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'Smith v. Bayer': Key Decision on Class Certification and Preclusion

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"Nothing too much," warned the Delphic oracle. To the defendant that obtains a denial of class certification, serial relitigation of class certification and its attendant expenses and threat of inconsistent judgments present a maddening prospect. If certification is granted, absent class members who do not opt out of the class are bound by the class proceedings. And an order denying class certification has full preclusive effect against the named plaintiffs: They cannot relitigate the denial of class certification. But may a denial of class certification preclude one or more members of a putative uncertified class from seeking to obtain certification of the same class in another court? Should the result depend on whether the counsel behind the relitigation initiative represented the prior plaintiff? Vacating an injunction entered under the "relitigation exception" of the Anti-Injunction Act, a unanimous Supreme Court in Smith v. Bayer Corp.[1] recently held that a federal court denial of class certification is not a proper basis to enjoin absent members of the uncertified class from seeking certification of the same class in state court.

Bayer substantially clarified the preclusive effect of class certification proceedings by drawing a firm line between orders granting and denying certification. The Court acknowledged the "heads-I-win, tails-you-lose" aspect of a rule permitting absent putative class members of an uncertified class to seek relitigation of the same certification question considered and rejected by a prior court, but determined that limitations on non-party preclusion require that defendants turn to stare decisis and comity among courts for relief. This column assesses the effect of Bayer, and whether it leaves defendants any room to secure injunctive relief against serial relitigation of a class certification denial.

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'Bayer'

When a losing party attempts to collaterally attack a federal court determination in state court, a federal court may, pursuant to the All Writs Act and the "relitigation exception" of the Anti-Injunction Act, protect its decisions by issuing appropriate injunctive relief. In the class action context, numerous courts had endorsed application of issue preclusion and issuance of a permanent injunction barring absent class members from pursuing class certification in state court where those plaintiffs had been members of a substantially identical putative federal class in which class certification was sought by a putative class representative and denied. In Bayer, the Supreme Court reversed a federal court injunction issued under the relitigation exception that enjoined absent members of a putative class in which certification was denied from seeking certification of a substantially identical class against the same defendant in West Virginia state court.

The original federal plaintiff (McCollins) sought certification of an economic loss class composed of individuals who at any time purchased Baycol in West Virginia. In an approach that may have significance for future cases, the federal court addressing the McCollins motion for class certification "assume[d], without deciding, that the requirements of Rule 23(a) [we]re satisfied," including adequacy of representation. The class McCollins proposed, however, did not satisfy Rule 23(b)(3)'s predominance and superiority requirements. Shortly after McCollins commenced his putative federal class action, Smith (a member of the putative federal court class) brought a substantially identical case in West Virginia state court on behalf of the same putative West Virginia class. Subsequent to the federal court denial of class certification and entry of final judgment in the McCollins suit, Smith moved for class certification in state court.

Defendant asked the federal district court to enjoin Smith, as an absent putative class member in the McCollins suit, from relitigating the federal ruling denying certification of a West Virginia class. Smith appeared in the federal court to oppose the motion, but the district court held that the relitigation exception to the Anti-Injunction Act applied and the balance of equities favored injunctive relief. Pursuant to its authority under the All Writs Act, the district court issued a tailored injunction barring Smith from seeking certification of an economic loss class of West Virginia Baycol purchasers in the Smith case. The district court's order permitted Smith to pursue his individual claims in West Virginia state court.

The Eighth Circuit affirmed, concluding that "in the context of MDL proceedings, certification in a state court of the same class under the same legal theories previously rejected by the federal district court presents an issue sufficiently identical to warrant preclusion under federal common law." Rejecting Smith's argument that the district court had improperly assumed without deciding that McCollins provided adequate representation, the Eighth Circuit concluded that a sufficient predicate for finding adequate representation existed because "the McCollins class and [Smith's] class are essentially the same. Both are West Virginians who purchased Baycol. Both classes rely on the same theory rejected by the district court: their ability to recover for economic loss despite the absence of a physical injury." Thus, their "interests were aligned."

Bayer defended the lower courts' injunction "by arguing that Smith—an unnamed member of a proposed but uncertified class—qualifie[d] as a party to the McCollins litigation." The Supreme Court determined that Smith and other absent class members were not precluded from seeking to relitigate in state court the prior denial of class certification for two reasons: (1) the class certification issue presented in the state court was not identical to the one litigated and decided in federal court, and (2) the state court plaintiff "did not have the requisite connection to the federal suit to be bound by the District Court's judgment."

As to the first impediment, the court concluded that although no meaningful difference separated the rejected proposed federal class and the putative state court class, or Federal Rule 23 and West Virginia's Rule 23, the alignment parted at the way the two rules are applied. West Virginia does not automatically follow federal interpretations of Rule 23, so that a West Virginia court asked to certify the same class "would decide a different question than the one the federal court had earlier resolved." In addition, the court held that the injunction violated "another basic premise of preclusion law: A court's judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions."

The Court stated that absent putative class members are not bound by proceedings in a putative class action before a class is certified because Rule 23's protections, including a finding of adequate representation, have not yet been engaged. "The 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…. In these circumstances, we cannot say that a properly conducted class action existed at any time in the litigation." Thus "[n]either 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.... [A] 'properly conducted class action,' with binding effect on nonparties, can come about in federal courts in just one way—through the procedure set out in Rule 23."

The Supreme Court acknowledged that powerful policy considerations support precluding absent class members from serial relitigation of class certification denials, but concluded 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 (except in the discrete categories of cases we have recognized) lies in binding nonparties to a judgment."

The Class Action Fairness Act's broad removal provisions (enacted after the Bayer cases were filed) may substantially ameliorate problems raised by permitting members of an uncertified class to relitigate a federal court denial of certification in state court. The Supreme Court observed that after removal federal courts may consolidate "multiple overlapping suits against a single defendant in one court," and "would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute."

Preclusion of Class Members

Several points warrant emphasis. First, Bayer's reasoning relied in significant part on the notion that the absent putative class member barred by the injunction from relitigating class certification had been unaware of the federal suit. Second, plaintiffs in the two suits were not represented by the same lawyer. It remains to be seen if Bayer will be extended to cases where the same lawyer who represented the named plaintiff in an unsuccessful bid to obtain class certification enlists a new plaintiff from the ranks of absent putative class members and seeks to relitigate elsewhere the class certification denial.

In Thorogood v. Sears, Roebuck and Co.,[2] pre-Bayer the U.S. Court of Appeals for the Seventh Circuit ruled it was reversible error for a federal court that had entered judgment in a putative multistate class action in which certification had been denied on predominance grounds to deny injunctive relief under the All Writs Act against the prosecution of a putative class action suit pending in another federal court raising substantially identical allegations on behalf of a single state subset of the class by a member of the first putative class. Thorogood does not implicate the Anti-Injunction Act because no state court is involved. Importantly, the plaintiff in

the second suit was represented by the same lawyer who represented the plaintiff in the prior suit. He persuaded a different federal district court that amendments to the new complaint sufficiently distinguished the two suits to bar preclusion.

The Seventh Circuit regarded this development as proof that preclusion doctrines are not always adequate protection against vexatious litigation. The All Writs Act fills the gap, as "[a]buse of litigation is a conventional ground for the issuance of an injunction under the All Writs Act, because without an injunction a defendant might have to plead the defense of res judicata or collateral estoppel in a myriad of jurisdictions in order to ward off a judgment, and would be helpless against settlement extortion if a valid such defense were mistakenly rejected by a trial court." The Seventh Circuit emphasized that the adequacy of the representation of members of the putative class in the first action could not seriously be questioned (the district court made a finding of adequacy), so that they were properly bound by the effect of the class certification denial and subject to the district court's injunctive authority.

The key components of a proper injunction protecting the denial of certification in these circumstances, the Seventh Circuit stated, are (a) enjoining the commencement or continued prosecution (even on behalf of a subset of the original class) of any class action raising substantially identical allegations as the suit in which certification was denied; (b) inclusion of the first plaintiff's counsel in the injunction; (c) clarification that the injunction does not bar any individual suits; and (d) provision that individual class members cannot be punished for contempt unless a copy of the injunction is served on them. The court acknowledged that in order to be effective, the injunction must also bar potential state court class actions, a judicial act implicating the Anti-Injunction Act and which is contrary to Bayer unless Bayer is distinguishable because there no finding of adequate representation was ever made in the prior action.

Thorogood has been remanded to the Seventh Circuit for further proceedings in light of Bayer. Whether Bayer's ruling that absent members of a proposed or rejected class are not parties for preclusion purposes scuttles the Thorogood class member injunction remains to be decided, but nothing in Bayer may fairly be interpreted to limit a federal court's recognized jurisdiction-protecting authority to enjoin lawyers appearing before it from serially relitigating issues in the hope of circumventing adverse rulings.[3] Bayer also "rest[ed]…on the Anti-Injunction Act's" prohibition against using the "heavy artillery" of an injunction affecting state court

proceedings, a concern absent from Thorogood where the second action was pending in another federal district court.

Third, the absence of a finding of adequate representation in the Bayer district court leaves undecided whether class member preclusion may apply when such a finding is made. The leading authority pre-Bayer approving injunctions barring relitigation of class certification denial was the Seventh Circuit's In re Bridgestone/Firestone Inc., Tires Products Liab. Litig.,[4] in which the injunction was predicated, in part, on the district court's finding of adequate representation in the order certifying a nationwide class that was subsequently reversed on other, non-adequacy-related grounds.

Issue Preclusion

Issue preclusion, which bars relitigation by parties and their privies of issues actually litigated and necessary to the outcome of the first action, may separately preclude relitigation of whether the plaintiff in the prior action was an adequate representative. For example, when a court rejects collateral attacks by class members following entry of judgment in a certified class action, the general rule is that once a court has decided that the prior plaintiff provided adequate representation to the class, the issue may not be relitigated. In Bridgestone/Firestone, no party contested the adequacy of representation at any stage. As the Seventh Circuit there recognized, a finding of adequate representation is essential in order to bind absent class members to a determination in a putative class action, and in Bayer this did not occur.

Bayer arguably does not foreclose the conclusion that once an adequate representative has fully and fairly litigated class certification, putative class members are bound by the class certification decision. Defense counsel that believes it has convincing bases to defeat certification other than a challenge to adequacy of representation may wish in certain cases to consider not disputing adequacy of plaintiff and counsel so that it may best preserve the argument that a Bridgestone/Firestone type of injunction remains permissible after certification is denied.

In Sawyer v. Atlas Heating and Sheet Metal Works Inc.,[5] a case addressing whether American Pipe class action tolling applied to a subsequent class action commenced after a prior putative class action alleging the same claims was voluntarily dismissed before the class issue was decided (the Seventh Circuit said it did), the

Seventh Circuit concluded it did not need to wait for the Supreme Court's decision in Bayer because Bayer concerned "what force to give to a federal court's decision that class litigation would be unmanageable, when a class member asks a state court to reach a different conclusion under state procedures."

The Seventh Circuit indicated that Bayer would not affect its endorsement of issue preclusion as a bar to a successor putative class action where certification of the prior class was denied for a reason other than adequacy of representation and adequacy was litigated and determined. "If, after concluding that the plaintiff would be an adequate representative of the class," Judge Frank Easterbrook explained, "the court denies certification for a reason that would be equally applicable to any later suit—for example, that the supposed victims are too few to justify class litigation, that a common question does not predominate, or that person-specific issues would make class treatment unmanageable—then members of the asserted class are bound by that decision." That is, once an adequate representative has fully and fairly litigated class certification, preclusion as to absent class members may be available.

Under the Seventh Circuit's reasoning, issue preclusive effect will be withheld only where "the reason why class certification is denied in the first suit is that the plaintiff was not an appropriate class representative." In that circumstance, "there is no basis for binding other members of the putative class, who have yet to receive a judicial decision on the question whether a class is certifiable under Rule 23." According issue preclusive effect to actual findings of adequate representation in a decision denying class certification is sound. Issue preclusion embodies the "fundamental precept of common-law adjudication" that "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies."[6]

Issue preclusion may apply to findings that are not embodied in a final judgment.[7] A federal court's final resolution of a particular issue that was actually litigated should be entitled to preclusive effect, regardless of whether the court has resolved the underlying claim. This approach is not free from doubt, however, as the Supreme Court in Bayer did say without qualification that "an uncertified class action cannot bind proposed class members," in language suggesting that a class certification denial may not be unbundled to preserve constituent findings supporting the certification that ultimately was denied.

A recent decision in a federal multidistrict litigation, In re Sears, Roebuck & Co. Tools Marketing and Sales Practices Litigation,[8] made no attempt to decouple any findings incorporated in a prior decision denying certification of a putative nationwide class, and applied Bayer to deny injunctive relief against a successor class certification motion, sponsored by the same counsel on behalf of a member of a putative uncertified class, seeking certification of claims that had already been denied class certification. The court stated without qualification that "[t]he putative class members [of the prior proposed class] cannot be considered 'parties,' and they cannot be bound as nonparties either because no 'properly conducted class action' existed at any time in these proceedings."

Endnotes:

1. 131 S.Ct. 2368 (2011).

2. 624 F.3d 842 (7th Cir. 2010), vacated and remanded for further consideration, 2011 WL 768649 (U.S. 2011).

3. Dickson v. San Juan County, 355 Fed.Appx. 243 (10th Cir. 2009); Wood v. Santa Barbara Chamber of Commerce Inc., 705 F.2d 1515, 1523 (9th Cir. 1983), cert. denied, 465 U.S. 1081 (1984); Hussein v. Nevada System of Higher Educ., 2010 WL 3035140, at *8 (D. Nev. 2010).

4. 333 F.3d 763 (7th Cir. 2003).

5. Sawyer v. Atlas Heating and Sheet Metal Works Inc., 642 F.3d 560 (7th Cir. 2011).

6. Montana v. United States, 440 U.S. 147, 153 (1979).

7. Christo v. Padgett, 223 F.3d 1324, 1339 (11th Cir. 2000).

8. 2011 WL 2745772, at *4 (N.D. Ill. 2011).