Recent Developments in Class Action Law and Impact on MDL Cases

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INTRODUCTION

This past Term, the Supreme Court decided three class action cases – *Wal-Mart v. Dukes*, *AT&T v. Concepcion*, and *Smith v. Bayer* – that will have significant ramifications for class action and MDL practice. In my talk, I will discuss these decisions and how courts have begun interpreting them. This overview provides three data points for each case: (1) a brief, one-paragraph, synopsis of the case's holding; (2) a discussion of the case; and (3) my analysis of the ramifications of the case for class action practice. At the conference, I will also discuss how courts have begun to respond to these cases.

Most of my discussion is focused on the *Smith* case, the least well-known of the trilogy. I focus on *Smith* because it was an MDL case and it therefore has particular interest for this audience. I also focus on *Smith* because I believe that the Supreme Court failed to appreciate the MDL nature of the underlying case – failed, that is, to appreciate what you all are doing – and my analysis of *Smith* is something of a defense of MDL judges. Most importantly, though, I focus on *Smith* because it helps identify a series of issues concerning preclusion in MDL matters that are important, likely recurring, and not well-settled.

DUKES v. WAL-MART

I. HOLDING

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Court ruled that a putative nationwide class of female employees could not maintain a class action against Wal-Mart, the nation's largest retailer. The Court held that the plaintiffs had failed to articulate a question of law or fact common to the class *and* that the class could not be certified pursuant to Rule 23(b)(2) because of the class's substantial claims for monetary relief.

II. DISCUSSION

The plaintiffs, seeking to represent a class of 1.5 million current and former female Wal-Mart employees, brought suit against the retailer, alleging that its policy of delegating discretion in pay and promotions to local store managers led to sex discrimination in violation of Title VII. The class sought injunctive and declaratory relief, as well as back pay and punitive damages. The federal district court for the Northern District of California certified the class. The Ninth Circuit substantially affirmed, noting that the class met the requirements of 23(a) and could be certified under 23(b)(2) because the class's claims for back pay did not predominate over its claims for injunctive and declaratory relief.

The Supreme Court reversed the lower courts' certification of the class on both grounds: first (by a 5-4 vote) the Court held that the commonality requirement was not met; second (by a 9-0 vote) the Court held that, as the class sought significant monetary relief, certification under Rule 23(b)(2) was inappropriate.

While these two issues are the primary precedent established in *Wal-Mart*, the Court actually made passing reference to a whole series of class action questions, as follows.

A. Commonality

As to commonality, four points are pertinent for MDL judges:

1. *One question enough.* The Court re-affirmed that "for purposes of Rule 23(a)(2) even a single [common] question will do." *Id.* at 2556 (internal citations omitted).

2. *Merits may be considered.* The Court stated that a judge may look at the merits in determining whether to certify a class, stating:

> [S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question. . . Frequently [the] rigorous analysis [required at certification] will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Nor is there anything unusual about that consequence: The necessity of

> touching aspects of the merits in order to resolve preliminary matters, e.g., jurisdiction and venue, is a familiar feature of litigation.

Id. at 2551-52 (internal citations omitted).

3. Daubert *likely relevant.* In embracing a look at the merits, the Court also made passing mention of the *Daubert* question, stating: "The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so . . ." *Id.* at 2554 (internal citations omitted). The Court proceeded to consider expert testimony that had not been analyzed under *Daubert*, but the quoted passage suggests that a majority might require expert testimony considered for purposes of certification to meet the *Daubert* requirements.

4. *Commonality Narrowly Defined.* Most centrally, the Court defined commonality more narrowly than it had in prior decisions, writing that:

> Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law. . . . Their claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. "What matters to class certification is not the raising of common questions – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation."

Id. at 2551 (internal citations omitted) (*quoting* Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

The Court then held that the commonality requirement had not been met in the instant case because the plaintiffs could not point to a general policy or practice of discrimination that was common to the entire class. The majority found that the plaintiffs' statistical evidence of sex-based differences in pay and promotions, anecdotal evidence of intentional discrimination, and assertion that a "corporate culture" infected the discretion given to local managers were insufficient to prove that the class had suffered a common discriminatory practice. Without any other legal or factual question common to the class, the Court ruled that 23(a)(2) was not met.

B. Certification Under Rule 23(b)(2)

As to (b)(2) certification, two key points are pertinent:

1. *At Most, "Incidental" Damages Only in a (b)(2) Class.* The Court held that the putative class action could not be certified under 23(b)(2), rejecting the accepted wisdom that 23(b)(2) suits could be maintained so long as the injunctive relief "predominated" over the monetary relief. The Court held that the presence of individual monetary damages undermined

the "unitary class" conceptualization of a (b)(2) class and thus triggered the requirements of predominance, superiority, notice, and opt-out embodied in Rule 23(b)(3). The Court thus held that the *substantial* and individual claims for back pay present in the *Wal-Mart* case precluded certification under 23(b)(2).

The Court left open the possibility that *incidental* damages might be permissible in cases certified under Rule 23(b)(2), stating:

> In *Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 415 (C.A.5 1998), the Fifth Circuit held that a (b)(2) class would permit the certification of monetary relief that is "incidental to requested injunctive or declaratory relief," which it defined as "damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." In that court's view, such "incidental damage should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new substantial legal or factual issues, nor entail complex individualized determinations." We need not decide in this case whether there are any forms of "incidental" monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause. Respondents do not argue that they can satisfy this standard, and in any event they cannot.

Id. at 2560 (internal citations omitted). This suggests that damages "that flow directly from liability to the class as a whole" may be available in cases certified solely under 23(b)(2).

2. *Trial Management*. The Court rejected trial management by formula, stating:

> Wal–Mart is entitled to individualized determinations of each employee's eligibility for backpay. . . . The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. *A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. We disapprove that novel project.* Because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being "incidental" to the classwide injunction, respondents' class could not be certified even assuming, arguendo, that "incidental" monetary relief can be awarded to a 23(b)(2) class."

Id. at 2561 (emphasis added) (internal citations omitted).

C. Dissent

Justice Ginsburg, in an opinion joined by the Court's three other more liberal Justices (Breyer, Sotomayor, and Kagan), concurred that the case should not have been certified under Rule 23(b)(2). However, the Ginburg four dissented on the commonality point, arguing that the Court had incorrectly infused its discussion of commonality with elements from the 23(b)(3) predominance analysis, and that, absent such infusion, the plaintiffs' allegations would have easily met the commonality standard as conventionally applied.

III. RAMIFICATIONS

In the short-run, *Wal-Mart* will spur many defendants to seek de-certification of previously certified classes (FRCP 23(C)(1)(c) states that "An order that grants or denies class certification may be altered or amended before final judgment"). Beyond the short term, defendants are likely to contest certification under the commonality prong much more strongly than in the past, insist that courts consider the merits at certification, push for *Daubert* determinations of expert testimony at the certification point, and resist certification under 23(b)(2). Some thoughts:

A. Commonality

As to commonality, *Wal-Mart* may be read as an exceptional case for several reasons.

1. Because the plaintiffs sought certification under Rule 23(b)(2), there was no doctrinal requirement that common issues predominate over non-common issues as there would have been in a Rule 23(b)(3) money damage class suit. As a result, much of the work that would conventionally have been done by the predominance requirement in Rule 23(b)(3) was necessarily shifted onto the commonality prong of Rule 23(a)(2). Thus, in the more common Rule 23(b)(3) suits, courts may continue to find the commonality test easily met notwithstanding *Wal-Mart* and instead continue to sort out cases inappropriate for aggregate treatment using the stricter predominance analysis.

2. Because the size and scope of the *Wal-Mart* class was exceptional – 1.5 million female workers throughout the United States, all challenging de-centralized decision-making by the nation's largest private employer – its "no commonality" ruling arose in a uniquely large, nationwide workplace.

3. Because the plaintiffs attempted to prove commonality alleging that the common discriminatory policy was to delegate pay and promotion decisions to the discretion of thousands of different, localized, and arguably un-common decision-makers, that argument struck the Court as paradoxical. This approach is somewhat more complex than, say, the common contract, single product, shared hiring test, or unitary misrepresentation at issue in more run-of-the-mill class suits and hence *Wal-Mart* might be of less relevance in the standard case.

4. Because *Wal-Mart* is an employment discrimination precedent and employment discrimination class actions have long been a particular sub-set of commonality law, *Wal-Mart* might be read as particularly pertinent in that area and less so beyond it.

For these reasons, it is difficult to predict with certainty *Wal-Mart*'s impact on general commonality standards going forward.

B. Merits at Certification

The Court's holding that at certification, the trial judge may examine the merits is capable of two distinct readings. *First*, the holding could mean that at certification, the trial judge must look to see if the case has merits. *Second*, the holding could simply mean that at certification, the trial judge must look at the substantive claims to ascertain whether the certification requirements have been met, for example, to determine whether the substantive claims share common questions of law or fact.

The *Wal-Mart* decision implies the second and performs the first of these readings. The decision implies the second because nowhere does it literally tell the trial court to weigh the strength of the plaintiffs' claims and because it analogizes what it means by "touching aspects of the merits" to a jurisdictional inquiry. In ascertaining personal jurisdiction, for example, a court may need to determine whether the cause of action arises out of or relates to a defendant's contacts with a forum; it must therefore look at the cause of action itself, but in doing so, it is not weighing the merits of the cause of action, simply identifying its substance and relation to jurisdiction. If this is what the Court means by "touching aspects of the merits," it might have been more precise to utilize the term "substance of the claims" rather than "merits."

Yet the Court employed the term "merits" and the decision itself reads as if the majority is weighing the evidence to determine the commonality question. The Court's off-handed reference to the *Daubert* case supports this reading, as it suggests that the strength or value of the parties' witnesses, not just the substance of their testimony, is pertinent at certification.

This question has been a recurring one for some time and it is likely that *Wal-Mart* will not be the last word on it since it comes at the question somewhat sideways rather than straight on. Generally speaking, it would be more efficient, and arguably more fair, to the litigants to keep the certification motion focused on the requirements of certification and to leave the merits for merit-related motions. The Court's rulings in *Twombley* and *Iqbal* requiring complaints to present "plausible" claims provide sufficient grounds for an early peak at the merits. The certification decision is sufficiently important, and sufficiently complex, on its own terms that it need not also become a means for full-on evaluations of the merits of an action.

C. Rule 23(b)(2) Certification

Wal-Mart suggests that cases certified under (b)(2) can no longer permit monetary damages – unless perhaps those damages are "incidental" – and thus it is likely to block (b)(2) certifications in cases that encompass money damages.

AT&T MOBILITY LLC v. CONCEPCION[1]

I. HOLDING

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Court held that the Federal Arbitration Act ("FAA") pre-empted the application of California's common law unconscionability doctrine to waivers of class action arbitration, such that an arbitration agreement containing such a waiver should have been enforced even if California law would have deemed it to be unconscionable.

II. DISCUSSION

The plaintiffs, consumers who had entered into a contract for wireless phone service with the defendant, AT&T, brought suit in federal court in the Southern District of California alleging fraud and false advertising. AT&T sought to compel arbitration pursuant to an arbitration agreement the plaintiffs had signed, but the District Court found the arbitration agreement unconscionable under California law because of its waiver of class actions. The Ninth Circuit affirmed.

A divided Supreme Court reversed, with Justice Scalia writing the majority decision for the Court's five more conservative Justices (Scalia, Thomas, Roberts, Alito, and Kennedy). The Court first acknowledged that the FAA does not preempt all state contract law; the FAA's "saving clause" normally permits arbitration agreements to be rendered unenforceable on any ground that would render any other contract unenforceable under state law – that is, so long as the state's law did not discriminate against arbitration but was generally applicable, it could be applied to arbitration clauses. However, the Court held that the particular contract doctrine at issue in *Concepcion* – California's application of its unconscionability doctrine to waivers of class actions – was preempted by the FAA because it would conflict with the purposes of that statute.

Specifically, the Court noted that California's unconscionability doctrine would require the option of class action arbitration in any enforceable arbitration agreement, and that class action arbitration was inherently contrary to the FAA's purpose of enforcing arbitration agreements in order to streamline litigation. The Court asserted that class action arbitration sacrificed informality, a major advantage of arbitration, for more formal arbitration rules governing class action arbitration. And, the Court noted that class action arbitration rules, unlike the Federal Rules of Civil Procedure, were ill-suited to protecting defendants in class litigation because they did not provide the same appellate review opportunities. As a result, state law could not mandate the removal of class action arbitration waivers from otherwise valid arbitration agreements.

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[1] As discussed in the text below, I authored an *amicus* brief in *Concepcion* that was filed on behalf of a group of law professors; the brief argued that class actions serve important purposes and that their eradication (through waiver) would make bad public policy. *See* Brief of Civil Procedure and Complex Litigation Professors as *Amici Curiae* in Support of Respondents, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

Justice Breyer's dissent (signed by Justices Ginsburg, Sotomayor, and Kagan) argued that California's unconscionability doctrine treated arbitration contracts no differently than other contracts, hence complying with the FAA. Justice Breyer noted that the Court's majority had created something of a straw man in arguing that the outcome below would have required class action arbitration and that such cumbersome arbitrations would run counter to the purposes of arbitration. Justice Breyer refuted that argument by contending that the proper comparison is not that between class action arbitration and individual arbitration, but rather between class action arbitration and judicial class actions – and that class action arbitration may well be more streamlined than judicial class actions. Moreover, class action arbitration is certainly more efficient than individual arbitration of huge numbers of identical claims.

III. RAMIFICATIONS

Given *Concepcion*, it is likely that corporations will increasingly place arbitration clauses, and no class action clauses, in standard form consumer and employment contracts. Plaintiffs' counsel are likely to test the limits of *Concepcion* by arguing that it does not apply to other states' contract defenses as it did to California's unconscionability defense and/or by finding other means of evading such clauses.

My own opinion is that the limitation on class actions is bad public policy as it significantly limits any deterrence on defendants in small claims matters. This is so because arbitration is rarely utilized. I authored an *amicus* brief for a group of law professors in *Concepcion* emphasizing these points: *first*, that class actions serve important functions and that a regime enabling only individual arbitration will sacrifice those goals; and *second*, that available empirical evidence show few individuals ever pursue arbitration in small claims situations such as that at issue in *Concepcion*. The brief stated that:

> [A]lthough AT&T had nearly 70 million customers by the end of 2007, in the five years between January 1, 2003 and December 31, 2007 only 170 customers in the United States filed arbitrations against AT&T Mobility, AT&T Wireless, or Cingular Wireless. Between October 30, 2006 and December 31, 2007 – the period after AT&T implemented the arbitration clause at issue here with the $7500 provision alleged to enable consumers to seek individual relief – only 10 customers filed for arbitration.[2]

[2] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), Brief of Civil Procedure and Complex Litigation Professors as *Amici Curiae* in Support of Respondents at 20 (citing Decl. of Bruce L. Simon in Support of Plaintiffs' Opposition to Defendants' Amended Motion to Compel Arbitration, Coneff v. AT&T Corp. et al., No. 06-944 (W.D. Wash., filed Mar. 14, 2008) (reporting on data collected from American Arbitration Association website statistics); Coneff v. AT&T Corp. et al., 620 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009) (citing these figures as evidence that the arbitration provisions at issue here "are not having their intended effect")).

The Court's decision enables wrong-doers to insulate their actions from effective recourse by insisting upon arbitration and banning class actions. Put simply, no one is ever likely to sue under such a procedural regime.

There are several ways in which the harsh result in *Concepcion* might be ameliorated:

- Some states' contract doctrines might be so different from California's unconscionability rule that they would withstand the Court's reasoning in *Concepcion* and would not be pre-empted by the FAA. While that outcome seems at least plausible, its reach is somewhat limited in that it would protect class suits from waivers only in those states.

- Public enforcement will fill the void that *Concepcion* creates. With the current state of the public fisc, this too seems unlikely. Moreover, the efficacy of such public enforcement is itself the subject of significant dispute.

- Congress can amend the FAA to outlaw class action waivers or to re-enable the operation of state contract doctrine in this area. The Arbitration Fairness Act of 2011, H.R. 1020, would effectuate such a change by amending the FAA to emphasize that it is meant to apply only to business-to-business disputes and hence to exempt from its reach employment, consumer, and franchise disputes. The current Congress is unlikely to enact that bill into law.

SMITH v. BAYER

I. HOLDING

In *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), the Court held that a federal court's denial of class certification did not preclude different proposed class representatives from seeking certification of the same class in a later state court proceeding. Specifically, because the state court would decide class certification pursuant to the state's procedural rules, which differed in interpretation from the Federal Rules of Civil Procedure, and because the new class representatives were not parties to the federal court litigation, the requirements of issue preclusion had not been met. For that reason, the Supreme Court overturned the federal trial court's anti-suit injunction, which had barred the litigants in the state case from seeking class certification.

The Court's seemingly straightforward decision – one court's denial of class certification does not bar a second court from considering the same motion brought by different parties – masks some interesting complexities in the case. To appreciate those, a full recitation of the factual background is necessary.

II. DISCUSSION

A. MDL

The *Smith* case arose out of litigation concerning the drug Baycol, manufactured by the Bayer Corporation.[3] In December of 2001, the Judicial Panel on Multidistrict Litigation created MDL 1431 in the U.S. District Court for the District of Minnesota (Hon. Michael Davis) to coordinate discovery and pretrial matters for the federal court Baycol cases. The website for the Baycol MDL describes the case in these terms:

> These cases involve allegations concerning a medication generically known as Baycol (also known as Lipobay, Cholstat or Cerivastatin). Baycol was commonly prescribed to aid in lowering cholesterol and triglycerides. It is within a class of drugs referred to as "statins", which are commonly prescribed for high blood pressure and heart disease. The plaintiffs allege that Baycol caused rhabdomyolysis, a disease which causes damage to muscle, kidney failure or other injuries. Baycol has been linked to over 100 deaths. It was withdrawn from the market in August 2001.[4]

In August of 2001, George McCollins, along with two other plaintiffs, filed suit against Bayer Corporation in West Virginia state court, asserting, *inter alia*, that Bayer had violated its express and implied warranties and had caused McCollins economic loss in violation of the West

[3]The Baycol MDL website states more specifically that: "Plaintiffs allege that Defendants Bayer AG, Bayer Corporation, Glaxosmithkline plc and Smithkline Beecham d/b/a/ Glaxosmithkline tested, marketed, distributed, promoted and sold Baycol." *See* http://www.mnd.uscourts.gov/MDL-Baycol/introduction.shtml.

[4] *See id.*

Virginia Consumer Credit and Protection Act ("WVCCPA"). The *McCollins* plaintiffs sought to represent a statewide class of all West Virginia purchasers of Baycol.

One month later, in September of 2001, Keith Smith and Shirley Sperlazza filed suit against Bayer Corporation in West Virginia state court, asserting similar claims of breach of warranty and violations of the WVCCPA. The *Smith* suit also named as defendants a West Virginia doctor and corporation.

In January of 2002, the defendants removed the *McCollins* action to federal court, where it was transferred to the MDL forum. The *Smith* action was not removable as complete diversity did not exist due to the two defendants from West Virginia and as its filing pre-dated Congress's enactment of the looser jurisdictional requirements of the Class Action Fairness Act of 2005.

Ultimately, about 40,000 plaintiffs filed Baycol cases, 22,500 in federal court,[5] making it one of the largest MDL cases in history.[6] For close to a decade, the Baycol MDL court coordinated the extensive pretrial and discovery processes for cases concerning Baycol throughout the United States. The MDL docket ultimately encompassed close to 1,000 separate entries and the district court issued more than 150 pretrial orders. As is typical in MDL proceedings, the MDL court appointed lead counsel and a plaintiffs' steering committee ("PSC") for the consolidated actions at the outset of the MDL. Judge Davis also coordinated state and federal proceedings, hosting a "Baycol Litigation Conference on Federal/State Coordination" in New Orleans, Louisiana that was attended by twenty-three of the state court judges presiding over Baycol cases.[7] More generally, the MDL court supervised fact and expert discovery, ruled on *Daubert* motions,[8] and oversaw motions for summary judgment.

Most pertinently, the MDL court ruled on motions for class certification. The PSC filed a class action complaint on behalf of a nationwide class of Baycol purchasers and sought certification of such a class, a motion that the MDL court denied in September 2003.[9] As the cases proceeded, the PSC filed a renewed motion for class certification in January 2005 but withdrew it in February of 2006. The MDL process successively resolved most Baycol claims: in 2010, the parties reported to the MDL court that only 168 cases remained outstanding (only

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[5] Brief for Respondent at 3, *Smith v. Bayer Corp*., 131 S.Ct. 2368 (2011).

[6] The Judicial Panel on Multidistrict Litigation reports that the Baycol MDL encompasses 9,107 total cases. *See* *http://www.jpml.uscourts.gov/Pending_MDL_Dockets-By-District-September-2011.pdf*. This places it as the sixth largest pending MDL action behind Asbestos (190,837), Diet Drugs (Fen-Phen) (20,179), Welding Fumes (12,678), Vioxx (10,310), and Prempro (9,745). As noted above, *see* text accompany n.4, *supra*, Bayer's Supreme Court brief reported 22,500 federal court filings, numbers that would make Baycol the largest MDL after the asbestos case.

[7] *See* Baycol Products Liability Website, Current Developments page, http://www.mnd.uscourts.gov/MDL-Baycol/index.shtml#current (June 6-8, 2002 Entry).

[8] *In re Baycol Products Litigation*, 532 F.Supp.2d 1029 (D. Minn. 2007).

[9] *In re Baycol Products Litigation*, 218 F.R.D. 197 (D. Minn. 2003).

three of those in federal court) and that they had settled 3,144 cases with a total value of $1,169,646,335 (or, roughly $375,000 per settlement).[10]

As the Baycol MDL was winding down, on November 1, 2006, the *McCollins* plaintiffs moved to remand the individual *McCollins* action back to the Southern District of West Virginia. On January 10, 2007, the defendants responded with a cross-motion to deny certification of a West Virginia state class and to enter judgment against the *McCollins* plaintiffs. On August 25, 2008, the MDL court granted the defendants' motion to deny class certification and the defendants' motion for summary judgment, dismissing with prejudice the *McCollins* plaintiffs' claims. McCollins did not appeal and the decision became final on September 25, 2008.

Five days later, the *Smith* plaintiffs sought certification of the same West Virginia state class in West Virginia state court. While the *McCollins* action was part of the mega-MDL, the *Smith* action had proceeded as an individual matter, a putative class action, in West Virginia state court. After filing the initial complaint in 2001, the plaintiffs filed an amended complaint in February of 2002. Years of discovery followed. Between May 2006 and October of 2008, the parties engaged in class discovery, with the court amending its schedule for class discovery and briefing on multiple occasions.

Given that the federal MDL court had denied certification of a West Virginia class in *McCollins* days before the *Smith* class filed its motion for certification, Bayer sought an injunction from the MDL court to prevent the *Smith* parties from litigating the certification question in West Virginia state court. The federal Anti-Injunction Act, 28 U.S.C. §2283, bars federal courts from enjoining state court proceedings, but the Act's "relitigation exception" permits injunctions necessary to "protect or effectuate its judgments," that is, to stop relitigation of questions finally decided in the federal court. The MDL court granted the injunction, noting that the relitigation exception is properly invoked when, as in the case before it, the requirements of issue preclusion had been met. The Eighth Circuit affirmed.

B. Supreme Court

The Supreme Court unanimously reversed, with Justice Kagan writing an opinion for the Court. The Court held that the requirements of issue preclusion had not been satisfied and that therefore the relitigation exception could not justify the District Court's injunction.

First, the Court stated that the issue decided in *McCollins* was different than the issue present in the *Smith* class action. The *McCollins* class action had been denied certification under Federal Rule of Civil Procedure 23, while the putative class representative in *Smith* had requested certification under West Virginia Rule of Civil Procedure 23. Though the relevant language of the two rules was identical, the Court noted that West Virginia state courts had interpreted that language differently than federal courts had and that therefore the legal standard controlling the two courts' class certification decisions would differ. Specifically, West Virginia courts had interpreted the predominance requirement of Rule 23(b)(3) more broadly than had

[10] *See* Joint Status Report (Apr. 26, 2010) available at http://www.mnd.uscourts.gov/MDL-Baycol/reports/2010-04-BaycolMDL-JointStatusReport5.pdf.

federal courts and this was the ground upon which the federal MDL court had denied class certification of the West Virginia state class.

Second, the Court held that the named plaintiffs in *Smith* were not parties to the *McCollins* litigation despite being among those who would have been class members had the proposed class been certified. The Court held that putative class actions that merely propose a class, or putative class actions in which certification has been denied, cannot bind nonparties, including unnamed members of the proposed or denied class. The Court therefore held that the requirements of issue preclusion had not been met, and reversed the Eighth Circuit's affirmance of the trial court's anti-suit injunction. The *Smith* class action may now proceed in West Virginia state court.

III. RAMIFICATIONS

A. The Straightforward

Three things seem straightforward about *Smith*:

1. ***The decision is doctrinally solid***. Class certification proceedings take place for the sole purpose of determining whether a representative can adequately represent the class and thereby bind absent class members to the outcome of the representative's litigation. If the answer to that question is "no," to then turn around and bind absent class members *to that threshold decision* seems, at first blush, quite illogical.

2. ***The decision is good public policy***. The opposite result – binding all potential class members to the first class certification attempt – would place too much power in the hands of the initial plaintiffs' attorneys and create opportunities for collusive proceedings.

3. ***The decision is good for the plaintiff's bar***. It enables multiple bites at the class certification apple.

The outcome of *Smith* seems so obvious that the Supreme Court appeared surprised that the MDL court and the Eighth Circuit got it so wrong, writing that while "close cases have easy answers . . . this case does not even strike us as close." *Smith*, 131 S. Ct. at 2381. So what were the MDL court and Eighth Circuit thinking?

B. The Nuanced

Here are three things about *Smith* that are less immediately obvious and that make its outcome somewhat less straightforward, if not necessarily wrong:

1. **Smith *arose out of an MDL Case***. It is my guess that the MDL court thought that it – not the West Virginia state court – was the forum that the Judicial Panel on Multidistrict Litigation had tasked with resolving Baycol litigation, an understandable presumption with which the Eighth Circuit agreed. As noted above, tens of thousands of Baycol cases had been filed in the federal courts and the MDL court had, for the better part of a decade, been processing

those cases in the aggregate, coordinating litigation across state courts throughout the country, and overseeing this nationwide litigation as the MDL charge required it to. Although the Supreme Court noted that the *McCollins* action was an MDL, it failed to appreciate that context and hence mischaracterized the lower court proceedings in several interesting ways.

First, the Court stated that for six years after their filings in 2002, the two cases "proceeded along their separate pretrial paths at roughly the same pace." *Smith*, 131 S. Ct. at 2374. This statement is humorous in that it overlooks the fact that the federal judge was managing an MDL comprised of tens of thousands of Baycol cases, while the *Smith* case was languishing in West Virginia state court. It took the *Smith* plaintiffs seven years to get a class certification motion teed up, with the case barely logging any docket entries in most of those years – 16 in all of 2003, 9 in all of 2004, 1 in all of 2005 (yes, 1 docket entry for the entire year), 18 in 2006, 18 in 2007, 16 in 2008. Meanwhile, the MDL court logged roughly 800 docket entries in a similar time period and moved tens of thousands of cases along. There were more pretrial ***orders*** in the MDL than there were total docket ***entries*** in the West Virginia matter.

Second, the Supreme Court wrote, after its comment that the cases had proceeded at "at roughly the same pace," that "[b]y 2008, both courts were preparing to turn to their respective plaintiffs' motions for class certification." *Id.* This statement is simply wrong. The MDL court had considered and rejected a motion for nationwide class certification many years earlier; by the time of the *McCollins* remand motion, the MDL court was winding down and had resolved thousands of Baycol cases. Further, the *McCollins* certification motion came at the behest of the defendants (who sought an order denying class certification), as an attempt to forestall and limit a remand of the *McCollins* action back to West Virginia state court.

All of this demonstrates that the Supreme Court did not completely appreciate either the nature of the MDL or the procedural history of the MDL proceeding. It does not demonstrate that the Supreme Court's decision was wrong.[11] Yet buried within *Smith* opinion are some thornier questions of preclusion within MDLs that were not explicitly at issue in *Smith.* I now turn to these issues.

2. ***MDL Courts Will Often Be Tempted To Enjoin Other Litigation, Especially After They Have Resolved Most of Their Docket***. A recurring theme in complex litigation generally is that it somehow seems unfair – to the defendant – that each plaintiff in a purported

[11] On the issue of whether the Supreme Court got the preclusion question wrong, it is worth noting that not insignificant precedent existed (particularly, though not exclusively, in the Seventh Circuit) that supported binding non-parties to a certification denial so long as they were adequately represented by the parties who unsuccessfully sought certification. *See, e.g., Thorogood v. Sears, Roebuck and Co.*, 624 F.3d 842(7th Cir. 2010) (Posner, J); *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 333 F.3d 763(7th Cir. 2003) (Easterbrook, J.); *Alvarez v. May Dept. Stores Co.*,143 Cal.App.4th 1223, 49 Cal.Rptr.3d 892 (2d Dist. 2006); *In re Wal-Mart Wage & Hours Empl. Practices Litig*., 2008 WL 3179315 (D. Nev. June 20, 2008) (stating the principle but holding it inapplicable to the facts in that case). In other contexts, parties may be bound by adequate representation without full-on class certification. *See, e.g., Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 318-319 (1950).

class action can, one at a time, attempt to certify a class without any of those efforts constraining the next litigant from starting from scratch. Moreover, MDL courts, in particular, are often tempted to enjoin satellite litigation because such litigation feels at odds with the jurisdictional mandate of the MDL charge.

There are two basic types of MDL matters and this sentiment infects them both: in small claims situations, an MDL tends to collect a series of competing class actions cases (or state class actions cases, removed under CAFA), while in cases with larger claims such as personal injury mass torts (*e.g.*, pharmaceutical cases), an MDL tends to collect thousands of individually-represented cases (and perhaps some attempts at class certification, as well). In the small claims situation, the MDL will often work out which, *if any*, of the competing class actions is best situated to proceed, while in mass tort situations, the MDL helps create an aggregate settlement. In both instances, the MDL court's work is comprehensive, the MDL judge will experience herself as the jurist "for the situation," and she will often (and often correctly) experience satellite litigation as potentially threatening. Thus, the understandable impulse to enjoin.

For instance, in the Fen-Phen cases, the Third Circuit, writing of its earlier decision in an asbestos case, stated that "[u]nder an appropriate set of facts, a federal court entertaining complex litigation, especially when it involves a substantial class of persons from multiple states, or represents a consolidation of cases from multiple districts, may appropriately enjoin state court proceedings in order to protect its jurisdiction."[12] The Third Circuit nicely captured the precise situation of the *Smith* case – and the feelings that certainly underlay Judge Davis's injunction – in writing that:

> Complex cases in the later stages – where, for instance, settlement negotiations are underway – embody an enormous amount of time and expenditure of resources. It is in the nature of complex litigation that the parties often seek complicated, comprehensive settlements to resolve as many claims as possible in one proceeding. These cases are especially vulnerable to parallel state actions that may frustrate the district court's efforts to craft a settlement in the multi-district litigation before it, thereby destroying the ability to achieve the benefits of consolidation. In complex cases where certification or settlement has received conditional approval, or perhaps even where settlement is pending, the challenges facing the overseeing court are such that it is likely that almost any parallel litigation in other fora presents a genuine threat to the jurisdiction of the federal court.[13]

While the issue of whether to enjoin satellite litigation often arises in cases that *have been certified*, the sentiment – and arguably the law – applies as well in MDL matters that are achieving global peace outside the class certification framework, as many do today.

3. ***Preclusion in MDL Cases is Under-theorized***. The *Smith* decision is premised on two core aspects of issue preclusion: (1) the issue in the second case must be the same as in

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[12] *In re Diet Drugs*, 282 F.3d 220 (3d Cir. 2002) (discussing and quoting *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 202-04 (3d Cir.1993)) (internal quotation deleted).

[13] *Id.*

the first and (2) the party being barred from relitigating must have been a party to the initial action. The issues diverged in *Smith* because federal courts have interpreted Rule 23 differently than West Virginia courts have interpreted their own Rule 23. But this is a bit of an anomaly: in many cases, the class certification rule will be the same in the second court as it was in the first. The recurring and more important question is the party question. The rule, put simply, is that only parties can be bound. In *Smith*, because the *Smith* plaintiffs were not parties to the *McCollins* litigation, they could not be bound by it.

So consider the hard question that was not literally at issue in *Smith* – who counts as "parties" in an MDL proceeding? In 2003, the MDL court had denied a motion for nationwide class certification. Who was bound by that decision? Arguably, all of the "parties" to the MDL, meaning the thousands of individuals whose cases had been transferred to the MDL at that point.[14]

What's interesting is that most of those individuals had their own attorneys, but few of those attorneys participated in, or had any control over, the nationwide class certification motion. The MDL court's lead counsel and steering committee controlled everything about the certification decision: the motion's timing, framing, and argument. If individual parties within the MDL are to be bound to the MDL's denial of nationwide class certification, it is only because their interests are "represented" by the steering committee, not because they had any participation or control.[15]

If this is correct, what it means is that plaintiffs *within* an MDL may be bound to the outcome of a certification denial adjudicated by the MDL's PSC, their representatives. This is, of course, precisely the opposite holding of the *Smith* case itself. Once one sees that the MDL court's certification decision arguably has a binding effect on all of the MDL parties – most of whom are only nominally parties – one can begin to appreciate what the MDL judge might have been thinking in *Smith* when he sought to block the West Virginia litigants from litigating certification again in the state court there. He was the judge assigned to resolve the Baycol matter. He had decided the certification question. In doing so, he had likely bound tens of thousands of "parties" to that outcome via the MDL PSC's representation of their interests (just

[14]Query whether individuals whose cases were transferred into the MDL after the nationwide class certification denial would be considered "parties" to that decision and would therefore be precluded from relitigating the nationwide class certification question. *Cf. Musial v. Hitachi Home Elecs. (Am.), Inc.*, 2011 U.S. Dist. LEXIS 75565 (N.D. Ill. July 12, 2011) (litigant seeks to avoid transfer into a consolidated action (not an MDL) wherein the judge had previously denied class certification).

[15]The *Smith* lawyers themselves reported to the Supreme Court that they had no knowledge of the *McCollins* class certification motion – even though they represented individual claimants whose cases had been removed into the MDL**.** *See* Brief for Petitioners at 6 n.3, *Smith v. Bayer Corp.*, 131 S.Ct. 2368 (2011) (stating, "Counsel for Smith were aware that an MDL Court had been established to handle Baycol litigation pending in federal court because they had one or more individual actions removed to federal court and transferred to the MDL. But none of those cases involved requests for class-action certification, and counsel for Smith were not served with papers in the *McCollins* case.").

as those parties are bound to all the MDL's pre-trial orders via such representation). Why not bind the West Virginia litigants as well, particularly as those litigants were not part of the MDL solely by vestige of federal jurisdictional rules?

My point in reviewing these complexities is to suggest that MDL-related preclusion is more complicated than the Court's treatment of the issues in *Smith* would seem to indicate. The complications provide an understanding of what Judge Davis and the Eighth Circuit might have been thinking in Baycol and suggest questions that are likely to emerge in the coming years.

The Supreme Court's decision in *Smith* comes slightly more than a decade after its decisions in *Amchem* (1997) and *Ortiz* (1999). It is fair to say that those two cases slowed (if not extinguished) the capacity of courts to certify large class actions in mass tort matters. What has sprung up in the wake of those decisions is the mass tort MDL – the sprawling MDL cases that resolve large numbers of individual actions through aggregation rather than certification. In creating the rules for these MDL aggregations, MDL trial courts are regularly experimenting with various procedures, ranging from bellweather trials to anti-suit injunctions. *Smith* interferes in that practice with a reminder about the rules of the preclusion game. In that sense, it resembles *Amchem* and *Ortiz*, which interfered in the earlier mass tort cases with a reminder about the rules of class certification. (Ironically, *Smith* creates more opportunities for certification while *Amchem* and *Ortiz* deterred certification.) What *Smith* does not do is resolve the many thorny questions about the scope of MDL preclusion that are likely to recur in the coming years.

CONCLUSION

In two 5-4 decisions, the Supreme Court's more conservative Justices curtailed access to the courts through the class action mechanism this Term. The Court's decision in *Concepcion* enables corporations to structure large scale transactions with contracts requiring arbitration and waiving the possibility of class action suits or class action arbitrations. If a class action does get into Court, the Court's decision in *Wal-Mart* will make it more difficult to certify the case, as it encourages lower courts to look at the merits, raises the bar for what constitutes common questions, and forbids cases involving anything but incidental damages to be certified under Rule 23(b)(2). Somewhat ironically, the Court's third decision – *Smith* – appears to encourage class suits as it enables a litigant to pursue class certification even after prior litigants have failed at that same task. While *Smith* makes that opportunity more available, it may be little more than an opportunity since *Concepcion* enables defendants to avoid it and *Wal-Mart* makes the opportunity more daunting than it had been.

The Court's class action jurisprudence seems unaware of the extent to which many – though certainly not all – MDL matters are resolving large chunks of cases in the aggregate but without class certification. The Court's decision in *Smith* failed to appreciate the MDL context of that case, equating the pre-trial in an MDL with the pre-trial portion of a essentially dormant West Virginia state court class action. The Court's decisions in *Amchem* and *Ortiz* steered aggregations away from certification; its decision in *Wal-Mart* only furthers that process. The Court has yet to tackle head on any of the more complicated questions arising out of MDL *aggregations*, but this is likely on the horizon.