Supreme Court, U.S.
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No. 09-1205

In the
Supreme Court of the United States

KEITH SMITH and SHIRLEY SPERLAZZA,
Petitioners,

v.

BAYER CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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I. Respondent's Reasons For Denying The Petition Are Flawed

Respondent postulates that this case does not warrant the Court's review because the judgment below is narrow. Respondent advances three arguments as support for its position. First, because the district court below found that petitioners were adequately represented in the McCollins case, respondent contends petitioners are wrong in asserting that the judgment below conflicts with decisions of this Court or any circuit court of appeals. Second, it submits that, unlike the judgment below, all of the decisions relied upon "by petitioners involve cases in which the underlying judgment was not enmeshed with substantive holdings or was not final." Third, it claims that the circumstances of this case are unlikely to recur because the odds of parallel class actions existing in state and federal courts are dramatically reduced by the enactment of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4. (Brief in Opp. at 2-4).[1]

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[1] As a parting jab, respondent also argues that this case is anomalous due to the length of time between the filing of petitioners' underlying lawsuit and the noticing of a hearing on the issue of class certification. Without any basis in fact, respondent suggests that petitioners were waiting to see if respondent would change its position on paying economic-loss-only claims (or as earlier suggested to the district court and Eighth Circuit, if the MDL court would grant class certification) and that this strategy or motive is responsible for the situation in which petitioners now find themselves. While the significant delay in having a class-certification hearing is indeed regrettable, it was not due to any motive or strategy on petitioners' part. Rather, as

The arguments of respondent reflect a "talent for trivializing the momentous and complicating the obvious."[2] Respondent ignores or at least downplays the significant deprivation of petitioners' due-process rights as well as the substantial encroachment on principles of federalism and comity--principles that are at the heart of the Anti-Injunction Act and the doctrine of collateral estoppel--caused by the judgment below. Respondent attempts to complicate the picture and obscure the obviousness of these violations by relying upon technical--and largely meaningless--distinctions between the judgment below and the cases relied upon by petitioners as being in conflict with said judgment and by suggesting that the circumstances of this case are unlikely to recur.

Contrary to respondent's assurances, the judgment below is in conflict with decisions of this Court and other circuit courts of appeal. Furthermore, while the enactment of CAFA will decrease the number of parallel class actions existing in federal and state courts, it cannot fairly be said that the circumstances of this case will not recur, due to limitations and exceptions to the Act.

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explained throughout this federal proceeding, numerous attempts had been made to obtain earlier dates but were unsuccessful due to the need for more discovery and the busy schedules of all counsel involved as well as the trial court. Petitioners do not believe that this argument deserves any further attention.

[2] GETTYSBURG (Turner Pictures 1993) (Brig. Gen. James L. Kemper to Maj. Gen. George E. Pickett: "Well, I got to hand it to you, George. You sure got a talent for trivializing the momentous and complicating the obvious. You ever consider running for Congress?").

A. The Judgment Below Creates or Adds to Important Conflicts That Warrant this Court's Review

1. Conflict Is Not Avoided by Finding of Adequate Representation

Respondent argues that the Eighth Circuit's judgment in this case does not conflict with any of the decisions cited by petitioners that discuss personal jurisdiction and due process concerns because there was a finding of adequate representation in this case by the district court.[3] Petitioners have asserted that the Eighth Circuit's ruling on this issue conflicts with this Court's recent decision in *Taylor v. Sturgell*,[4] as well as the pre-*Taylor* decisions of the Third Circuit in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*,[5] and the Eleventh Circuit in *In re Bayshore Ford Trucks Sales, Inc.*[6] (Pet. at 20-31).

Respondent argues that the Eighth Circuit's judgment below does not conflict with this Court's decision in *Taylor* because of this Court's recognition therein that "properly conducted class actions" are among the recognized exceptions to the rule against

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[3] *See In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d 716, 725 (8th Cir. 2010). Pet. App. at 15a.

[4] 553 U.S. 880, 128 S.Ct. 2161, 2171-73 & 1276 (2008).

[5] 134 F.3d 133, 141 (3d Cir. 1998).

[6] 471 F.3d 1233, 1245 (11th Cir. 2006).

nonparty preclusion.[7] This argument misses the point. The Court in *Taylor* acknowledged that "properly conducted class actions" were a recognized exception to the rule against nonparty preclusion because of "the procedural safeguards contained in Federal Rule of Civil Procedure 23."[8] Adequate representation is only one of the procedural safeguards afforded under Rule 23; additional safeguards include rights to notice, an opportunity to be heard or participate in the litigation (whether in person or through counsel), and the right to opt out or request exclusion. These procedural safeguards are only afforded class members upon certification of a class.[9]

Simply stated, an individual lawsuit requesting class certification does not become a "properly conducted class action" at least until class certification has been granted in accordance with the requirements set forth in Rule 23. As noted in the petition, the Court of Appeal for the Second District of California has recognized this exact point, albeit in *dicta*, in *Johnson v. GlaxoSmithKline, Inc.*[10] (Pet. at 28-29). This point has also now been recognized by the American Law Institute ("ALI") in its *Principles of the*

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[7] Brief in Opp. at 13.

[8] *Taylor*, 553 U.S. at 892-96 & 900-01, 128 S.Ct. at 2171-73 & 2176.

[9] *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); Fed.R.Civ.P. 23; W.Va.R.Civ.P. 23.

[10] 83 Cal.Rptr.3d 607, 618 n. 8 (Ct. App. 2d Dist. 2008).

Law of Aggregate Litigation § 2.11 (2010).[11] The ALI now suggests that principles of comity, rather than preclusion, should affect a forum court's discretion as to whether to follow a prior court's denial of class certification when dealing with the same or similar class-certification question.[12] As explained, in part, in Comment b:

> The choice of comity rather than preclusion as the focus of this Section stems from the difficulties associated with the latter with respect to a denial of class certification. The major difficulty arises from the recognition that, as to such a denial, the prospective absent class members have become neither parties to the proposed class action nor persons with any attributes of party status (such as the capacity

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[11] This version of the section was adopted and promulgated by the ALI on May 20, 2009, and now provides: "A judicial decision to deny aggregate treatment for a common issue or for related claims by way of a class action should raise a rebuttable presumption against the same aggregate treatment in other courts as a matter of comity."

[12] While petitioners do not agree with the adoption of the rebuttable presumption suggested by the ALI, the acknowledgment that principles of comity rather than preclusion should guide a forum court's discretion seems much more consistent with this Court's pronouncements that under the Anti-Injunction Act, 28 U.S.C. § 2283, "[p]roceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." *Atl. Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. 281, 286-87 (1970). *Accord Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146-50 (1988); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229-30 (1922).

> to be bound thereby, as in a duly certified class action). Nor is there any guarantee that prospective absent class members even would be aware of the court's determination of their ability to assert claims as a class action. The notion that absent class members could be bound in an issue-preclusion sense with respect to the seeking of certification in another court, even for the same proposed class action, runs afoul of existing precedents that confine to certain narrowly defined categories the situations in which preclusion can be extended to reach nonparties. Issue preclusion arising from a denial of class certification as to would-be absent class members would approach the kind of "virtual representation" disallowed under current law.

Principles of the Law of Aggregate Litigation § 2.11, Comment b (2010).

As further explained in the Reporters' Note to Comment b:

> On the rejection of "virtual representation" as a basis for preclusion of nonparties, *see Taylor v. Sturgell*, 128 S.Ct. 2161 (2008). There, the Supreme Court observed that "the rule against nonparty preclusion is subject to exceptions." *Id.* at 2172. The Court hastened to underscore, however, that those exceptions "delineate discrete" situations that "apply in 'limited circumstances,'" *id.* at 2175 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 n. 2 (1989)), none of which extend generally to the situation

> of a would-be absent class member with respect to a denial of class certification.
>
> Informed by the *Taylor* Court's analysis of the outer bounds for nonparty preclusion, this Section rejects the *Bridgestone / Firestone* court's pre-*Taylor* view of the issue-preclusive effect that may properly flow from a denial of class certification. Even in the pre-*Taylor* period, moreover, the approach to issue preclusion in *Bridgestone / Firestone* represented the minority view within the federal circuits . . . .

Principles of the Law of Aggregate Litigation § 2.11, Reporters' Note Comment b (2010) (citations omitted).

Respondent's argument that the Eighth Circuit's judgment below also is not inconsistent with the pre-*Taylor* decisions of the Third Circuit in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, *supra*, and the Eleventh Circuit in *In re Bayshore Ford Trucks Sales, Inc.*, *supra*, is a red herring because neither of those courts held that their relevant holdings, based upon due process and lack of personal jurisdiction, were solely dependent upon a finding of inadequate representation, or the absence of a finding of adequate representation, as opposed to any other basis for denying a class action under Fed.R.Civ.P. 23.[13] Furthermore, it must be stressed in

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[13] *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 139 & 141 (noting that certification of settlement class had been overturned due to failure of district court to make any of the findings required under Rule 23, including adequacy of representation, but only expressing doubt as to district court's ability to find commonality, typicality, and

this case that the district court never made an express finding of adequate representation in its decision denying class certification in *McCollins*, rather it merely presumed adequate representation existed for purposes of its discussion. The district court should not be permitted, when addressing the motion for an injunction, to make a *post hoc* judgment as to such a critical issue.[14]

2. Conflict Is Not Properly Avoided by Enmeshing Substantive Ruling in Procedural Ruling Denying Class Certification

Petitioners contend that the Eighth Circuit's judgment below conflicts with decisions recognizing that the doctrine of collateral estoppel may not be used under the Relitigation Exception to the Anti-Injunction Act to preclude a forum court from exercising the right and discretion to apply its own procedural rules in a

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predominance requirements; not basing its finding of lack of personal jurisdiction on any precise reason for denial of class treatment); *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d at 1245 (although inadequate representation was reason for denial of class treatment by district court, appellate court did not base its finding of lack of personal jurisdiction on this particular reason for denial of class treatment; also citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, *supra*, as support for holding).

[14] *See Chick Kam Choo*, 486 U.S. at 148. (cautioning that a district court is not permitted to render a *post hoc* judgment as to what an earlier order should have said).

manner different from its federal counterparts.[15] (Pet. at 7-19). Recognizing these authorities and the well-established legal principles espoused therein, respondent and the courts below have attempted to distinguish this case by arguing that the district court's procedural denial of class certification was enmeshed with a substantive ruling regarding the requirements under West Virginia law for proving proximate causation.[16] For reasons explained in the petition, this argument of respondent and the courts below misinterpret the proper consideration of substantive issues by a court when making a Rule 23 determination. (Pet. at 17-19). Adopting the approach advanced by respondent and the courts below would have the effect of essentially emasculating the above stated legal principles and authorities because a trial court must be aware of and consider the substantive law and issues in examining nearly every requirement for class-action treatment made under Rule 23.

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[15] *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. at 148-49 (*forum non conveniens* doctrine); *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996) (class action rule); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 146 (same); *Allen v. Stewart Title Guar. Co.*, No. 06-cv-2426, 2007 WL 916859, at **1-2 (E.D. Pa. Mar. 20, 2007) (same).

[16] Respondent also argues that the circuit court decisions discussed by petitioners involved class-certification denials that were not yet sufficiently final to be afforded preclusive effect. While it is true that those circuit courts did indeed so rule, they did not limit their holdings to that ruling. *See J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d at 179-80 (also noting that final judgment was entered during pendency of appeal); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 146.

Petitioners also note that the ALI in its *Principles of the Law of Aggregate Litigation* § 2.11 (2010), has also acknowledged the above cited legal authorities as a reason for its rejection of preclusion principles. As explained, in part, in Comment b:

> Apart from the further due-process limitations, issue preclusion itself requires that the same issue must have been litigated and determined in the proceeding that produced the adjudication now said to have preclusive effect. The same-issue requirement is relatively strict, calling for litigation and determination in the initial proceeding not simply of the same kind of issue concerning the appropriateness of aggregation but, rather, the identical issue. Same-issue status is not present when the aggregation question in the first proceeding arose under a procedural rule of the rendering court and the aggregation question in the subsequent proceeding arises under a procedural rule—albeit, perhaps, an identically phrased rule—that need not be interpreted or applied in identical fashion. Issue preclusion is generally not appropriate in such a situation, for the court in the subsequent proceeding must have the opportunity, if it chooses, to construe its procedural rule differently on the aggregation question, within the ambit afforded by federal constitutional due process. . . .

Principles of the Law of Aggregate Litigation § 2.11, Comment b (2010).

As further stated in the Reporters' Note to Comment b:

> Even in the pre-*Taylor* period, moreover, the approach to issue preclusion in *Bridgestone / Firestone* represented the minority view within the federal circuits, with other courts emphasizing the stringency of the same-issue requirement for issue preclusion. *See J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996); *accord In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 146 (3d Cir. 1998) (citing with approval *Clearwater*). . . .

Principles of the Law of Aggregate Litigation § 2.11, Reporters' Note Comment b (2010) (citations omitted).[17]

3. The Enactment of CAFA Does Not Ensure that these Circumstances Will Not Recur

While it cannot be disputed that CAFA substantially enlarges the scope of a district court's original and removal jurisdiction regarding class actions, it cannot be accurately predicted to what

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[17] *See also* 25 No. 2 Federal Litigator 4 (discussing Eighth Circuit's decision in this case and acknowledging, in part: "It is unusual for a federal court, having declined to certify a class, to enjoin members of the proposed class from seeking certification in separate litigation in state court. . . . More typical is the federal court's refusal to issue an injunction. [Citing circuit court decisions relied upon by petitioners] . . . This decision and *Bridgestone / Firestone* recognize the potential availability of an injunction to block a certification attempt in state court following a federal court's denial of certification. Realistically, though, the chances of obtaining an injunction are not good." (citations omitted)).

extent its enactment diminishes the odds of these circumstances recurring. CAFA, itself, provides for discretionary and mandatory remand under certain circumstances.[18] Furthermore, consistent with prior law, courts have held that Congress, when adopting CAFA, did not intend to permit removal when requests for class certification are contained in counterclaims, cross claims, and third-party complaints.[19]

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[18] 28 U.S.C. §§ 1332(d)(3) & (d)(4)(A) & (B). *See Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 804, 810-12 (5th Cir. 2007). *See also Luther v. Countrywide Home Loans Servicing L.P.*, 533 F.3d 1031 (9th Cir. 2008) (holding that CAFA did not trump specific bar to removal of cases arising under Securities Act of 1933, 15 U.S.C. § 77v(a)).

[19] *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 331-36 (4th Cir. 2009); *First Bank v. DJL Props., LLC*, 598 F.3d 915, 916-18 (7th Cir. 2010); *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1017-18 (9th Cir. 2007).

II. PRAYER FOR RELIEF

For all of the foregoing reasons as well as those stated in the petition, petitioners respectfully pray that Your Honorable Court grant their petition for writ of certiorari and reverse the opinion and judgment of the Eighth Circuit Court of Appeals.

Respectfully Submitted,

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