

ANOTHER CHAPTER IN THE BATTLE OF FEDERAL VS. STATE SUPREMACY

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In January 2011, the U.S. Supreme Court will consider two issues which are key in the class action process, and which could have significant ramifications for consumers, as well as consumer protection and class action attorneys. In *Smith v. Bayer Corp.*, 09-1609, the court will decide whether the re-litigation exception of the Antilnjunction Act allows district courts to enjoin parties from seeking class certification under state procedural rules after denying certification to a similar class when neither of the parties sought to be estopped, nor the claims made, are identical as those in state court. Second, the court will decide whether the district court has personal jurisdiction over absent class members to enjoin them from seeking class certification in state court.

Presented for review are important questions concerning the re-litigation exception and a state's right to protect its own citizens from unsafe products and devices. Depending on the court's holding in *Smith v. Bayer*, a state's right to protect its citizens through consumer protection statutes, which permit class actions, may be threatened.

The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The statute provides three exceptions where federal courts may grant an injunction to stay state court proceedings: the "expressly authorized" exception; the "necessary in aid" exception; and the "re-litigation" exception - which is at the heart of *Smith v. Bayer*.

In the past, the Supreme Court has explained that the existence of exceptions to the Anti-Injunction Act "imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988).

Under the re-litigation exception, a federal court can enjoin a state proceeding in order "to protect or effectuate its judgments." Essentially, this exception "was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." According to the court in *Chick Kam Choo*, the re-litigation exception "is founded in the well-recognized concepts of res judicata and collateral estoppel." However, the re-litigation exception permits an injunction only against a state proceeding that raises issues that were actually litigated before and decided by a federal court. Thus while the re-litigation exception does not sweep as broadly as the doctrines of res judicata and collateral estoppel, it nonetheless may be viewed as overreaching in allowing federal courts the ability "to protect or effectuate its judgments."

The 8th U.S. Circuit Court of Appeals in *Smith v. Bayer* held that the re-litigation exception permitted an injunction barring re-litigation in state court of a federal court's denial of class certification. The circuit court also held that the protections available to absent class members, in

the context of an adverse certification ruling, satisfy due process and are sufficient to bind absent class members to the district court's certification decision. In other words, the court held that a judgment can be enforceable against absent class members, regardless of their state citizenship - effectively barring a state's right to protect its own citizens from unsafe products and devices.

In its brief to the court, Bayer argues that "petitioners are identically situated to the named plaintiff in the underlying federal court case: none suffered an injury caused by [the product]." Bayer maintains that Keith Smith has not lost his right to pursue an individual action and is only precluded from re-litigating class certification. As a result, Bayer argues that due process is sufficiently satisfied.

On the other hand, Smith argues that a state court should be allowed to apply its own procedural rules governing access to the courts. According to Smith, the re-litigation exception cannot be used to enjoin state court proceedings solely based on the fact that a federal court had previously applied its own procedural rules to the issue in question. As Smith aptly points out, neither the parties nor the issues are the same, and should therefore not be enjoined.

Smith relies heavily on *Chick Kam Choo*, where the Supreme Court held that the re-litigation exception prohibited the federal court from enjoining a Texas state court's determination of Singapore-law claims under Texas' own forum non conveniens analysis simply because the federal court had previously dismissed the same claims under federal forum non conveniens principles. Similarly, in Smith, the petitioner reasons that the manner in which West Virginia applies its own version of Federal Rule of Civil Procedure 23 is different from the manner in which the federal court applies the rule. Thus, requiring the state court to follow its federal counterpart's analysis in denying class certification would "amount to nothing more than Pavlovian responses to federal decisional law." Bayer, however, asserts that West Virginia's rule "tracks Federal Rule 23" and therefore, there is no substantive difference in the standard for class certification between state and federal rules.

In the second issue to be considered by the court, Smith argues that the district court lacks personal jurisdiction over absent class members who were not parties to the prior federal proceeding. Petitioner's argument is largely based on the traditional jurisprudence principle that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. In deciding to enjoin absent members of the class from seeking certification in state court, the 8th Circuit adopted the 7th Circuit's reasoning in *In re Bridgestone/Firestone Inc. Tires Prod. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002), cert. denied, 537 U.S. 1105 (2003). *In re Bridgestone*, the court held that as long as the absent members were "adequately represented by the named litigants and class counsel," absent members could be estopped under the relitigation exception of the Anti-Injunction Act. Smith contends, however, that this reasoning is applicable only in situations where the class has already been certified and absent class members have been given notice. Accordingly, Smith argues that 7th Circuit's broader application of this rule was in error.

With regard to the Class Action Fairness Act (CAFA), Bayer points out that Smith was filed before the act. Indeed, the act has changed the face of class action litigation, and has minimized the risk of parallel litigation in state and federal courts. Had Smith been filed post-CAFA, it would have been removed and transferred to the Baycol multidistrict litigation court where the district court would be able to protect its final class certification ruling from re-

litigation in state court. However, CAFA does not ensure that the same circumstances will not recur, as Bayer asserts. In fact, such conclusions cannot be reached because CAFA itself provides for discretionary and mandatory remand under certain circumstances.

In sum, the fundamental difference between both arguments is that Bayer maintains that the underlying issue is substantive in nature, while Smith maintains that it is procedural. Not surprisingly, class action attorneys will be keeping a close eye on the Supreme Court's ruling in this case. The court's ruling in *Smith v. Bayer* may not only infringe upon a state's right to protect its own citizens, but it may also prevent an absent class member from bringing a class action in state court, where the re-litigation exception has been applied.