Supreme Court Declines To End Multiple Class Action Mischief

June 22, 2011 by Sean Wajert

The second of our Supreme Court trilogy for the week. The Court ruled last week in Smith v. Bayer Corp., No. 09-1205, that a federal district court was prevented by the the Anti-Injunction Act from enjoining a state court from entertaining plaintiff's motion to certify a class action even when that federal court had earlier denied a similar motion to certify an overlapping class in a closely related case.

Generally, the Anti-Injunction Act bars a federal court from granting injunctions to stay proceedings in state courts except where specifically authorized by Congress, or "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Most of our readers hoped that the Court would agree with the lower courts' ruling that this was just such an exception.

The *Smith* case involved the issue whether a federal court can enjoin class members from bringing a product liability class suit in a state court after the federal court declined to certify a similar class. Specifically, the Baycol MDL court in Minnesota had denied class certification, and the court of appeals upheld the injunction barring plaintiffs from bringing virtually the same suit in West Virginia state court. The federal court of appeals in fact unanimously affirmed, holding that the injunction was authorized by the All Writs Act and the re-litigation exception to the Anti-Injunction Act, and that petitioners did not have a due process right to re-litigate class certification.

The Supreme Court, unfortunately, reversed, in a decision that may encourage forum shopping.

-The decision encourages "creative" case structuring strategies by the plaintiffs' bar to give themselves a second bite at the apple (or more) in class claims, even after the federal court properly denies certification, and even when the state class law mirrors Federal Rule 23; here, the Court found that an application of West Virginia's Rule 23 did not present the same exact issue as the application of the federal rule version, even though the language of the rules is nearly identical.

-The decision highlights the double-edged sword that is federalism; now, the preclusive effect of a certification denial, if any, will be decided by state courts applying the notions of res judicata rather than by the enjoining court. This comports with the general notion that the second court looking back decides the impact, not the first court looking forward. But readers are well aware of the hard-to-fathom preclusion decisions some state courts have fashioned in the class action context. E.g., the *Engle* class in Florida. And, as plaintiffs told Justice Ginsburg in oral argument of the case, a state has the right to apply and interpret a rule of civil procedure "as it sees fit to manage its own docket and administrate its own docket as it sees fit."

-As a practical matter, it invites "if at first you don't succeed, try, try again," with plaintiffs seeking to bring similar cases again and again, shopping for a forum or judge that will finally agree to certify something. Plaintiffs will recruit a new named plaintiff, and recreate the risks associated with class certification, even after the defendant has seemingly won that important battle. Justice Alito asked petitioners at oral argument whether after a class certification denial is entered in one federal court, a plaintiff's attorney could simply substitute the name of a new named plaintiff and file the same complaint in another federal court. Plaintiffs answered that an attorney could do that.

-Note that petitioners had not been foreclosed from seeking relief on their individual claims, but only from seeking to represent other people through a class action. Whether a class should be certified had been fully and fairly litigated in proceedings that ought to be binding on petitioners and in which petitioners' interests were adequately represented by an identically situated named plaintiff -- one whom plaintiff's counsel promised was an adequate representative, was typical, with common claims and no adverse interests. The Court apparently did not consider the possible argument that an absent class member who is adequately represented might be in sufficient privity with the named plaintiff such that he can be precluded from litigating the certification decision a second time.

-Even though in dicta, the Court discouraged the application of preclusion to absent class members. It may be of little comfort to defendants faced with the costs and risks of serial class claims that, as the Court put it, the "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."

-The Court agreed that the policy concerns were the defendant's "strongest argument, " and seemingly recognized the mischief it was permitting, because the opinion noted that nothing in this holding forecloses legislation to modify established principles of preclusion should Congress decide that CAFA does not sufficiently prevent re-litigation of class certification motions. Nor does the opinion at all address the permissibility of a change in the Federal Rules of Civil Procedure pertaining to this question. The Court said the trial court could not call on the "heavy artillery" of an injunction, but perhaps an even mightier weapon is needed.