

SMITH V. BAYER CORPORATION

**DEFINING AND LIMITING THE FEDERAL COURTS'
ABILITY TO ENJOIN COMPETING CLASS ACTIONS**

**By Elizabeth J. Cabraser
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP**

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1. Introduction

On June 16, 2011, the United States Supreme Court issued its opinion in *Smith v. Bayer Corp.*, No. 09-1205, 564 U.S. ___, 131 S. Ct. 2368 (2011), interpreting the Anti-Injunction Act, 28 U.S.C. § 2283, to hold that federal courts cannot enjoin state courts from certifying class actions that mirror federal cases in which certification has been denied.

In *Smith v. Bayer*, preclusion met federalism, and federalism won. It was Justice Kagan, not (yet) known for segues into federalism, who authored the opinion, with Justice Thomas, a staunch federalism advocate, joining Parts I and II-A.

Smith v. Bayer has been characterized as a proceduralist's dream. It involved the convergence of a federal statute, similar, yet not identical, federal and state class action rules, and classic preclusion doctrine. The procedural conundrum presented in *Smith v. Bayer*, while baroque, was not unique: the existence of parallel or competing class actions has been a recurring and inevitable feature of our dual federal and state civil justice system. While mechanisms exist within the federal system to centralize and coordinate class actions involving similar claims before a single court, such as venue transfer under 28 U.S.C. § 1404, or multidistrict centralization under 28 U.S.C. § 1407, and similar coordination mechanisms exist within some state court systems, there was no formal mechanism to coordinate multiple class actions across the federal/state divide. In 2005, the enactment of the Class Action Fairness Act ("CAFA") broadened federal diversity jurisdiction to enable, for the first time, most class actions not involving federal claims to be filed in or removed to the federal courts, so long as the citizenship of any one putative class member and any defendant were diverse. *See* 28 U.S.C. § 1332(d). But the *Smith* saga unfolded before CAFA existed.

2. A Tale Of Two Classes

The matter before the Supreme Court involved two separate class action certification motions in two separate lawsuits, in two separate jurisdictions. In each case, the plaintiffs moved to certify a class of West Virginia residents who purchased Baycol—a cholesterol lowering prescription medication manufactured and distributed by Bayer Corporation—and who claimed only economic loss. The personal injury claims arising from Baycol use were litigated, and largely settled, in individual federal and state suits that were aggregated in various ways, including a multidistrict litigation transferred to and centralized in the District of Minnesota, *see In re Baycol Prods. Liab. Litigation* (MDL No. 1431), 180 F. Supp. 2d 1378 (Judicial Panel on Multidistrict Litigation 2002)

a. The First Action: *McCollins V. Bayer*

George McCollins was prescribed Baycol, but did not suffer any of the side effects that led Bayer to withdraw the drug from the market. McCollins and two other individuals filed suit against Bayer, on behalf of themselves and other similarly situated West Virginia consumers, in West Virginia state court. The *McCollins* complaint asserted breach of express and implied warranties and violation of the West Virginia Consumer Credit and Protection Act (“WVCCPA”) on behalf of a West Virginia statewide class. Bayer removed the *McCollins* case to federal court, and it was thereafter transferred by the Judicial Panel on Multidistrict Litigation to the District of Minnesota as part of the MDL No. 1431 proceedings.

b. The Second Action: *Smith v. Bayer*

In the second case, Keith Smith and Shirley Sperlazza filed suit against Bayer in West Virginia state court on behalf of a putative West Virginia statewide Baycol consumer class. Smith and Sperlazza asserted economic loss claims related to the manufacture, sale, advertisement and warnings of Baycol and for product liability. The *Smith* action sought class

treatment for claims sounding in fraud, breach of warranties, and violations of the WVCCPA.

Id. Because complete diversity did not exist (plaintiffs had sued several West Virginia defendants in addition to Bayer) Bayer was not able to remove the *Smith* case to federal court, as it had with *McCollins*, and the case remand in the state courthouse in Brooke County, while the *McCollins*'s case journeyed to Minneapolis to become part of the Baycol MDL. *Id.* at 720.

As Justice Kagan recounts, “[o]ver the next six years, the two cases proceeded along their separate pretrial paths at roughly the same pace. By 2008, both courts were preparing to turn to their respective plaintiffs’ motions for class certification. The Federal District Court was the first to reach a decision.” 131 S. Ct. 2374. Ruling in favor of Bayer, the MDL transferee court granted Bayer’s motion to deny class certification to the economic loss class proposed by *McCollins*, and later granted summary judgment dismissing his individual claim in August 2008. The *McCollins* court concluded that, because each plaintiff in the putative class would have to demonstrate that [he or she was] either injured by Baycol, or that Baycol did not provide [him or her] any health benefits, common issues did not predominate as required by Fed. R. Civ. P. 23(b)(3) and 23(c)(4). The Eight Circuit affirmed *In re Baycol Products Litig.*, 593 F.3d 716, 720 (8th Cir. 2010).

And so it came to pass that in September 2008, plaintiffs Smith and Sperlazza filed their own class certification motion in state court, seeking certification of an economic-loss-only class under Rule 23(b)(3) of the West Virginia Rules of Civil Procedure.

c. The Anti-Suit Injunction

In response to The *Smith* plaintiffs’ motion, Bayer filed a motion in the MDL seeking to enjoin Smith and Sperlazza (as absent putative class members in the *McCollins* case) from re-litigating the federal district court’s denial of class certification in their state court action. *Id.* at 721. Bayer based its argument on the Anti-Injunction Act, which generally prohibits federal

courts from interfering with proceedings pending that are in state courts. The Act also contains an exception known as the “relitigation exception” allows federal courts to enjoin a state court action where such an injunction is necessary to “protect or effectuate its judgments.” 28 U.S.C. § 2283. The district court determined that the “relitigation exception” was applicable and granted the injunction, enjoining Smith and Sperlazza from re-litigating the federal court denial of class certification in their state court action.

Relying on the Anti-Injunction Act, the Eighth Circuit affirmed the district court’s injunction barring a second class action, reasoning that the class certification issues presented in both the state and federal lawsuits were sufficiently identical, because they both required proof of physical harm or injury to recover under the WVCCPA, regardless of whether certification was sought under Rule 23 or West Virginia’s corresponding rule. *In re Baycol Prods. Litigation*, 593 F.3d 716, 722 (8th Cir. 2010). It also found that the parties in the state court suit were in privity with those in the original federal suit and therefore were adequately represented because both proposed classes would be comprised of West Virginia residents who had purchased a recalled drug and were seeking recovery of purely economic losses. *Id.* at 724. The Eighth Circuit further concluded that due process was satisfied because the state court parties still had the ability to pursue their individual claims in state court—much like the putative class members who choose to opt out of the class. *Id.* at 725.

d. The Supreme Court’s Decision

The Supreme Court granted *certiorari*, citing a Circuit split on the application of the relitigation exception,¹ and reversed, finding that the very limited relitigation exception to the

¹ “We granted *certiorari*...because the order issued here implicates two circuit splits arising from the Anti-Injunction Act’s relitigation exception. The first involves the requirement of preclusion law that a subsequent suit raise the ‘same issue’ as a previous case. The second concerns the
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Anti-Injunction Act did not apply in the case before it. *Smith v. Bayer*, 131 S. Ct. at 2373. The Court explained that a state court plaintiff's certification motion would be precluded only if two conditions were met: (1) the federal and state cases presented the same issue; and (2) the state court plaintiff was actually a party to the federal court action or was an "exceptional kind of nonparty who [could] be bound" by it. *Id.* at 2376.

The Court concluded that the first requirement for preclusion was not met because, although the applicable federal and state rules of procedure were nearly identical, state and federal case law interpreting those rules conflicted in material respects. For example, West Virginia requires a balancing of issues to determine predominance, while the federal court had not balanced issues, but instead concluded that the need for individual proof on the causation and injury predominated. Accordingly, the two courts faced and decided "distinct questions." *Id.* at 2377-78.

The second preclusion requirement was also lacking. Although the state plaintiffs were members of the *proposed* class in federal court, that federal class had never been certified. Certification would have brought unnamed class members within the federal court's authority; denial of class certification left them free. *Id.* at 2379-81. The Court acknowledged that a federal judgment can bind the members of a certified class, but explained that "[i]f we know one thing about the [the federal] suit, we know that it was not a class action," and "[n]either a proposed class action nor a rejected class action may bind nonparties." *Id.* at 2380. The *Smith* plaintiffs wanted a class action, but "wishing does not make it so." *Id.* The denial of plaintiffs' wish would come to haunt defendant, too. As the Court explains the irony:

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scope of the rule that a court's judgment cannot bind nonparties. We think the District Court erred on both grounds when it granted the injunction, and we now reverse." *Id.* at 2374-75.

But here Bayer faces a conundrum. 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 (because it is only as such that a nonparty in Smith’s situation can be bound) to a determination that there could not be a class action. And if the logic of that position is not immediately transparent, here is Bayer’s attempt to clarify: “[U]ntil the moment when class certification was denied, the *McCollins* case *was* a properly conducted class action.”... That is true, according to Bayer, because *McCollins*’ interests were aligned with the members of the class he proposed and he “act[ed] in a representative capacity when he sought class certification.” *Id.*, at 36.... *McCollins* sought class certification, but he failed to obtain that result. Because the District Court found that individual issues predominated, it held that the action did not satisfy Federal Rule 23’s requirements for class proceedings. 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. So in the absence of a certification under that Rule, the precondition for binding Smith was not met. Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23. But *McCollins*’ lawsuit was never that.

131 S. Ct. at 2780.

As Justice Kagan observed, “Bayer’s strongest argument comes not from established principles of preclusion, but instead from policy concerns relating to the use of the class action device.” *Id.* at 2381. But *Smith v. Bayer* concluded that the same argument “flies in the face of the rule against nonparty preclusion.” *Id.*

3. No Pre-Certification Preclusion

Absent class certification (or some other joinder mechanism), serial litigation of similarly-situated litigants is not foreclosed, and a success may come after many failures, through relitigation, by different parties, of the same or similar issues. The solution—a certified class—is what Bayer opposed, and the consequences of its success in the MDL court—denial of class certification in *McCollins*—is what set it up for defeat in *Smith*. A judgment issued in a *certified* class, of course, does bind, and is preclusive on its members. Moreover, *Smith v. Bayer* does not disturb the injunctive power of a federal court presiding over a certified class to enjoin

activities, by class members or others (including plaintiffs who have “opted out” or excluded themselves from the certified class), that interfere with the class action court’s exercise of its jurisdiction.²

The Court concluded that by resolving close questions of preclusion in favor of permitting state courts to proceed, even “close cases have easy answers.” *Id.* at 2382. This case, however, did “not even strike [the Court] as close.” The Court acknowledged the concern that under its ruling, class counsel can repeatedly try to certify the same class by merely “changing the named plaintiff in the caption of the complaint,” but it concluded that the principles of stare decisis and comity sufficiently “mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs.” *Id.* at 2381. The Court also found comfort in the fact that the federal jurisdiction provided by the Class Action Fairness Act of 2005 operated to limit class action relitigation. As the Court advised:

And to the extent class actions raise special problems of relitigation, Congress has provided a remedy that does not involve departing from the usual rules of preclusion. In the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. §§ 1332(d) (2006 ed. and Supp. III), Congress enabled defendants to remove to federal court any sizable class action involving minimal diversity of citizenship. Once removal takes place, Federal Rule 23 governs certification. And federal courts may consolidate multiple overlapping suits against a single defendant in one court (as the Judicial Panel on Multi-District Litigation did for the many actions involving Baycol). *See* § 1407. Finally, we would expect federal courts to apply principles of comity to each other’s class certification decisions when addressing a common dispute. *See, e.g., Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000) (citing *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)).

Id. at 2381-82.

Indeed, CAFA buttressed the Court’s adherence to traditional preclusion principles:

² This is typically done by invoking the All Writs Act, 28 U.S.C. § 1651. *See, e.g., In re: Diet Drugs Prod. Liab. Litig.*, 282 F.3d 220 (3d Cir. 2002); *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985).

CAFA may be cold comfort to Bayer with respect to suits like this one beginning before its enactment. But Congress’s decision to address the relitigation concerns associated with class actions through the mechanism of removal provides yet another reason for federal courts to adhere in this context to longstanding principles of preclusion.¹² And once again, that is especially so when the federal court is deciding whether to go so far as to enjoin a state proceeding. *Id.* at 2382.

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¹² By the same token, nothing in our holding today forecloses legislation to modify established principles of preclusion should Congress decide that CAFA does not sufficiently prevent relitigation of class certification motions. Nor does this opinion at all address the permissibility of a change in the Federal Rules of Civil Procedure pertaining to this question. *Cf. n.7, supra* (declining to reach Smith’s due process claim).

4. Implications For Other Cases

The *Smith* decision may encourage multiple attempts at class certification in state courts after losing in federal court—although it does not necessarily bar an anti-suit injunction against the same named parties or their counsel. The Court observed repeatedly in *Smith* that the enjoined litigants were unaware of the pendency of the federal class action. As such, *Smith* does not address the problem of class counsel who seek a second (or third or fourth) bite at the apple after losing their first bid at class certification issue in federal court. Recent decisions have dealt with this phenomenon in various ways,³ and the now-commonplace removal of state court class actions to federal court under CAFA reduces the frequency of such scenarios.

However, the Court made no mention of how its decision might impact dueling class actions pending in state courts were such still to exist in the post-CAFA landscape. Finally, because this decision is grounded in the Anti-Injunction Act and the relationships between federal and state courts, the effect of this decision on multiple class actions pending in federal court remains uncertain. While principles of stare decisis and comity mitigate against repetitive

³ See, e.g., *Smith v. Sprint Communications Company*, 387 F.3d 612 (7th Cir. 2004), *cert. denied*, 545 U.S. 1135 (2005).

class suits, and 28 U.S.C § 1407, the multidistrict litigation statute, will usually be invoked to place such suits before a single federal judge, the discretion accorded to courts applying inherently discretionary and flexible class certification theories may result in less certainty for companies defending against proposed class actions. That may be as it should be. The ultimate lesson of *Smith v. Bayer* is that preclusion is a benefit that comes after, not before, class certification, understanding the importance of class actions—or other alternative aggregating techniques to achieve finality in mass litigation.