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June 2011

**PRODUCT LIABILITY UPDATE**

**Supreme Court Limits Federal Courts' Power to Enjoin Class Actions In State Courts – Highlighting the Importance of CAFA**

In a 9-0 decision, the U.S. Supreme Court reversed the Eighth Circuit's affirmance of an order enjoining a state court class action against Bayer Corporation after a similar class certification had been denied in federal court. The Court held that the Anti-Injunction Act, 28 U.S.C. § 2283, bars a federal court that has denied class certification from enjoining state court class actions in which (1) the state's legal standard for class certification is different from, or may be interpreted differently than, the federal standard or (2) the named class representatives are different. *Smith v. Bayer Corp.*, 564 U.S. \_\_\_, No. 09-1205 (June 16, 2011).

In response to the policy argument against allowing relitigation of class certification, the Court noted that *stare decisis* and comity are the legal system's remedies for repetitive litigation that falls outside of the rules of preclusion, and that once a class action is removed to federal court under the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. §§ 1332(d), 1453, federal standards under Rule 23 must be applied and comity observed.

**BACKGROUND**

In August 2001, George McCollins sued Bayer Corporation in the Circuit Court of Cabell County, West Virginia, asserting various state law claims arising from Bayer's marketing of the prescription drug Baycol. Pursuant to West Virginia Rule of Civil Procedure 23, McCollins filed a motion to certify a statewide class of residents who had purchased Baycol.

Approximately one month after the McCollins action was filed, Keith Smith and Shirley Sperlazza brought a similar action against Bayer in the Circuit Court of Brooke County, West Virginia, and, like McCollins, sought certification of a class of Baycol purchasers residing in West Virginia pursuant to West Virginia's version of Rule 23. Both cases thus predate the enactment of CAFA.

In January 2002, Bayer removed McCollins' case to federal court on the basis of diversity jurisdiction, and the Judicial Panel on Multidistrict Litigation transferred the case to the District of Minnesota, where all federal cases involving Baycol had been transferred. *Smith*, slip op. at 2. Smith's case, however, remained in state court in West Virginia because removal was prevented by lack of complete diversity. *Id.* at 3.

After the two cases proceeded separately for six years, the District Court in Minnesota denied McCollins' motion for class certification, applying Federal Rule of Civil Procedure 23. The District Court held that each plaintiff would have to prove actual injury from his or her use of Baycol to recover under West Virginia law, and that individual issues of fact would therefore predominate



over common ones. *Smith*, slip op. at 3. The court also dismissed McCollins' claims for failure to demonstrate physical injury. He did not appeal. *Id.*

Bayer then moved the District Court to enjoin proceedings on Smith's motion for class certification in the West Virginia state court. *Smith*, slip op. at 3. Agreeing with Bayer that such an order was appropriate to protect its judgment denying class certification in the *McCollins* case, the District Court granted the motion. *Id.* at 4.

On appeal, the Court of Appeals for the Eighth Circuit affirmed. *In re Baycol Prods. Litig.*, 593 F.3d 716 (8th Cir. 2010). The Eighth Circuit reasoned that Smith sought certification "of the same class" in a suit alleging "the same legal theories" as in the *McCollins* case, and held that the injunction was proper because Smith was an unnamed member of the McCollins class, and because their "interests were aligned." *Id.* at 724.

### **THE SUPREME COURT'S ANALYSIS**

The Supreme Court started with the Anti-Injunction Act, which prohibits District Courts from "grant[ing] an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of jurisdiction, or to protect or effectuate its judgments." *Smith*, slip op. at 5 (quoting 28 U.S.C. § 2283). Bayer relied on the third exception, which is designed to "implement 'well-recognized concepts' of claim and issue preclusion." *Id.* at 6, (quoting *Chick Jam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988)). It applies only if two conditions are met: (1) the issue decided in federal court must be "the same one" to be presented in state court and (2) the enjoined party "must have been a party to the federal suit, or else must fall within one of a few discrete exceptions to the general rule against binding nonparties." *Id.* at 7. The Court held that neither condition was satisfied in this case.

#### ***First Condition: Same Issue***

The Court agreed that the proposed classes were the same and that the substantive claims in the two cases overlapped, but found that the Eighth Circuit had not considered the critical question of whether West Virginia's courts would interpret and apply the language of its Rule 23 the same way that Federal Rule 23 is interpreted and applied. *Smith*, slip op. at 8, 9. Certification of McCollins' proposed class was denied under Federal Rule 23, while certification in Smith's case would have been decided under West Virginia Rule 23. *Id.* at 9. The Eighth Circuit relied on the "near-identity" of the texts of Federal Rule 23 and West Virginia's Rule 23 to find that the question presented in the two cases was the same. Smith argued that the mere fact that courts of different sovereignty would decide the motions made the issues to be determined different, because the second court must have the opportunity to construe differently its procedural rule. *Id.*

The Court rejected both of these approaches and held that the "the right path lies somewhere in the middle." *Smith*, slip op. at 9. Following this "middle path," preclusion applies and injunctive relief is appropriate only if the state courts have "made crystal clear that they follow the same approach



as the federal court applied.” *Id.* at 9-10. When this is not made clear, the question of preclusion must be left to the state courts:

So a federal court considering whether the relitigation exception applies should examine whether state law parallels its federal counterpart. But as suggested earlier, see *supra*, at 6, the federal court must resolve any uncertainty on that score by leaving the question of preclusion to the state courts.

*Id.* at 10.

In this case, an identity of issues could not be established because the West Virginia courts have not bound themselves to federal interpretations of Rule 23. First, as a general matter, the West Virginia Supreme Court has “declar[ed] its independence from federal courts’ interpretation of the Federal Rules – and particularly of Rule 23” by noting that, while such federal decisions “may be persuasive, [they are] not binding or controlling.” *Smith*, slip op. at 10 (quoting *In re W.Va. Rezulin Litigation*, 214 W.Va. 52, 585 S.E.2d 52, 61 (W.Va. 2003)). Second, in denying McCollins’ motion for class certification, that court also has specifically “disapproved the approach to Rule 23(b)(3)’s predominance requirement that the Federal District Court embraced.” *Id.* at 11. Therefore, although the federal and West Virginia rules have similar texts, the federal and West Virginia courts “apply different law” and “decide distinct questions.” *Id.* at 12.

### ***Second Condition: Same Party***

Bayer argued that Smith, as an absent class member in the *McCollins* case, qualified as a party to it, and in the alternative, that he qualified for the exception to the rule against nonparty preclusion for members of class actions. *Smith*, slip op. at 13. The Supreme Court rejected both arguments on the ground that, while preclusion applies to members of a certified class, it does not apply to members of a class before it is certified or after certification has been denied. *Id.* The Court specifically rejected Bayer’s argument that Smith should be bound as an absent class member because, “[u]ntil the moment when class certification was denied, the *McCollins* case was a properly conducted class action.” *Id.* at 14 (quoting Resp. Brief at 37). This argument failed for the very reason that the District Court denied class certification:

If we know one thing about the McCollins suit, we know that it was *not* a class action. Indeed, the very ruling that Bayer argues ought to be given preclusive effect is the District Court’s decision that a class could not properly be certified. So Bayer wants to bind Smith as a member of a class action ... to a determination that there could not be a class action.

*Id.* at 14. The Court made clear that only a certified class action binds nonparties:

In these circumstances, we cannot say that a properly conducted class action existed at any time in the litigation. Federal Rule 23 determines what is and is not a



class action in federal court, where McCollins brought his suit. ... Neither a proposed class action nor a rejected class action may bind nonparties.

*Id.* at 15. In adopting this bright-line rule, the Court also rejected the theory of “virtual representation,” under which preclusion would extend to parties based on “identity of interests and some kind of relationship between parties and nonparties.” *Id.* (quoting *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008)).

Bayer’s strongest argument in the Supreme Court’s eyes was the policy argument that if federal courts do not enforce their judgments denying certification, serial relitigation of class certification will result, and defendants will be forced to settle class actions. While acknowledging the reality of this threat, the Court noted that the argument “flies in the face of the rule against nonparty preclusion,” which “perforce leads to relitigation of many issues ...” *Smith*, slip op. at 16. The primary remedies for this problem in our legal system are principles of *stare decisis* and comity between courts. *Id.* at 17. For class actions in particular, the Court pointed out that Congress also has provided the remedy of enlarged removal jurisdiction under CAFA, and that, once in federal court, class actions may be transferred and consolidated in one court, and that “we would expect federal courts to apply principles of comity to each other’s class certification decisions when addressing a common dispute.” *Id.* at 17.

#### **FUTURE IMPACT: CAFA REMOVAL IS CRITICAL**

Before *Smith*, defendants had at least two important, potential means other than comity and *stare decisis* to prevent serial relitigation of class certification in duplicative and overlapping class actions: CAFA and injunctive relief. After *Smith*, both means are still available, but federal courts’ power to enjoin state court actions – which was never clear to begin with – has been sharply narrowed, making the availability of CAFA removal all the more important. Federal courts still may enjoin subsequent class certification proceedings in state courts under *Smith*, but only if the same legal standard for certification has clearly been established and the plaintiff was also a plaintiff in federal court.

*Smith*’s narrowing of federal courts’ power to grant injunctive relief heightens the importance of removing actions to federal court for defendants who want to prevent plaintiffs from repeatedly relitigating class certification. Plaintiffs’ counsel can be expected to redouble efforts to use the “local controversy” or “home state” exceptions, artful pleading of damages claims, and other means to avoid CAFA’s jurisdictional reach. They also will seek to magnify differences in federal and state law standards for class certification and continue to urge state courts to widen those differences and adopt lower class certification standards. It is more critical than ever for defendants to know how to counter these tactics and be prepared with creative and aggressive removal strategies under CAFA.



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### FOR MORE INFORMATION

For more information, please contact:

Kip T. Bollin	216.566.5786	<b><a href="mailto:Kip.Bollin@ThompsonHine.com">Kip.Bollin@ThompsonHine.com</a></b>
William W. Jacobs	216.566.5533	<b><a href="mailto:Bill.Jacobs@ThompsonHine.com">Bill.Jacobs@ThompsonHine.com</a></b>
Brian A. Troyer	216.566.5654	<b><a href="mailto:Brian.Troyer@ThompsonHine.com">Brian.Troyer@ThompsonHine.com</a></b>
Elizabeth B. Wright	216.566.5716	<b><a href="mailto:Elizabeth.Wright@ThompsonHine.com">Elizabeth.Wright@ThompsonHine.com</a></b>
M. Scott Young	513.352.6617	<b><a href="mailto:Scott.Young@ThompsonHine.com">Scott.Young@ThompsonHine.com</a></b>

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