KRISLOV FIRM ANNOUNCES VICTORY FOR CONSUMERS: SUPREME COURT UNANIMOUSLY REJECTS NOTION THAT DENIAL OF CLASS CERTIFICATION SHOULD BAR OTHERS FROM PURSUING THEIR CLAIMS AS CLASS CLAIMS

In a unanimous decision[1] in *Smith et al. v. Bayer Corp.*, No. 09-1205 (2011), followed by a summary grant with order to vacate, in *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842 (7th Cir. 2010), *vac & rem.*, No. 10-10807, the Supreme Court has rejected the notion that a defendant's successful defeat of class certification in one case can be asserted to preclude other plaintiffs from pursuing their similar claims on a class basis.

Smith collaterally arose out of the Baycol MDL consumer litigation. In *Smith*, One plaintiff, George McCollins, sued Bayer in West Virginia state court, alleging Bayer's violation of West Virginia's consumer-protection law and the company's express and implied warranties. A month later, Keith Smith and Shirley Sperlazza (Smith for short), separately filed similar state law claims in another West Virginia state court.

McCollins' case was removed to federal court, and transferred to the District Court of Minnesota, pursuant to a preexisting MDL order. The District Court denied class certification under Federal Rule 23, believing that individual issues regarding class members' actual injury would predominate. Bayer was unable to remove Smith's case to federal court due to lack of diversity jurisdiction, but argued that Smith's case was identical to McCollins', and asked the District Court to enjoin the West Virginia state court from hearing Smith's motion to certify the class under West Virginia's own Rule 23. The District Court issued the injunction against the state court from proceeding on a class basis, and the Eighth Circuit affirmed,[2] expanding the concept of issue preclusion based on "adequate representation" and identity of interests.

Smith, held that a federal district court's denial of class certification in one plaintiff's lawsuit may not be asserted, by issue preclusion under the "relitigation exception" of the Anti-Injunction Act, 28 U.S.C. § 2283, to enjoin all others from pursuing similar claims in state court as class claims when the legal standards are different.

The Supreme Court ducked the due process issue presented in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), but reversed on two separate grounds. First, holding that because the Federal and State class certification standards were different (presumably that a case not certifiable under the federal standard could be subsequently brought under the state's class action provision), the *legal standards* differed, and an injunction was not appropriate. Essentially, West Virginia's Rule 23 varies slightly by treating predominance on more of a balancing test basis than does the federal rule, thus, a single common issue could override multiple individual ones,

[1] Justice Thomas joined only Parts I and II-A of the opinion but provided no additional commentary

[2] *In re Baycol Prods. Litig.*, 593 F.3d 716 (2010).

and the West Virginia state court could permit the case to proceed as a class case based on this differing standard. [3]

Justice Kagan then proceeded to evaporate Bayer's assertion that the "relitigation exception" would support treating a decision in a case brought, but not certified, as a class action, as nonetheless binding on the absent "members". Justice Kagan squarely declared that the District Court's injunction was "independently improper" because "[n]either a proposed class action nor a rejected class action may bind nonparties". Reiterating its rejection of "virtual representation" and "*de facto* class actions", in *Taylor v. Sturgell*, 533 U.S. 880, 901 (2008) (probably the most important but under-recognized decision since *Shutts*), which the Court said "could hardly be more clear", the Court noted that a "properly conducted class action" can arise only after satisfying all of Rule 23's requirements. The Court labeled Bayer's policy concerns of serial litigation its "strongest argument" but quickly acknowledged that even such argument "flies in the face of the rule against nonparty preclusion".

Having decided that aspect of the case on preclusion issues alone, the Court explicitly did not address whether the injunction violated the requirements of "minimum due process" as set out in *Shutts*. (*Smith*, fn.7).

Today, the Court also granted certiorari and vacated the Seventh Circuit's injunction order in *Thorogood*, a consumer fraud suit in which the Seventh Circuit reversed the Illinois' district court's 29-jurisdiction class certification order, and after mooting Thorogood's individual claim, enjoined all consumers nationwide from pursuing similar claims as class actions anywhere. Judge Posner labeled the attempt to certify a subsequent class an "abuse", held that absent class members can be bound by mere "adequate representation", and enjoined, under the jurisdiction of the All Writs Act, 28 U.S.C. § 1651, without notice or opportunity to opt out, a ruling explicitly rejected by *Smith*. Notably, prior to the issuance of the injunction in *Thorogood*, Defendant Sears had failed to convince a California federal district judge to shut down a similar case brought for a single-state California class, finding their claims of collateral estoppel inappropriate.

Thorogood's attorney, *Chicago attorney Clint Krislov, was quoted:* *"These decisions vindicate the idea that due process is a two-way street, protecting not only wealthy corporate defendants, but individual consumers, as well. We believe that legal scholars will find the only abuse here was Judge Posner's."*

[3] Of course, had that ended the discussion, the result may have created a sort of inverse corollary to the rule in *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), in that Federal Rule 23 would have governed in federal court, while West Virginia's class rule would govern in West Virginia's courts.