

Feature Article

By: Michael C. McCutcheon
Baker & McKenzie

***Smith, et al. v. Bayer Corp.*: The United States Supreme Court Takes An Arrow Out of the Quiver of Class Action Defendants and Clarifies the Requirements for Using the Anti-Injunction Act’s “Relitigation Exception” to Prevent Duplicative Litigation and Forum Shopping**

Syllabus

In *Smith, et al. v. Bayer Corp.*, a unanimous Supreme Court addressed the limits of the Anti-Injunction Act’s “relitigation exception” as a tool for combating forum shopping in class action litigation. In reversing the Eighth Circuit Court of Appeals, the Supreme Court constrained a valuable tool for defendants who face duplicative litigation in state and federal courts by holding that a federal district court that had denied class certification could not prevent the certification of a nearly identical later-filed state class action proceeding. The *Smith* decision is considered by many to be a significant victory for the plaintiffs’ class action bar, and it is assumed that more state class action litigation will follow in its wake. If this bears true, *Smith* provides further incentive for corporations to write arbitration agreements containing class action waivers into their consumer contracts – a mechanism that has recently been endorsed by the Supreme Court in *AT&T Mobility v. Concepcion*.

Discussion

On June sixteenth, the United States Supreme Court issued its 9-0¹ opinion in *Smith, et al. v. Bayer Corp.*, No. 09-1205. The case concerned federal civil procedure, specifically, a federal district courts’ ability to enjoin state court class actions that may be duplicative of previously decided federal class actions. The issue in the case was whether the federal court’s rejection of a proposed class action precluded the later adjudication in state court of Smith’s certification motion. Answering this question in the negative, the Supreme Court reversed the Eighth Circuit Court of Appeals, which had affirmed the district court, holding that it was improper for the district court to “enjoin[] a state court from considering a plaintiff’s request to approve a class action [where the District Court] had earlier denied a motion to certify a class in a related case, brought by a different plaintiff against the same defendant alleging similar claims.”

The *Smith* case is important to Illinois practitioners for two reasons. First, for those who practice in the federal courts, it sets forth important precedent for both the plaintiffs’ and the defendants’ bars to follow in

litigating class action cases involving filings in numerous jurisdictions. An example of this occurred recently when thousands of lawsuits were filed nationwide alleging violations of the Fair and Accurate Credit Transaction Act (FACTA). In those cases, many nationwide retailers and restaurant chains found themselves litigating multiple lawsuits alleging violations of federal and state laws relating to automatically-generated credit card receipts. Another example is product liability cases that have the potential to affect thousands of people across the nation. In cases like these, the potential for differing class certification rulings from state and federal courts is always a possibility for the parties, and is an unsavory variable given the stakes of litigation. Second, and more importantly for Illinois lawyers, was the Supreme Court's discussion of nonparty preclusion. In its opinion, the Supreme Court explained that principles of *stare decisis* and comity among courts "mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." The Supreme Court explained that in order for the district court to enjoin the state action based on its determination to not certify the federal action, "the issue the federal court decided must be the same as the one presented in the tribunal." The Supreme Court further held that [the state plaintiff] must have been a party to the federal suit" In so holding, the Supreme Court recognized that although West Virginia's class action statute mirrored Federal Rule 23, *its courts had interpreted it differently*. Thus, the Court held that the class certification issue raised in the federal class action was not the same class certification issue raised in *Smith*. Illinois' class action statute, 735 ILCS 5/2-801, unlike West Virginia's, is different than Federal Rule 23. Thus, for Illinois practitioners and litigants, *Smith* virtually guarantees that any suit seeking class certification in Illinois courts will not be enjoined as a result of a certification decision reached in the federal courts under Federal Rule 23, because the issue of certification will likely be deemed different under Illinois' statute. As the *Smith* court explained "[i]f a State's procedural provision tracks the language of a Federal rule, but a state court interprets that provision in a manner federal courts have not, then the state court is using a different standard and thus deciding a different issue."

The Trial Court Decisions

McCollins v. Bayer

The initial case, *McCollins, et. al. v. Bayer Corp.*, was originally filed in August, 2001 in state court in West Virginia. It was later removed to federal court by the defendant, and then was transferred to the multidistrict court in Minnesota. The case was one of thousands that had been filed against Bayer as a result of its production of a drug called Baycol, a cholesterol reducing medication that was eventually withdrawn from the market. The plaintiffs alleged, generally, that Bayer had not adequately tested, developed and studied Baycol, and that Bayer's warnings and advertisements were false and misleading.

Plaintiff McCollins had not experienced the side effect that was responsible for Baycol's withdrawal from the market, and the record indicated that McCollins had actually benefitted from use of the drug. Thus, McCollins did not bring suit for physical damages, but instead sought refunds on behalf of a class (purely economic loss) under the theory that Bayer breached its warranty and violated the West Virginia Consumer Credit and Protection Act. McCollins sought certification of a proposed West Virginia economic-loss only class under Rule 23(b)(3).

The multidistrict court rejected McCollins' certification attempt, ruling that individual issues of fact predominated because (1) "actual injury" would have to be proved for each plaintiff under West Virginia law in order to recover from Bayer and (2) proof of injury would vary among plaintiffs. In addition, the district court dismissed McCollins' lawsuit because he had failed to prove that using Baycol had caused him a physical injury.

Smith v. Bayer

The second case and the subject of the Supreme Court appeal, *Smith v. Bayer Corp.*, was filed in a West Virginia state court one month after the *McCollins* action was filed. However, *Smith* was never removed to

federal court. After class certification was denied in *McCollins*, Smith sought to certify a West Virginia economic-loss-only class in the West Virginia state court. Bayer moved for an injunction based on the *McCollins* decision and the argument that the *Smith* plaintiffs were absent putative class members in *McCollins*. The District of Minnesota granted the injunction.

The Eighth Circuit Court of Appeals' Decision

On appeal, the Eighth Circuit Court of Appeals relied on the “relitigation exception” to the Anti-Injunction Act in its decision. The Anti-Injunction Act provides:

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.*

28 U.S.C. §2283 (emphasis added). Although the Anti-Injunction Act usually prohibits federal courts from interfering in state proceedings, a federal court may issue an injunction in a state proceeding to “protect or effectuate its judgments.” This is known as the “relitigation exception.”

In affirming the district court’s injunction, the Eighth Circuit held that the issue addressed by the district court was “sufficiently identical” to that at issue in the state court. Further, the Eighth Circuit affirmed the district court’s holding that Smith’s and McCollins’ “interests were aligned” sufficiently such that it was appropriate to bind Smith to the *McCollins* judgment.

The Eighth Circuit also agreed with public policy concerns regarding forum shopping that had been raised in two Seventh Circuit cases. See *Thorogood v. Sears, Roebuck and Co.*, 624 F.3d 842 (7th Cir. 2010) and *In the Matter of Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 333 F.3d 763 (7th Cir. 2003). Although the concern in *Smith v. Bayer* regarding relitigation was the same concern addressed in the Seventh Circuit cases, the facts of the Seventh Circuit cases are different. In both *Thorogood* and *Bridgestone*, the class was initially certified by the district court and later decertified at the direction of the Seventh Circuit Court of Appeals. In *Thorogood*, after decertification of the class, a subsequent “nearly identical case[,]” *Martin v. Sears, Roebuck and Co.*, was filed by the same counsel who filed *Thorogood*. Sears claimed that filing *Martin* after the Seventh Circuit directed that *Thorogood* be decertified defied the Seventh Circuit’s judgment. Sears moved to enjoin *Martin* and the District Court denied Sears’ motion. The Seventh Circuit reversed and remanded the case. The concern shared by the Seventh and Eighth Circuits was that “[r]elitigation in state court of whether to certify the same class rejected by a federal court present[s] an impermissible ‘heads-I-win, tails-you-lose situation.’” Both the Seventh and Eighth Circuits were concerned that plaintiffs could continue to forum shop until their class was certified, even if a federal court had already found that the case did not warrant class certification.

The United States Supreme Court’s Decision

The United States Supreme Court granted certiorari in *Smith* “because the order issued here implicates two circuit splits arising from application of 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 scope of the rule that a court’s judgment cannot bind nonparties.” The Supreme Court reversed the Eighth Circuit Court of Appeals, holding that *McCollins* did not involve the same issue or the same parties as *Smith* such that the relitigation exception could be used to enjoin the case.

In its reasoning, the Supreme Court recognized that the public policy concerns regarding forum shopping was “Bayer’s strongest argument[,]” however, the Supreme Court noted that “this form of argument flies in the face of the rule against nonparty preclusion.” The Court explained that “our legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar

litigation brought by different plaintiffs. We have not thought that the right approach . . . lies in binding nonparties to a judgment.” The Court further explained that in order for the District Court to enjoin the *Smith* action based on its determination to not certify the *McCollins* action, “the issue the federal court decided must be the same as the one presented in the tribunal. And second, Smith must have been a party to the federal suit”

In its analysis, the Supreme Court first explained that “[i]f a State’s procedural provision tracks the language of a Federal rule, but a state court interprets that provision in a manner federal courts have not, then the state court is using a different standard and thus deciding a different issue.” In this case, the Supreme Court noted that the West Virginia Supreme Court has been clear that, on the issue of class certification, cases about Federal Rule 23 “may be persuasive but [they are] not binding or controlling.” Where the state action was filed in West Virginia whose Rule 23 has the same text of the Federal Rule of Civil Procedure 23, but is not always interpreted to be coterminous with Federal Rule of Civil Procedure 23, a state court “would decide a different question than the one the federal court had resolved earlier.” Thus, the Court held that the class certification issue raised in *Smith* was not the same class certification issue raised in *McCollins*.

Second, the Court stated that “[a] court’s judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions.” One of those exceptions pertains to an unnamed member of a certified class. However, “[t]he definition of the term ‘party’ can on no account be stretched so far as to cover a person like Smith, whom the plaintiff in a lawsuit was denied leave to represent.” Thus, the Court held that because the *McCollins* class was never certified, Smith was never a party to the *McCollins* action.

***Smith’s* Implications**

Smith is unfavorable for corporate defendants, and many consider it a win for plaintiffs’ class action firms and consumer rights advocates. The decision gives plaintiffs’ class action firms multiple bites at the class certification apple by allowing them to certify a class under the procedural rules of different jurisdictions even if initially unsuccessful in federal court. For example, if an initial attempt to have a class certified in federal court fails, class counsel can find a different representative plaintiff in a state that has a class action standard that differs, even in a small way—either in language or application—from Federal Rule of Civil Procedure 23, and can then try again to get a class certified so long as they can avoid removal to federal court. This may prove to be an expensive defensive posture for corporate defendants.

For class actions filed after the enactment of the Class Action Fairness Act of 2005 (CAFA), the impact of *Smith* may be less dramatic. CAFA allows defendants to remove large class actions to federal court with only minimal diversity of citizenship. After removal, Federal Rule of Civil Procedure 23 will govern all certification issues and the Court “would expect federal court to apply principles of comity to each other’s class certification decisions when addressing a common dispute.” Nevertheless, not all class actions filed in state court qualify for removal under CAFA, and *Smith* will prevent defendants from seeking to enjoin those cases in many instances. Generally, however, *Smith* teaches that removal, to the extent possible, is an important step in the direction of limiting exposure for clients that could face multiple class action filings arising out of the same nucleus of facts.

For plaintiffs’ counsel, *Smith* should be perceived as a victory coming from a Supreme Court term that had otherwise produced several high-profile decisions that negatively impacted the ability to prosecute class actions in the federal courts. One of those decisions is *AT&T Mobility LLC v. Concepcion*, No. 09-893, in which the Supreme Court held that § 2 of the Federal Arbitration Act preempts the California rule – established in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005) – that held most collective-arbitration waivers in consumer contracts were unconscionable. Reversing the Ninth Circuit, the Supreme Court’s ruling in *Concepcion* effectively abrogates class arbitration, at least in the consumer law context, by requiring consumer cases that might otherwise be eligible for class-wide arbitration to be arbitrated individually. *Concepcion* is viewed as a significant victory for businesses, and a defeat for the plaintiffs’ class action bar that has been attacking class waivers under state law for years. The ruling in *Smith* further emphasizes the

value that corporate clients can derive from utilizing arbitration agreements containing *Concepcion*-style class action waivers to force would-be class representatives to arbitrate their disputes individually in a single forum.

Finally, the story continues for Illinois litigants. On June 27, 2011, the Supreme Court, on petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit, vacated the judgment in *Thorogood v. Sears, Roebuck and Co.*, 624 F.3d 842 (7th Cir. 2010), and remanded the case to the Seventh Circuit for further consideration in light of *Smith v. Bayer Corp.* As of the date of publication of this article, no further action had been taken.

About the Author

Michael C. McCutcheon is a partner in the Chicago office of *Baker & McKenzie LLP*. He regularly represents U.S. and international clients in litigation and arbitration matters and has substantial trial and appellate experience in varied areas of civil law.

About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.iadtc.org.

Statements or expression of opinions in this publication are those of the authors and not necessarily those of the association. *IDC Quarterly*, Volume 21, Number 4. © 2011. Illinois Association of Defense Trial Counsel. All Rights Reserved. Reproduction in whole or in part without permission is prohibited.

Illinois Association of Defense Trial Counsel, PO Box 3144, Springfield, IL 62708-3144, 217-585-0991, idc@iadtc.org