three well-known exceptions: (1) where issuance of an injunction is expressly authorized by federal statute; (2) where a federal injunction would be in aid of the federal court's jurisdiction; and (3) where an injunction is necessary "to protect or effectuate its judgments." See generally *Chick Kam Choo v. Exxon Corp.,* 486 U.S. 140 (1988); *Vendo Co. v. Lecktro-Vend Corp.,* 433 U.S. 623 (1977); *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.,* 398 U.S. 281 (1970).

This third exception to the Anti-Injunction Act is commonly called the "relitigation exception." In this litigation, all parties agree that the appeal involves the authority of the federal district court to issue an injunction restraining the West Virginia plaintiffs under the relitigation exception to the Anti-Injunction Act.

If an exception to the Anti-Injunction Act is properly invoked, then a federal court has the ability to issue an injunction pursuant to the federal All Writs Act, 28 U.S.C. § 1651. None of the parties to this appeal contend that the All Writs Act was inappropriate authority for issuance of the injunction against the West Virginia plaintiffs.

The controversy in *Smith* centers on whether the Minnesota federal court properly (or erroneously) invoked the relitigation exception to the Anti-Injunction Act. The relitigation exception is based on principles of res judicata and collateral estoppel, and may be used to prevent the relitigation of claims that have been actually decided by a federal court in a prior proceeding. Bayer and Smith disagree over what body of law supplies the governing principles. Bayer contends that the federal preclusion doctrine controls; Smith contends that federal common law incorporates the collateral estoppel doctrine of the relevant state, unless it is incompatible with federal interests.

As such, Smith invokes West Virginia's collateral estoppel preclusion doctrines. However, West Virginia principles and federal principles are substantially the same.

In general, res judicata (claim preclusion) or collateral estoppel (issue preclusion) prevents subsequent litigants from relitigating any claim or issue, between parties and parties in privity, that was actually litigated and decided in a prior proceeding. For collateral estoppel to apply, West Virginia law requires four findings: (1) the issue previously decided must be identical to the current one; (2) there must have been a final adjudication on the merits in the prior action; (3) the party against whom the doctrine is invoked must have been a party or in privity with a party to the prior action; and (4) the party against whom the doctrine is invoked must have had the opportunity to have had a full and fair opportunity to litigate the issue in the prior action.

Correlatively, the law has recognized a general rule against nonparty preclusion. In representative litigation, however, courts have long recognized an exception to the res judicata principles of nonparty preclusion. *Hansberry v. Lee,* 311 U.S. 32 (1940). Thus, because of the representative nature of class litigation, courts consistently have held that absent class members who are not actually before the court may be bound by the preclusive effect of a class action judgment, provided that the absent class members were adequately represented in the litigation.

The *Smith* appeal presents an interesting wrinkle on the class action exception to res judicata principles because it involves a judicial decision denying class certification, rather than a final judgment on the merits of the substantive claims pleaded in the class complaint. As such, the Supreme Court is being asked to address whether principles of res judicata, and by extension the reach of the Anti-Injunction Act, apply with equal force to a federal court's denial of a class certification motion.

Stated differently, the Court is being asked to determine whether subsequent state plaintiffs may relitigate an adverse federal class certification decision, free from the binding effect of a federal court's determination that class certification is not appropriate. Do res judicata and collateral estoppel principles implemented through the Anti-Injunction and All Writs Acts prevent state class action plaintiffs from getting another bite at the class certification apple? Can absent class members who have lost a class certification decision in federal court turn around and seek class certification of the same class action in state court, hoping for a better outcome?

The nub of the argument in *Smith* turns on a series on interrelated issues concerning the application of res judicata principles: (1) whether denial of a class certification motion is a final judgment for res judicata purposes; (2) whether the parties involved in the Minnesota *McCollins* class certification denial were the same as the putative members of the *Smith* class action; (3) whether the issues decided in the Minnesota *McCollins* class certification denial were the same issues presented in the *Smith* class action; and (4) whether absent class members in the Minnesota *McCollins* class action were afforded adequate due process protections because the class was never certified. Smith and Bayer disagree over the answers to each of these questions.

Smith contends that he cannot be bound by the *McCollins* denial of class certification, for several reasons. Smith argues that he was not the same party who brought the Minnesota proceeding and was not in privity with *McCollins;* he was not a named party in the McCollins litigation; and that due process considerations do not permit Smith to be deemed a party under the class action exception to the rule against nonparty preclusion.

In addition, according to Smith, the same issues were not litigated in the prior proceeding, nor were those issues essential to the court's denial of class certification; moreover, *Smith* asserted a common-law fraud claim that was not asserted in *McCollins*. Smith argues that a federal court's interpretations of federal rules are not binding on state courts, even where the state rules replicate the same language as the federal rules, and that a West Virginia court might exercise discretion to certify a class action under the West Virginia rule differently than a federal court under Rule 23.

Smith further contends that the federal court's denial of class certification is a procedural ruling, and that federal and state courts have authority to interpret and apply their procedural rules independently of each other. In this same vein, Smith suggests that the federal court's denial of class certification based on underlying substantive law cannot transform this procedural ruling into a substantive judgment on the merits so as to qualify for collateral estoppel effect.

Finally, because the Minnesota court denied class certification, Smith contends he was never was afforded the due process protections he would have received had the class been certified, such as notice of the class action, the opportunity to appear by counsel, and the opportunity to opt-out. These procedural safeguards are necessary for a "properly conducted class action" and are afforded to class members only upon class certification, which Smith argues is the true beginning of a class action. Consequently, because the denial of class certification meant that *McCollins* never became a properly conducted class action, the class action exception against nonparty preclusion does not apply to this action. Thus, collateral estoppel could not be utilized to foreclose relitigation of the class certification decision in West Virginia state court.

In response, Bayer contends that Smith's analysis is incorrect on virtually every factor required for the application of collateral estoppel and issuance of an injunction to enforce preclusion. Bayer contends that the same issues were presented in both the *McCollins* and *Smith* class actions. Both cases were predicated on the same economic-loss claims. Consequently, Bayer concludes that the propriety of certifying an economic loss Baycol class under West Virginia law was fully and fairly litigated in the Minnesota federal class certification hearing.

Because the controlling legal principles under federal and West Virginia class action laws are the same, the same issues were presented. In this view, Bayer asserts that the question of whether individual issues would predominate on the underlying economic-loss liability issue was the same for the federal and West Virginia state courts, and because West Virginia courts follow federal jurisprudence, the outcome on the predominance issue would have to be the same. Instead, the *Smith* motion for class certification simply seeks a different result from the West Virginia state court.

Moreover, Bayer argues, the unnamed *Smith* class members of an uncertified class are treated as parties for a variety of purposes, including application of preclusion doctrine. *Devlin v. Scardeletti,* 536 U.S. 1 (2002). Bayer thus suggests that just as unnamed class members are entitled to the benefits of a favorable decision on class certification, they also should be bound by an unfavorable one. Moreover, the procedural nature of class certification should not defeat preclusion; the fact that it is a procedural ruling does not preclude an attempt to relitigate the same procedural issue. The fact that a class certification decision involves an element of judicial discretion also does not defeat application of preclusion doctrine, claims Bayer. Discretionary rulings, no less than factual findings, are entitled to preclusive effect when the underlying issues were fully and fairly litigated and essential to a judgment that binds the parties.

Bayer contends that precluding the *Smith* litigants from relitigating class certification does not violate their due process rights. According to Bayer, the *Smith* absent class members were adequately represented in the *McCollins* class proceedings; notice and opt-out rights are not essential to a finding of due process in the class action context. Bayer argues that a class action does not become one only at the point of class certification; the concept of a "properly conducted class action" embraces all proceedings after a class action is filed with the court.

In Bayer's view, the extensive *McCollins* class certification proceedings constituted a properly conducted class action for which certification judgment is entitled to preclusive effect. The *McCollins* class representatives fully and fairly litigated the class certification decision, and the additional procedures that were not provided would not, according to Bayer, have increased the probability of a favorable or correct class certification result. Instead, requiring the additional due process procedures that *Smith* suggests (such as notice and the right to opt-out) as a predicate for finding adequate representation, would instead encourage gamesmanship and inconsistent results.

Bayer advances a series of policy arguments in support of affirming the Minnesota federal injunction. Bayer points out that if the Eighth Circuit's decision is not upheld, this will provide an incentive for every unnamed class member who loses class certification in a federal forum to relitigate the class certification issue in a state court seeking a better outcome, producing the very multiplicity of litigation that Rule 23 was intended to avoid. Hence, Bayer argues, class members should not be able to play a game of hopscotch between federal and state courts. Not only would this result undermine the goal of judicial efficiency and economy, but it also would undermine the purposes of preclusion doctrine, which is a doctrine of repose intended to bring finality and certainty to judicial proceedings. The preclusion doctrine is intended to prevent litigants from having unlimited bites at the apple until the litigant can convince a single court of its position.

Finally, Bayer argues that application of the preclusion doctrine and the issuance of the injunction is further supported by the strong policies underlying Rule 23, the MDL statute, and the Class Action Fairness Act of 2005 (CAFA). In this view, Rule 23 was promulgated, in part, to avoid duplicative litigation by permitting the aggregation of claims involving common questions of law and fact. The MDL statute, similarly, was intended to create a federal procedure to control the multiplicity of cases and coordination of multiple claims for the effective management of complex litigation. Hence, a federal preclusion rule that would permit the *Smith* litigants to relitigate the *McCollins* class certification decision would undermine federal court's ability to accomplish the policy goals of efficiency, fairness, and uniformity of decisions. Lastly, Bayer contends, in enacting CAFA, Congress manifested a judgment that duplicative state-court class actions served no useful purpose, harmed interstate commerce, and caused an enormous waste of party and judicial resources. Therefore, permitting the *Smith* litigants to relitigate the Minnesota class certification decision would conflict with congressional rationales for enacting CAFA.

SIGNIFICANCE

In deciding the *Smith* appeal, the Supreme Court will not forge any new ground in interpreting the Anti-Injunction Act or the All Writs Act. The appeal basically presents a fairly straightforward question concerning the appropriate exercise of the relitigation exception, in the context of dual federal-state class action practice. However, the Court's *Smith* decision will have important implications for federal and state class action litigation.

In the past twenty years, the burgeoning of class action litigation in both federal and state court has given rise to problems relating to intersystem adjudication of complex litigation. There are no legal restrictions on litigants from filing parallel actions in both federal and state court, and the Anti-Injunction Act is a relatively weak mechanism for restraining parallel state proceedings.

In the past two decades, federal courts have attempted to better manage duplicative class action litigation through increased use of the MDL procedures, which enable consolidation of all similar cases throughout the federal system and for coordinated pretrial discovery and other proceedings. MDL procedures have proved to be very effective mechanisms for resolving massive litigation. In addition, Congress manifested an interest in channeling class action litigation into federal courts by enactment of CAFA, which created new federal jurisdiction for class actions and provided a vehicle for removing class actions from state court into the federal system.

Notwithstanding these developments, litigants still may pursue state class action relief. The *Smith* appeal confronts the Court with the important question of whether state litigants are free to seek a different class certification decision in a state court, once a federal court has determined class certification should be denied. As Bayer suggests, such a ruling would provide litigants with an incentive to keep filing state class actions until they find a judge who decides differently than the federal court. For policy reasons alone, Bayer contends this is an untenable conclusion.

The *Smith* plaintiffs, on the other hand, suggest this case tests the very heart of federalism: the notion that state courts are free to determine issues according to their own interpretation of their laws and procedures, even where those laws and procedures are identical to federal rules.

In the end, the Court's opinion is likely to turn on a careful, nuanced analysis of the preclusion doctrine's requirements, with careful attention to the parties, issues, and nature of the class proceedings in *McCollins* and *Smith*. We also may expect the Court to supply some

further elucidation of what due process requires, in the class action context, to give preclusive effect to a class certification denial to nonparties to a prior litigation.

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PREVIEW of United States Supreme Court Cases, pages 181–185.
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