It Should Be An Interesting Couple Of Weeks

Thursday, June 16, 2011

According to the Supreme Court's website, the current term is due to end on June 27. With no fewer than **six** cases of interest still undecided after today's decision in Smith v. Bayer Corp., No. 09–1205 (U.S. June 16, 2011), it promises to be an interesting couple of weeks. There are only three remaining opinion days scheduled on the Court's calendar: 6/20, 6/23, and 6/27 (although the Court, being the Court, could change that if necessary). That works out to an average of two interesting decision per day.

First, Smith v. Bayer. It's a loss for our side, but as a practical matter the issue of enjoining successive plaintiffs' attempts to certify the same class action in different courts doesn't loom as large as it once did – since the Class Action Fairness Act ("CAFA") rounds most of these sorts of cases up and ships them all into federal court where they can be coordinated – thus avoiding such plaintiff-side shenanigans. Smith involved some relatively old litigation, and thus unfortunately predated CAFA. See Slip op. at 3 n.1. In all likelihood, the same thing couldn't happen again today.

Still, for personal and professional reasons we mourn the result because of Bexis' involvement in winning that issue (the unanimous Supreme Court now says wrongly) in the first such case to be litigated, In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation, 333 F. 3d 763 (7th Cir. 2003). That was back when it still mattered a great deal, so at least its done some good in the meantime.

Smith was decided on Anti-Injunction Act grounds. For you non-lawyers, that act, one of the oldest statutes still in effect (enacted in 1793), governs when a federal court can enjoin (that means stop or interfere with the progress of) another lawsuit pending in a state court. The key exception to the Act's general prohibition against doing this is that a federal court may act when "necessary . . . to protect or effectuate its judgments." In Smith that meant protecting the federal court's decision that no class involving the particular product under the particular state law cause of action could be certified.

The scope of this particular Anti-Injunction Act exception is governed by issues of res judicata (claim preclusion) and collateral estoppel (issue preclusion). Slip op. at 6. But these rules are

applied, for various reasons, with "every benefit of the doubt go[ing] toward the state court." Id. Any time we see the judicial thumb going on the scale like that (think "presumption against preemption") and it's against our side, we don't expect anything good.

Two things must happen for preclusion to apply: (1) the issue must be the same and (2) the second plaintiff must have been involved in the original federal suit that produced the judgment that the injunction seeks to protect. Slip op. at 7. On issue #1, that means: Is a federal denial of class certification the "same" as a decision under an analogous state class action rule (where the language is essentially identical)? On issue #2, that means: is an absent class member in the first suit sufficiently involved in that suit to be bound by the denial?

The Court in Smith says "no" to each. Slip op. at 7.

First, state and federal class action rules were not the same, even though the classes were "mirror" images, and the substantive issues "broadly overlapped."

> "If 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."

Slip op. at 9. So it comes down to whether – where the analogous class action rules are identically written – have the state courts "declar[ed] their independence" of federal precedent on the issue? Id. at 10. On class actions, the Court found that the West Virginia Supreme Court (of Appeals) had done so. It cited some thumb-in-the-feds-eye language from another prescription drug class action, In re West Virginia Rezulin Litigation, 585 S.E.2d 52 (W. Va. 2003), where that court stated that it intended "to avoid having our legal analysis of our [class action] Rules amount to nothing more than Pavlovian responses to federal decisional law." Slip op. at 10 (quoting 585 S.E.2d at 61). The Court went on to find that Rezulin in fact rejected federal predominance precedent. Slip op. at 11.

Okay, so we lose, since we had to win both #1 and #2. All things considered, it could have been worse. Not every state's class action jurisprudence is as ornery towards federal Rule 23 precedent as West Virginia's. Get a different state where there's lots of "we look to federal precedent for guidance" language in state class action opinions and the result could well be different.

Right?

Wrong, because the Court – in what is arguably *dictum* (that means stuff in an opinion that isn't essential to the result) – went on to decide issue #2. The Court held that an unnamed class member cannot be considered a "party" to a class action that was never certified. Slip op. at 13-14. Nor did the Court find that absent class members were within any of the relatively rare exceptions to that Anti-Injunction Act's party requirement. Instead, it held that "[n]either a proposed class action nor a rejected class action may bind nonparties." Id. at 15. That's an interesting statement that may come in useful in other contexts, but it was regrettably fatal to the defense position on issue #2 in Smith.

In passing, we note that one of the authorities the Court in Smith cited was the ALI's Principles of the Law of Aggregate Litigation §2.11. Slip op. at 16 n. 11. We mentioned before that one of our objections to the Principles was that they sought to overrule Bridgestone/Firestone. Well, precisely that has come to pass. One subsidiary lesson that we take away from Smith is that the defense side needs to pay more attention to what goes on at ALI.

Basically the Court says "tough luck" to the policy argument that class action plaintiffs shouldn't get multiple bites at the class certification apple. Defendants are stuck relying on "*stare decisis* and comity" and hoping for the best. Slip op. at 17. But the Court goes on to point out, as we have, that as a practical matter CAFA now substantially fixes this problem – and thus gives the Court another excuse not to use the Anti-Injunction Act to do the same thing:

> "[T]o 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 [CAFA], 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 [an MDL]. Finally, we would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute."

Id. (citations omitted). Maybe, in addition to CAFA, the last sentence in this quote will serve as a kick in the pants to the lower courts – federal courts, anyway – not to let plaintiffs peddle the same meritless class actions in multiple fora. We hope so, and will employ that sentence to that effect.

The Smith Court admits that CAFA provides "cold comfort" to the defendants in this case. Slip op. at 17. But let's not forget that the entire Smith v. Bayer decision provides equally cold comfort to the plaintiffs. That's because, as we've celebrated before, in the interim, the West Virginia Supreme Court has blown out the substantive cause of action on which the class action in Smith was based. In White v. Wyeth, 705 S.E.2d 828 (W. Va. 2010), that court held that, as a matter of statutory interpretation and fundamental policy, "[t]he private cause of action afforded consumers under West Virginia [consumer protection act] does not extend to prescription drug purchase." Id. at (syllabus point 6). So bye-bye Smith.

Ironically, the one place where the Bridgestone/Firestone principle might live on is in those states (California is one, and we're sure there are others - Texas?) where the intermediate appellate courts are divided geographically and don't have to follow each other's precedent. Right now, the California intermediate appellate courts are split, as well, on whether to follow Bridgestone/Firestone. See Johnson v. GlaxoSmithKline, Inc., 83 Cal. Rptr.3d 607 (Cal. App. 2008) (not following); Alvarez v. May Dept. Stores Co., 49 Cal.Rptr.3d 892 (Cal. App. 2006) (following).

Where the conflict is between two state courts, there's no Anti-Injunction Act federalism overlay (thus no need for a thumb on the scale), and the issue is by definition the same, since the same state's class action rule is involved. The tougher question would be whether an absent class member can be considered sufficiently close to a "party" in the prior action to be bound. We would still answer that question "yes" – as long as the first class certification denial was not based on adequacy of representation grounds. If there's adequate representation, then there's no reason not to bind those adequately represented in the first action to its result. But that's just us. Smith didn't buy that in the Anti Injunction Act context.

Anyway, that still leaves us with six mega-cases to be decided in the remaining two weeks (actually less) of the Supreme Court's current term. Here's a brief overview of what's out there.

The only pharma-product liability case on the list is the Mensing generic preemption case, Nos. 09-993, 09-1039. We've already had a lot to say about Mensing, and if you're interested those posts are here, here, here, and here. Given the unusual lineups and close questions that we

pointed out after reviewing the oral argument, we're not going to make any predictions about the outcome (which could even be a 4-4 tie, although such a result would probably have been announced earlier), except to say that Mensing could go right down to the 6/27 wire.

Another pharma-related case is Sorrell v. IMS Health Inc., 10-779. We blogged about Sorrell here, here, and here. Sorrell could establish, albeit in a non-products setting, that pharmaceutical detailing is First Amendment-protected commercial speech, and we're optimistic that the Court will go at least this far. Depending upon exactly how the Court conducts the commercial speech analysis that would follow an affirmative answer to the first question, Sorrell could say a lot, or might not say much, of interest to another of our "hot button" issues – the First Amendment protection of truthful promotion of off-label use.

We've also followed and analyzed the two "stream of commerce" product liability personal jurisdiction cases that the Court has, J. McIntyre Machinery v. Nicastro, No. 09-1343, and Goodyear v. Brown, No. 10-76. We've discussed those cases here, here, and here. As we discussed, the lower court result in Brown would open a foreign defendant to almost unlimited "general personal jurisdiction" (could be sued about anything) based upon minute market shares. Nicastro would abolish state borders for purposes of determining "specific personal jurisdiction" (suits related to the in-state transaction), and determine everything on the basis of national contacts in stream of commerce cases. We expect those two cases to be decided in tandem. Because of the absurd result in Brown and the federalism implications of Nicastro, we also have to say that we're cautiously optimistic in both cases. If we get good results, we hope they will also result in the overturning of another, even more recent, extreme expansion of corporate personal jurisdiction, Bauman v. DaimlerChrysler AG, ___ F.3d ___, 2011 WL 1879210 (9th Cir. May 18, 2011).

Also of interest to us is the climate change case, American Electric Power Co. v. Connecticut, No 10-174. This is the ultimate in "judicial triumphalism" cases, where a plaintiff tries to convince a court to engage in social engineering of the sort that the (more) political branches of government haven't been able to enact. There are any number of ways that AEP could be decided, including narrow grounds that wouldn't interest us very much – as bloggers, anyway. There are two potential bases for decision, however, that we would find extremely encouraging. These are: (1) The Court could reinvigorate the "political question doctrine" and thereby directly curb the lower courts' impulse towards judicial triumphalism. (2) The Court

could analyze the plaintiff's non-traditional public nuisance cause of action and hold, for legal and/or policy reasons, that the federal common law is not about to recognize any such claim. While not binding on any state court, in the past, Supreme Court decisions rejecting expansive tort theories in the context of federal common law have also been quite persuasive in forestalling further adoption of such theories by state courts. We can think of the economic loss rule and pure risk/medical monitoring as two examples of this. We previously blogged on these implications of AEP here.

Last but certainly not least, the Court has yet to decide the mother of all class action cases, Dukes v. WalMart, No. 10-277. As we discussed in our prior Dukes post, the Court is almost certain to decide the scope of Fed. R. Civ. P. 23(b)(2) in cases where a purportedly "injunctive" class also includes a large monetary relief component. The Court could also provide new binding precedent concerning the scope of any or all of the Fed. R. Civ. P. 12(a) class certification criteria of numerosity, commonality, typicality, and/or adequacy of representation. Whatever the Court does with respect to the Rule 23(a) issues would be binding in any type of class action case. A decision in Dukes upholding certification of such a huge and polyglot class would be most unwelcome (in this precinct, anyway), but we think also unlikely. If there's a reversal in Dukes (the more probably bottom line), its scope will determine whether class certification in the more run-of-the-mill class actions is made easier or more difficult. Needless to say, we're rooting for the latter.

In any event, hang on to your hats – the Supreme Court's annual end-of-term roller coaster ride is just beginning, and this one has more peaks (and possible valleys) than most.