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CLASS ACTION

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WHAT'S INSIDE

COMMENTARY

Supreme Court and Congress focus on mandatory pre-dispute arbitration agreements: The debate continues

Andrew L. Sandler and Victoria Holstein-Childress of BuckleySandler LLP discuss what will come next on the issue of mandatory arbitration waivers, in light of the Supreme Court decision in *AT&T Mobility LLC v. Concepcion.*

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GENDER DISCRIMINATION

Supreme Court closes door on huge gender-bias class action against Wal-Mart

The U.S. Supreme Court has decided that over 1 million female Wal-Mart current and former employees cannot sue the company for gender discrimination as a group.

Wal-Mart Stores Inc. v. Dukes et al., No. 10-277, 2011 WL 2437013 (U.S. June 20, 2011).

The court said the 9th U.S. Circuit Court of Appeals should not have certified the class because the plaintiffs failed to show that "there are questions of law or fact common to the class," the majority opinion said.

REUTERS/Larry Downing

Protesters hold signs in front of the U.S. Supreme Court while the class-action lawsuit was argued before the court in March. Recently the high court ruled the 9th Circuit should not have certified the class.

Justice Antonin Scalia wrote the majority opinion joined by Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas and Samuel Alito.

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Baycol MDL judge wrong to toss state court suit, Supreme Court says

The U.S. Supreme Court has ruled that the judge presiding over multidistrict litigation over the cholesterol drug Baycol improperly blocked a West Virginia state court class action that was not identical to a federal suit for which class certification had been denied.

Smith et al. v. Bayer Corp., No. 09-1205, 131 S. Ct. 2368 (U.S. June 16, 2011).

The unanimous high court said the Anti-Injunction Act, 28 U.S.C.A. § 2283, allows a federal court to stay a state court proceeding only under rare instances.

Writing for the Supreme Court, Justice Elena Kagan said the West Virginia suit did not meet the conditions under which a federal court can act. She said the claims in the state court suit were not the same as those in the uncertified federal suit and the state court plaintiff was not a party to the federal suit.

The high court overturned a ruling by the U.S. District Court for the District of Minnesota, which had been affirmed by the 8th U.S. Circuit Court of Appeals.

The high court's decision was not a surprise to attorney **Anthony Rolo** of **McGlinchey Stafford**, who was not involved in the suit.

The court's 2008 ruling in *Taylor v. Sturgell*, 553 U.S. 880, foretold the Bayer decision, according to Rolo.

He noted that the Supreme Court cites *Taylor* in the decision when it said that "neither a proposed, nor a rejected, class action may bind nonparties."

Rolo added that he does not believe, as some have suggested, that the ruling will "open the floodgates" to more class actions. Everything that has been happening in the class-action realm will continue to happen, Rolo said.

In 2001 Bayer Corp. pulled Baycol from the market after the drug was linked to more than 30 deaths, many related to the rare muscle-wasting disease rhabdomyolysis.

Thousands of people filed sued Bayer. The cases were consolidated in Minnesota federal court under U.S. District Judge Michael Davis.

In August 2008 he denied class certification in a suit filed by West Virginia resident George McCollins, ruling that each proposed class member would have to show that the drug had not worked effectively. McCollins had sought to represent a class of West Virginia Baycol users.

Shortly after McCollins' suit was rejected, Keith Smith, another West Virginia resident, sought certification of a similar suit in state court.

Bayer asked Judge Davis to block Smith's state court suit. It argued that the suit would amount to the unlawful relitigation of the same issues raised in McCollins' earlier suit because Smith had been an absent member of McCollins' proposed class.

Judge Davis agreed and dismissed Smith's action. On appeal, the 8th Circuit affirmed the decision.

Smith filed a petition for *certiorari* with the Supreme Court. He argued that the federal judge was wrong to block his suit because McCollins' suit was never certified. Therefore, Smith said he was not an absent class member and the West Virginia state law claims had never been presented before the court.

The high court said that under the Anti-Injunction Act, two conditions must be met for a federal court to grant a stay of a state court action following a certification decision:

- The issue decided by the federal court must be the same as that presented in the state court action.
- The state court plaintiff must have been a party to the federal litigation.

Smith's suit met neither criterion, the Supreme Court concluded.

The court noted that the claims and the proposed classes — all Baycol users in West Virginia — are substantively similar.

Attorney Anthony Rolo of McGlinchey Stafford said he does not believe, as some have suggested, that the ruling will "open the floodgates" to more class actions.

However, it said certification in McCollins' suit was denied based on Federal Rule of Civil Procedure 23, while Smith's was to be considered based on West Virginia's Rule 23.

Justice Kagan said the Supreme Court cannot conclude that the state court would interpret the two rules the same way. This uncertainty precludes an injunction to stay the Smith suit, the opinion said.

Additionally, Smith cannot be considered a party to McCollins' suit, the court said.

The federal court denied McCollins the opportunity to represent Smith by denying certification, the high court said, so McCollins' suit was not a proper class action.

Without certification of the class, Smith cannot be bound by the decision in McCollins' case, the high court held.

Rolo said the most significant part of the ruling is its narrowness.

He explained that while the ruling focuses on the relitigation exception to the Anti-Injunction Act, there are other situations in which a federal court can enjoin a state court proceeding that it sees as a threat to federal court jurisdiction.

As an example, Rolo said state court's notice of settlement that would conflict with a notice in the federal court falls outside the scope of relitigation and is unaffected by the ruling. WJ

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Respondent: Philip S. Beck, Chicago

Related Court Document:
Opinion: 131 S. Ct. 2368

Use your QR Code reader to see the opinion on Westlaw:

CLASS CERTIFICATION

Supreme Court returns Sears dryer suit to 7th Circuit

The U.S. Supreme Court has ordered the 7th Circuit to reconsider its decision to block a false-advertising suit against Sears in light of the high court's recent ruling that limited a federal judge's ability to stay a state court action.

Thorogood et al. v. Sears, Roebuck & Co., No. 10-2407, 2011 WL 768649 (U.S. June 27, 2011).

The 7th U.S. Circuit Court of Appeals had ruled that an Illinois federal judge should have granted Sears' motion to enjoin a California false-advertising suit that was nearly identical to a class action that the judge dismissed in 2008.

Both suits allege Sears fraudulently advertised that the dryer contained a stainless-steel drum even though the drum's front was coated with mild steel, which allegedly rusted and caused stains on clothes.

Stephen Thorogood sued the Illinois-based retailer in federal court there in 2006 on behalf of a proposed class of 500,000 customers from 29 states, including California. Martin Murray, the plaintiff in the California suit *Murray v. Sears, Roebuck & Co.*, No. 09-5744, (N.D. Cal. 2009), was a member of Thorogood's proposed class.

Sears asked U.S. District Judge Harry Leinenweber of the Northern District of Illinois to prevent it from having to engage in more litigation. The retailer said the California suit was related to the same dryer advertisements and claims.

The judge denied Sears' motion for an injunction barring Murray's suit, but the 7th Circuit overturned the ruling on appeal

The appeals court said the suit contained no new allegations and was "aimed at coercing a settlement by running up Sears' discovery costs."

The Supreme Court granted the plaintiffs' *certiorari* petition, vacated the 7th Circuit's decision and remanded the suit for reconsideration based on its decision in *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (June 16, 2011).

Smith held that a federal court cannot stop a state judge from certifying a class action when the state court suit is similar but not identical to a federal suit. WJ

REUTERS/Rick Wilking