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Limiting Duplicate Class Action Litigation After *Smith v. Bayer:* How Much Weight Can 'Comity' Bear?

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In the arena of class action litigation, so-called ''copycat'' lawsuits are a persistent phenomenon. A class action complaint, once filed, can easily be duplicated by another (or the same) law firm, substituting a different plaintiff, while asserting the same claims against the same defendant on behalf of the same proposed class. Sometimes ''duplicative actions are filed by lawyers who hope to wrest the potentially lucrative lead role away from the original lawyers.''[1] Sometimes the same lawyers ''file similar class actions before different courts in an effort to find a receptive judge who will rapidly certify a class.''[2] Regardless of the motive, the overriding question for defendants in these cases is how to avoid costly relitigation of issues, particularly the issue of class certification itself, and particularly when that issue has been resolved in the defendant's favor in the initial action.

In 2011, the Supreme Court took away one tool for combating relitigation of the class certification issue in a copycat class action. In *Smith v. Bayer Corporation*,[3] the Supreme Court held that the Anti-Injunction Act does not permit a federal court to enjoin a state court from granting class certification in a duplicate action brought by a different named plaintiff. The Court suggested that its ruling was limited to duplicate actions in state court, and that its impact would be blunted by the Class Action Fairness Act of 2005 (enacted after the actions in *Smith* were filed, and therefore inapplicable). However, decisions by federal courts in the wake of *Smith* indicate that the Court's assessment may have been inaccurate. As discussed below, the *Smith* decision considerably increases the risk that a defendant will be unable to prevent relitigation of the class certification issue in duplicate class actions, regardless of whether the actions are in federal or state court, and notwithstanding the passage of the Class Action Fairness Act. Nevertheless, even after *Smith*, it may still be possible for a defendant to seek an injunction of certain state court class action proceedings in some circumstances.

The Supreme Court's Decision in *Smith*

In *Smith*, the defendant Bayer was faced with duplicate class actions filed in West Virginia by different named plaintiffs. The named plaintiff in each action al-

[1] The Class Action Fairness Act of 2005, S. Rep. 109-14, at 23 (2005).

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[2] *Id.*

[3] 131 S. Ct. 2368 (2011).

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leged that Bayer's product Baycol was defective, and asserted essentially identical claims (violations of West Virginia's consumer-protection statute and breaches of express and implied warranties) on behalf of the same class of West Virginia residents.[4] Bayer removed one of the two class actions to federal court on the basis of diversity jurisdiction. The other could not be removed because the plaintiff there had named additional, nondiverse defendants. (As noted above, both actions predated the Class Action Fairness Act, which now permits many class actions involving nondiverse defendants to be removed to federal court.[5])

The removed action was transferred to the District of Minnesota where all Baycol suits had been consolidated by the Panel on Multi-District Litigation. The district court judge in Minnesota ruled that a class could not be certified under Federal Rule of Civil Procedure 23 because, under West Virginia law, each class member would have to prove ''actual injury'' to recover on his or her claims, and thus individualized issues predominated over common issues.[6]

Bayer then asked the district court in Minnesota to enjoin the state court in West Virginia from granting class certification in the duplicate action in that court. The Anti-Injunction Act generally prohibits such injunctions, but Bayer argued that an injunction was permissible ''to protect or effectuate'' the district court's certification order—the so-called ''relitigation exception'' recognized in the Act—on the theory that the certification issue decided by the federal court was identical to the certification issue before the state court, and thus should have preclusive effect in that action. The district court agreed and granted the injunction, which was affirmed by the Eighth Circuit.[7]

The Supreme Court granted certiorari and reversed on two grounds. First, the Court held that the certification issue decided by the district court in Minnesota could not be identical to the issue before the state court in West Virginia because the former court had rejected class certification under federal Rule 23, whereas the latter would have decided certification under West Virginia Rule of Civil Procedure 23, which the West Virginia Supreme Court had suggested might incorporate a less stringent predominance requirement than the federal rule, at least with regard to individualized issues involving injury or causation.[8]

Second, the Court held that while the named plaintiff in the West Virginia state court was a member of the proposed class the Minnesota district court had declined to certify, an unnamed putative class member was not a party to the federal court action that could be bound by the district court's order refusing to certify the class. A member of a *certified* class would of course be bound by any judgment affecting the class, but here the very order Bayer contended should have preclusive effect had determined that a proposed class should not be certified. Thus, the relitigation exception did not apply and the Anti-Injunction Act prohibited the Minnesota district court's injunction.[9]

On the surface, the Court's ruling in *Smith* might seem to be limited simply to barring a federal court from enjoining a class action in *state* court where the federal court has refused to certify a duplicate action brought by a different named plaintiff. Indeed, the Court itself seemed to suggest that the enactment of the Class Action Fairness Act mitigated the impact of its ruling because that Act now ''enable[s] defendants to remove to federal court any sizable class action involving minimal diversity of citizenship.''[10]

The problem with the Court's assessment is that the second of the two grounds supporting its decision—that an unnamed member of a proposed class for which certification was rejected in a prior action was never a party to that action and therefore cannot be bound by the denial of class certification—applies equally to duplicate actions in state or federal court. With collateral estoppel thus rendered inapplicable, there would appear to be little to prevent an aspiring class counsel from ''repeatedly try[ing] to certify the same class by the simple expedient of changing the named plaintiff in the caption of the complaint.''[11] This ''simple expedient'' would be no less available in federal court than in state court.

The Supreme Court acknowledged the force of this concern, but reasoned 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.''[12] Moreover, according to the Court, the Class Action Fairness Act provided a ''remedy'' in that federal courts would be more likely to ''apply principles of comity to each other's class certification decisions when addressing a common dispute.''[13]

In short, then, under *Smith*, the only real protection available to a defendant to prevent relitigation of the class certification issue in a duplicate class action is to appeal to ''principles of comity,'' bolstered by the ability to remove state court actions to federal court, where, presumably, the comity argument will have greater force.

The Meaning of 'Comity' in *Smith*

The Supreme Court's reasoning in *Smith*—that the Class Action Fairness Act would blunt the impact of its ruling by permitting defendants to remove most duplicate state court class actions to federal court—assumes that a federal court will likely defer to a prior federal court ruling rejecting the proposed class. Unfortunately, ''principles of comity'' simply may not provide a precise enough, or predictable enough, framework in which to seek to prevent a second federal court from revisiting a class certification issue decided in the defendant's favor in a previous case.

The Seventh Circuit's analysis of this issue in *Smentek v. Dart*[14] provides an apt illustration. There the defendant argued that a district court judge in the Northern District of Illinois was required to follow another judge's ruling in the same court rejecting certification of an identical class in a previous action brought

[4] *Smith,* 131 S. Ct. at 1273.
[5] *Id.*
[6] *Id.* at 2374.
[7] *Id.*
[8] *Id.* at 2377-78.
[9] *Id.* at 2379-80.
[10] *Id.* at 2382.
[11] *Id.* at 2381 (internal quotation marks omitted).
[12] *Id.*
[13] *Id.* at 2382.
[14] 683 F.3d 373 (7th Cir. 2012).

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by a different named plaintiff. The Seventh Circuit concluded that, after *Smith*, the sole basis on which the defendant could ask the second court to defer to the prior court's ruling was a ''weak notion of 'comity' . . . requiring a court to pay respectful attention to the decision of another judge in a materially identical case, but no more than that even if it is a judge of the same court or a judge of a different court within the same judiciary.''[15] Because the second district court judge ''gave plausible reasons for her disagreement with'' the prior ruling, ''more [could not] be required'' by principles of ''comity.''[16]

If this ''weak'' notion of comity, requiring mere ''respectful attention'' to a prior ruling rejecting class certification, is what the Supreme Court had in mind in *Smith*, then defendants who have successfully fought class certification in a previous federal action would seem to face a great deal of uncertainty as to whether they will be able to convince a second federal court to follow the prior ruling. If the second court need only give ''plausible reasons'' to disagree with the first, then aspiring class counsel will have a greater incentive to attempt to obtain a different result by filing a duplicate action. At the same time, defendants will have little basis on which to predict the result in the second action with any confidence, and thus have a greater incentive to settle.

A More Stringent Conception of Comity

One federal court has opted for a more robust conception of comity than the weak conception articulated by the Seventh Circuit in *Smentek*. In *Baker v. Microsoft Corporation*,[17] the United States District Court for the Western District of Washington was faced with a proposed class action based on alleged defects in the Xbox 360 game console. A previous judge in the same district court had refused to certify an identical class on the grounds that individual issues of damages and causation predominated over common issues.[18] The plaintiffs in *Baker* argued that the second federal court was not bound by the prior ruling and should decline to follow it, particularly because a case relied on by the previous court had subsequently been reversed by the Ninth Circuit.[19]

The *Baker* court reasoned that while it was not bound by the prior ruling, it was nevertheless required under *Smith v. Bayer* to apply principles of comity to it. However, the court noted that ''the *Smith* court gave no specific guidance as to *how* lower courts should apply principles of comity within the class certification context.''[20] For guidance, the court turned to the American Law Institute's Principles of the Law of Aggregate Litigation, under which ''the denial of class certification should raise a rebuttable presumption against the same aggregate treatment in another court.''[21]

The court determined that the plaintiffs had not offered a sufficient basis to rebut the presumption that the prior ruling was correct. Instead, the plaintiffs were asking the court ''under the guise of separate litigation,'' to ''step into the shoes'' of an appellate court ''and effectively overrule a fellow member of this court,'' a result that would ''undermine well-settled principles of judicial comity.''[22] Thus, the court followed the prior ruling and refused to certify the proposed class.

The approach to comity applied by the court in *Baker* is very different from that adopted by the Seventh Circuit in *Smentek*. Under the Seventh Circuit's approach, a second federal court need only give ''respectful attention'' to a prior federal court's decision rejecting class certification ''in a materially identical case.''[23] By contrast, under the approach in *Baker*, a previous federal court's rejection of class certification creates a ''rebuttable presumption'' against certification of an identical class in a second federal court. While neither approach makes the prior decision strictly binding, the *Baker* analysis arguably allows for greater protection against duplicate class actions and a greater assurance that, in the words of *Smith*, ''class counsel can[not] repeatedly try to certify the same class by the simple expedient of changing the named plaintiff in the caption of the complaint.''[24]

Neither the *Smentek* nor the *Baker* approach to comity has received much analysis by other federal courts. Moreover, the *Baker* approach has yet to be endorsed at the Circuit Court level. Thus, the *Smentek* approach may prove more persuasive as a consensus for applying *Smith* begins to emerge.

An Alternative Basis to Enjoin State Court Proceedings

Smith does not completely foreclose the possibility of a federal court enjoining state court litigation brought by parties that were not before the federal court. In addition to the relitigation exception, the Anti-Injunction Act also recognizes an exception for injunctions that are ''necessary in aid of [the federal court's] jurisdiction.''[25] This exception is not based on principles of *res judicata* or collateral estoppel, and thus, unlike the relitigation exception, cannot be defeated simply because parties in the litigation sought to be enjoined were not parties in the federal court.

A post-*Smith* example of a federal court injunction of state court proceedings under this ''in aid of jurisdiction'' exception can be found in the Vioxx multidistrict litigation.[26] In *Vioxx*, the federal MDL court had approved nationwide class settlements of personal injury claims as well as claims asserted by third-party payers to recover funds paid for Vioxx prescriptions. Meanwhile, a state court in Missouri had certified a class of Missouri residents seeking to recover economic damages allegedly arising out of their purchases of Vioxx. The state court class expressly excluded anyone claiming to have suffered a personal injury as a result of tak-

[15] *Id.* at 377.
[16] *Id.*
[17] 851 F. Supp. 2d 1274 (W.D. Wa. 2012).
[18] *Id.* at 1276.
[19] *Id.* at 1277.
[20] *Id.* at 1278 (emphasis in original).
[21] *Id.* (quoting Principles of the Law of Aggregation Litigation § 2.11).
[22] *Id.* at 1280.
[23] 683 F.3d at 377.
[24] 131 S. Ct. at 2381 (internal quotation marks omitted).
[25] 28 U.S.C. § 2283.
[26] *In re Vioxx Prods. Liab. Litig.*, 2012 BL 107443 (E.D. La. Apr. 23, 2012).

ing Vioxx.[27] Thus, the plaintiffs in the Missouri state court action were not parties to the MDL settlements.

At the state court trial, the plaintiffs intended to offer expert testimony regarding class members' damages based on all moneys spent on Vioxx by anyone in Missouri, including payments by individuals who had released personal injury claims and payments by third-party payors subject to the federal court settlements.[28] Merck, the manufacturer of Vioxx, asked the federal court to enjoin the Missouri state court plaintiffs from presenting this evidence on the grounds that, if accepted by the jury, it would subject Merck to a judgment in favor of the state court class members for damages Merck had already paid to personal injury plaintiffs and third-party payors in Missouri.[29]

The federal court determined that the Missouri state court plaintiffs were not directly seeking to relitigate any claim resolved in the federal court settlements. Thus, the federal court declined to apply the relitigation exception to the Anti-Injunction Act.[30] However, the federal court concluded that the state court plaintiffs' proposed damages evidence could ''result in a judgment against Merck that includes damages attributable to claims that Merck has already settled and paid in connection with the MDL settlements.''[31]

The federal court reasoned that it ''is imperative that parties in MDL litigation be able to settle claims with plaintiffs and to rely on the peace they have bought through arms-length negotiation.''[32] But if ''a defendant settles claims in an MDL and later has a judgment entered against it based on testimony that includes amounts attributable to those settled claims, the value and meaningfulness of the settlement has been depleted.''[33] The court concluded that ''[p]arallel state court litigation that nominally pursues separate claims but functionally would require [d]efendants to pay twice on the same claims would severely hinder the incentive to settle,'' and would ''interfere[] with the ability'' of a federal court to ''resolve large numbers of claims'' in multi-district litigation.[34] Thus, ''the 'in aid of jurisdiction' exception to the Anti-Injunction Act [was] directly implicated,'' and an injunction prohibiting plaintiffs from submitting evidence of damages attributable to the claims Merck had already settled was appropriate.[35]

The *Vioxx* litigation illustrates that, even after *Smith*, a federal court injunction—even against state court proceedings involving a party not before the federal court—can still issue, provided the defendant seeking the injunction can make a case that the non-party's lawsuit in state court ''interfere[s] with [the federal court's] flexibility and authority'' to resolve the litigation in federal court.[36] The *Vioxx* court stopped short of enjoining the class trial itself, and merely limited the damages evidence the state court plaintiff sought to submit. Whether the reasoning of *Vioxx* can be extended beyond this result, to support an injunction against certification of a duplicate class in state court on the grounds that such a proceeding would interfere with a federal court's authority to resolve a putative class action pending before it, remains to be seen.

[27] *Id.* at *3.
[28] *Id.* at *4.
[29] *Id.*
[30] *Id.* at *5.
[31] *Id.* at *10.
[32] *Id.* at *11.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*

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