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UPDATE
Class Actions and Complex Litigation

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Supreme Court Declines to Permit Federal Injunction Precluding State Court Class Action

In light of the Supreme Court's recent decision in *Smith v. Bayer Corp*., defendants generally will no longer be able to pursue federal court injunctions prohibiting plaintiffs from seeking class certification in state court where certification on the same issue was previously denied by a federal court. The current pattern of plaintiffs' lawyers repeatedly attempting to certify the same class in multiple jurisdictions is thus likely to continue, except to the extent it is restrained by the expanded federal jurisdiction for class actions provided by the Class Action Fairness Act of 2005 (CAFA).

On June 16, 2011, the United States Supreme Court issued its opinion in *Smith v. Bayer Corp*., No. 09-1205, 564 U.S. ____ (2011). The Court, in a unanimous opinion authored by Justice Kagan, held that a federal court—except in very limited circumstances—cannot issue an injunction to prohibit a plaintiff in a state court case from seeking class certification on the same issue on which certification was denied by the federal court.

BACKGROUND

The *Smith* case was one of numerous cases consolidated before a federal court in Minnesota concerning Baycol, a cholesterol-reducing drug withdrawn from the market by Bayer. After a federal judge denied class certification to a putative class of West Virginia users of Baycol, a plaintiff in another case filed a motion for class certification in a West Virginia state court. Although the Anti-Injunction Act generally prohibits federal courts from enjoining state court proceedings, the act contains a "relitigation exception," which permits a federal court to enjoin a state court from deciding a claim or issue that previously was decided by the federal court. Applying the "relitigation exception," the federal judge enjoined the plaintiff in the West Virginia state court case from continuing to pursue class certification. On appeal, the Eighth Circuit upheld the injunction, and the Supreme Court thereafter granted *certiorari*.

THE COURT'S RATIONALE

In deciding whether the federal district court properly applied the "relitigation exception," the Court considered: (1) whether the issue presented in the state court was the same issue that previously had been decided by the federal court; and (2) whether the plaintiff in the state court action was a party to the federal case or a nonparty that could be bound by the federal court decision. Both requirements must be met for an injunction to be appropriate.

With respect to the first point, the Court noted that the issue would not be identical if a state has a different class action rule than the federal rule. However, even if the texts of the state rule and the federal rule were the same or nearly the same, the Court observed that the issue would not be identical if the state courts apply the state rule differently. Because the West Virginia Supreme Court had disapproved of the federal courts' approach to Fed. R. Civ. P. 23(b)(3)'s predominance requirement, the Court held that the issue of whether to certify the putative class action pending in the West Virginia state court was not identical to the issue of whether to certify the class of West Virginia Baycol purchasers in federal court.

Turning to the second consideration, the Court held that a putative class member in a case where class certification has been denied is not a party or a nonparty that could be bound by a federal court's denial of class certification. Although an unnamed member of a *certified class* may be considered a party in certain limited circumstances, an unnamed putative class member is not a party to the class action litigation before the class has been certified or when certification has been denied. Concluding that "[n]either a proposed class action nor a rejected class action may bind nonparties," the Court held that the plaintiff in the West Virginia state court case could not be bound by the federal court denial of certification. (Slip op. at 15.) Accordingly, the Court determined that the Anti-Injunction Act's "relitigation exception" did not apply and reversed the judgment of the Eighth Circuit.

POTENTIAL SOLUTIONS TO THE RELITIGATION PROBLEM

Before concluding its opinion, the Court addressed Bayer's policy argument that, under the approach established by the Court, plaintiffs' lawyers can engage in "serial relitigation" of class certification—even after certification on the same issue has been denied numerous times—and defendants therefore "would be forced in effect to buy litigation peace by settling." (Slip op. 16.) Although the Court's decision did not resolve the problem of repetitive class action litigation, the Court nevertheless observed several potential solutions to the problem: (1) the principles of *stare decisis* and comity can mitigate the costs of repetitive class action litigation; (2) CAFA enables defendants "to remove to federal court any sizeable class action involving minimal diversity of citizenship," and federal courts then may consolidate overlapping suits in one court; and (3) Congress can enact legislation or the Federal Rules of Civil Procedure can be amended to restrict relitigation of class certification.

THE NEXT FRONTIER

Time will tell whether CAFA is robust enough to solve the relitigation problem by bringing class actions into federal court or whether plaintiffs' attorneys effectively can employ exceptions to CAFA or purported "$4.9 million" class actions to keep them in state court. Unless CAFA solves this problem, further congressional action or an amendment to the Federal Rules of Civil Procedure may be necessary.

For further information, please contact Wystan M. Ackerman, chair of Robinson & Cole LLP's Class Action Team and author of the blog *Insurance Class Actions Insider* at www.insuranceclassactions.com.

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