

No. 091205 APR 5- 2010

In the **OFFICE OF THE CLERK**
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*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Among the elements for the doctrine of collateral estoppel to be used in support of the relitigation exception to the Anti-Injunction Act are requirements that the state parties sought to be estopped are the same parties or in privity with parties to the prior federal litigation and that issues necessary to the resolution of the proceedings are also identical. In determining whether issues are identical, courts have also recognized that state courts should have discretion to apply their own procedural rules in a manner different from their federal counterparts. Can the district court's injunction be affirmed when neither the parties sought to be estopped nor the issues presented are identical?

2. It is axiomatic that everyone should have his own day in court and that one is not bound by a judgment *in personam* in a litigation in which he has not been made a party by designation or service of process. One exception to this rule are absent members of a class in a properly conducted class action because of the due-process protections accorded such absent members once class certification has been granted. Does a district court have personal jurisdiction over absent members of a class for purposes of enjoining them from seeking class certification in state court when a properly conducted class action had never existed before the district court because it had denied class certification and due-process protections had never been afforded the absent members?

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Keith Smith and Shirley Sperlazza respectfully petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS AND ORDERS BELOW

The decision of the Court of Appeals affirming the injunction is reported at 593 F.3d 716 and is reproduced in the Appendix at 1a-19a. The order of the United States District Court for the District of Minnesota granting the permanent injunction against petitioners has not been officially reported but is available at 2008 WL 7425712 and is reproduced in the Appendix at 20a-34a. The prior order of the district court in which it denied certification of a West Virginia class action and granted judgment against George McCollins has yet to be officially reported but is available at ___ F.R.D. ___, 2008 WL 7416660 and is reproduced in the Appendix at 35a-52a.

JURISDICTION

This petition for writ of certiorari is filed under Rule 10 of the Rules of the Supreme Court of the United States. The Eighth Circuit filed its decision on January 5, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review a circuit court's decision on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, that “[n]o

person shall . . . be deprived of life, liberty, or property, without due process of law U.S. Const. Amend V.

The Anti Injunction Act provides that “[a] court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” 28 U.S.C. § 2283 (1970).

The All-Writs Act provides, in relevant part, that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a) (1988).

STATEMENT OF THE CASE

On September 20, 2001, Petitioners, Keith Smith and Shirley Sperlazza, together with Nancy Gandee,¹ filed a civil action, *Smith, et al. v. Bayer Corp., et al.*, No. 01-C-191 (1-3) JPM (Cir.Ct. Brooke County, W.Va. Sept. 20, 2001), in the Circuit Court of Brooke County, West Virginia, seeking certification of a West Virginia-only class action concerning state-law claims regarding the manufacture, sale, advertisement, warnings, and use of Baycol. As set forth in their complaint, the *Smith* plaintiffs sought certification of a class of “all

¹ Plaintiff Nancy Gandee settled her claims against Bayer in July 2003 and is no longer a proposed representative or member of the putative class in *Smith*. The plaintiffs had also originally sued two, non-diverse West Virginia citizens who subsequently were dismissed at or about the time that Nancy Gandee settled her claims.

West Virginia residents and others who have ingested Cerivastatin, sold under the trade name ‘Baycol’ in West Virginia” and requested damages for personal injury, medical monitoring, and economic loss.

On September 30, 2008, Petitioners filed a motion seeking certification of only an economic-loss class based upon their claims of common-law fraud, breach of warranties, and violations of the West Virginia Consumer Credit and Protection Act (“WVCCPA”).² A class-certification hearing was scheduled in *Smith* for December 10, 2008.

On October 31, 2008, Respondent Bayer Corporation filed an expedited motion for a permanent injunction, seeking to enjoin the class-certification hearing on the basis that on August 25, 2008, the United States District Court for the District of Minnesota, which had been designated as the MDL Court for Baycol Products Litigation, had denied certification of a proposed West Virginia class concerning economic-loss claims arising from the sale and use of Baycol in *McCollins v. Bayer Corp.*, No. 02-0199.³

Petitioners—who neither were named plaintiffs in *McCollins* nor had received notice of *McCollins* and the motions regarding class certification filed therein—opposed Bayer Corporation’s expedited motion for a permanent injunction. Petitioners appeared specially

² W.Va.Code § 46A-6-101, *et seq.*

³ *In re Baycol Prods. Litig., McCollins v. Bayer Corp.*, MDL NO. 1431, No. 02-0199, ___ F.R.D. ___, 2008 WL 7416660 (D.Minn. Aug. 25, 2008) (Davis, C.J.). Appen. at 35a-52a.

to contest personal jurisdiction and to oppose the injunction being issued under the All-Writs Act and the relitigation exception to the Anti-Injunction Act.

Contrary to the suggestion of Bayer Corporation, Petitioners had not rested on their laurels waiting to see the outcome of the class-certification hearing in *McCollins* before seeking their own class certification in West Virginia. During the relevant time frame, Petitioners had no knowledge that *McCollins* or any other Baycol case seeking certification of a West Virginia class action was pending before the district court.⁴ Indeed, several earlier dates for a class certification hearing had been set in *Smith* but had been continued due to the need for more discovery or scheduling conflicts.

By Order entered on December 9, 2008, the district court granted Bayer Corporation's expedited motion for a permanent injunction.⁵ Petitioners timely appealed such ruling to the Eighth Circuit which has jurisdiction to hear an appeal of an interlocutory order of a district court granting an injunction under 28 U.S.C. § 1292(a)(1). On January 5, 2010, the Eighth

⁴ Counsel for Petitioners 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.

⁵ *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, MDL 1431, No. 02-0199, 2008 WL 7425712 (D.Minn. Dec. 9, 2008) (Davis, C.J.). Appen. at 20a-34a.

Circuit issued its opinion affirming the district court's grant of the injunction.⁶

REASONS FOR ALLOWANCE OF WRIT

The Eighth Circuit's opinion in this case creates and/or adds to conflicts between Circuit Courts of Appeal⁷ on the important questions of (1) whether a district court can utilize the doctrine of collateral estoppel under the relitigation exception of the Anti-Injunction Act in order to estop and enjoin plaintiffs in state court from seeking certification of a statewide class under the state's procedural rules when the district court had previously denied certification of a similar, statewide class under federal procedural rules;⁸ and (2) whether a district court has personal jurisdiction over absent members of a once-proposed class—who never were afforded the due-process protections owed to class members in properly conducted class actions because of the court's denial of class certification—so as to permit it to estop and enjoin them from seeking class certification in state court.⁹

⁶ *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d 716 (8th Cir. 2010). Appen. at 1a-18a.

⁷ See Sup. Ct. R. 10(a).

⁸ See *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d 133, 146 (3d Cir. 1998).

⁹ See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 141; *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1245 (11th Cir. 2006).

Indeed, the Eighth Circuit's rulings on these questions also indirectly run afoul of this Court's recent holding¹⁰ in *Taylor v. Sturgell*,¹¹ wherein the Court rejected the doctrine of virtual representation. In so holding, this Court noted that absent members of a properly conducted class action were exceptions to the general rule that every person is entitled to his own day in court because of the due-process protections afforded absent members once class certification is granted.¹² No such due-process protections are afforded to absent members of a class when class certification is denied rather than granted. In such instance, a class action, properly conducted or otherwise, simply does not exist.

Similarly, the Eighth Circuit's holding on the first question stated above also indirectly conflicts with this Court's decision in *Chick Kam Choo v. Exxon Corp.*,¹³ wherein the Court held that a state court should be permitted to apply its own procedural rules governing access to its courts and that the relitigation exception to the Anti-Injunction Act could not be used to enjoin such state-court proceedings solely on the basis that a federal court had previously applied its own procedural rules to the same issue.

¹⁰ See Sup. Ct. R. 10(c).

¹¹ ___ U.S. ___, 128 S.Ct. 2161, 2171-73 & 1276 (2008).

¹² *Ibid.*

¹³ 486 U.S. 140, 148-49 (1988).

I. The Eighth Circuit's Opinion Conflicts With Decisions Holding That An Injunction Cannot Be Issued Based Upon The Doctrine Of Collateral Estoppel And The Relitigation Exception To The Anti-Injunction Act Where Neither The Parties Nor The Issues Are Identical

The Anti-Injunction Act is premised upon principles of federalism and comity and absolutely prohibits a federal court from enjoining state-court proceedings “except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”¹⁴ This Court has consistently cautioned that “[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.”¹⁵ The exceptions to the Act’s prohibition of injunctions were “designed to ensure the effectiveness and supremacy of federal law” and are to be narrowly construed.¹⁶ In this case, Respondent Bayer Corporation has only advanced, and the Eighth Circuit has relied upon, the third of the Act’s exceptions, commonly known as “the relitigation exception.” The relitigation exception is

¹⁴ 28 U.S.C. § 2283 (1970).

¹⁵ *Atlantic 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. at 146-50; *Kline v. Burke Construction Co.*, 260 U.S. 226, 229-30 (1922).

¹⁶ *Chick Kam Choo v. Exxon Corp.*, 486 U.S. at 146.

based upon principles of *res judicata* and collateral estoppel.¹⁷

When an exception to the Anti-Injunction Act applies, the All-Writs Act¹⁸ provides the positive authority for a federal court to issue an injunction against state-court proceedings.¹⁹ Both the All-Writs Act and the relitigation exception to the Anti-Injunction Act are permissive and non-mandatory in nature.²⁰ Before issuing an injunction the federal court must already independently possess both subject-matter jurisdiction and personal jurisdiction over the state-court action and litigants because neither the All-Writs Act nor the Anti-Injunction Act creates such jurisdictional prerequisites.²¹

As recognized by the Eighth Circuit, a federal court applies federal common law in determining the preclusive effect of an order denying certification. Under federal common law, a federal court will “usually incorporate the collateral estoppel doctrine of the relevant state unless it is ‘incompatible with federal interests[,]’ in which case ‘a contrary federal

¹⁷ *Ibid.*, 486 U.S. at 147.

¹⁸ 28 U.S.C. § 1651(a) (1988).

¹⁹ *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 143.

²⁰ *Bailey v. State Farm Fire and Cas. Co.*, 414 F.3d 1187, 1189 (10th Cir. 2005).

²¹ *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 31-34 (2002); *Carlough v. Amchem Prods. Inc.*, 10 F.3d 189, 198 (3d Cir. 1993).

rule' may be justified."²² Under West Virginia law, among the elements for applying the doctrine of collateral estoppel are requirements that the issues previously decided be identical to the ones presently at issue and that the parties against whom the doctrine is sought to be invoked were parties or in privity with parties to the prior action.²³

In the instant action, neither the parties nor the issues are the same. All, save one,²⁴ of the cases relied upon by Bayer Corporation in support of invoking the relitigation exception to the Anti-Injunction Act were easily distinguishable because the parties sought to be estopped had been named parties to the prior action in which class certification had been denied.²⁵

²² *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d 716, 721 (8th Cir. 2010) (quoting *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001)).

²³ *State v. Miller*, 459 S.E.2d 114, 120 (W.Va. 1995); *Conley v. Spillers*, 301 S.E.2d 216, 220-21 (W.Va. 1983).

²⁴ The one exception, which will be discussed *infra*, is *In re BridgeStone/Firestone, Inc. Tires Prod. Liab. Litig.*, 333 F.3d 763 (7th Cir. 2003).

²⁵ *Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1012 & 1015 (8th Cir. 2002) (court noting "ten of the original plaintiffs from *Canady I* filed two new class actions in Missouri state court" and "[i]t is undisputed that the eighteen *Saunders* defendants also were named as defendants in *Canady I*. Therefore, the parties are undeniably the same in both cases."); *In re Piper Aircraft Distrib. Sys. Antitrust Litig.*, 551 F.2d 213, 216 & 218-19 (8th Cir. 1977) (upon denial of request for class certification in a Florida state court, the same plaintiff then filed six other proposed class actions in federal district courts); *In re Dalkon Shield Punitive Damages*

As to the issues presented, not only have petitioners asserted a common-law claim of fraud which was not asserted by the plaintiffs in *McCollins*,²⁶ but even more importantly the West Virginia Circuit Court would be determining class-certification issues under Rule 23 of the West Virginia Rules of Civil Procedure rather than under Rule 23 of the Federal Rules of Civil Procedure which was utilized by the district court in *McCollins*. Several courts,²⁷ including at least two United States Circuit Courts of Appeals, have expressly held that state courts should be permitted to exercise their discretion under their own rules of procedure addressing certification of class actions differently than their federal counterparts.²⁸

Litig., 613 F. Supp. 1112, 1116 (E.D.Va. 1985) (same defendant seeking certification of a class on issue of punitive damages).

²⁶ Petitioners' common-law claim of fraud is not simply a new theory of liability raised in support of a previously asserted cause of action but is an entirely separate cause of action from the statutory cause of action for deceptive practices under the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W.Va.Code § 46A-6-101, *et seq.*

²⁷ See, e.g., *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d at 180; *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 146; *Allen v. Stewart Title Guar. Co.*, No. 06-cv-2426, 2007 WL 916859, at **1-2 (E.D.Pa. Mar. 20, 2007).

²⁸ Petitioners note that the Eighth Circuit's decision in *Canady v. Allstate Ins. Co.*, *supra*, does not detract from this point. In *Canady*, the civil action sought to be enjoined had been removed to federal court and, because it was mistakenly believed that subject-matter jurisdiction existed for the removal under the All-Writs Act, 28 U.S.C. § 1651(a) (1988), the Eighth Circuit believed that the district court did not need to be concerned about any distinction between federal and state procedural rules because

As explained by the Fifth Circuit in *J.R. Clearwater Inc. v. Ashland Chem. Co.*:

The denial of class certification is “a procedural ruling, collateral to the merits of a litigation. . . .,” *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 336, 100 S.Ct. 1166, 1173, 63 L.Ed.2d 427 (1980), and the decision as to whether to certify a class lies within the “wide discretion” of the trial court. . . . While Texas Rule of Civil Procedure 42 is modeled on Rule 23 of the Federal Rules, and federal decisions are viewed as persuasive authority regarding the construction of the Texas class action rule, . . . *a Texas court might well exercise this discretion in a different manner.* It is our considered view that the wide discretion inherent in the decision as to whether or not to certify a class dictates that *each court-or at least each jurisdiction-be free to make its own determination in this regard.* . . . *This reasoning is particularly applicable when matters of state-federal relations are involved as in the present case in which an injunction would impinge upon the state court’s ability to exercise discretion in the administration of its*

under *Erie* principles and Fed.R.Civ.P. 81(c) the district court was to apply its own procedural rules. *Canady*, 282 F.3d at 1016-17 & 1019. The Eighth’s Circuit’s view that subject-matter jurisdiction existed for the removal under the All-Writs Act was incorrect. See *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. at 31-34; *Arkansas Blue Cross and Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 821-22 (8th Cir. 2009).

own docket *contrary to the policies underlying the Anti-Injunction Act*.²⁹

Similarly, the Third Circuit has also held that its interpretation of Rule 23 of the Federal Rules of Civil Procedure is not binding on a state court applying its own rule of procedure regarding class certification and that neither itself nor the district court had authority to enjoin the state-court proceedings. As held by the Third Circuit in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*:

[T]he decision by this Court to reject the provisional settlement class is not a “judgment” with respect to the Louisiana settlement agreement, and *our interpretation of Rule 23 is not binding on the Louisiana court. . . . [O]ur construction of Rule 23 and application to the provisional settlement class is not controlling on the Louisiana court, because it is not bound by our interpretation of Rule 23*. Rather, the Louisiana court properly applied La.Code Civ. Proc. Ann. Arts. 591 and 592, the parallel Louisiana class certification rule.³⁰

The fact that a state court should be permitted to apply its own procedural rules governing access to its courts and that the relitigation exception to the Anti-Injunction Act cannot be used to enjoin such state-court proceedings solely on the basis that a federal court had previously applied its own procedural rules

²⁹ 93 F.3d at 180 (emphases added; internal citations omitted).

³⁰ 134 F.3d at 146 (emphases added; footnote omitted).

to the issue in question is also demonstrated by this Court's opinion in *Chick Kam Choo v. Exxon Corp.*, *supra*. More specifically, this Court rejected the issuance of an injunction under the relitigation exception to the Anti-Injunction Act, reasoning that a Texas state court's determination of whether Texas' *forum non conveniens* analysis would permit a plaintiff to bring Singapore-law claims could not be foreclosed by a federal court's prior decision dismissing such claims under federal *forum non conveniens* principles.

As explained by this Court:

[T]he only issue decided by the District Court was that petitioner's claims should be dismissed under the federal *forum non conveniens* doctrine. *Federal forum non conveniens principles simply cannot determine whether Texas courts, which operate under a broad "open-courts" mandate, would consider themselves an appropriate forum for petitioner's lawsuit. . . .* Respondents' arguments to the District Court in 1980 reflected this distinction, citing federal cases almost exclusively and discussing only federal *forum non conveniens* principles. . . . Moreover, the Court of Appeals expressly recognized that the Texas courts would apply a significantly different *forum non conveniens* analysis. . . . *Thus, whether the Texas state courts are an appropriate forum for petitioner's Singapore law claims has not yet been litigated, and an injunction to foreclose*

*consideration of that issue is not within the relitigation exception.*³¹

The Eighth Circuit, adopting the district court's reasoning, has attempted to sidestep this issue by holding (1) that Petitioners have not pointed to any significant substantive or procedural differences between Fed.R.Civ.P. 23 and W.Va.R.Civ.P. 23,³² and (2) that a determination of whether to certify a class under Rule 23 is as much a substantive ruling as a procedural one.³³ But these holdings like the proverbial "house built upon sand" lack a strong foundation.³⁴

First, the cases cited above by Petitioners do not base their holdings upon actual substantive or procedural distinctions in the language of the respective rules of civil procedure but upon the right of a state court to have the discretion to construe and apply its rules in a different manner with a different

³¹ *Chick Kam Choo.*, 486 U.S. at 148-49 (emphases added).

³² *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d at 721-22 ; *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, MDL 1431, No. 02-0199, 2008 WL 7425712 at * 3. Appen. at 7a; 25a.

³³ *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d at 722-24; *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, MDL 1431, No. 02-0199, 2008 WL 7425712 at ** 3-4. Appen. at 8a-11a; 25a-27a. *Accord Bridgstone/Firestone*, 333 F.3d at 768 ("Determining the permissible scope of litigation is as much substantive as it is procedural.").

³⁴ *Matthew 7:24-27.*

result.³⁵ As explained by Petitioners to both the district court and the Eighth Circuit, the fact that the West Virginia Supreme Court of Appeals applies its version of Rule 23 in a manner different from its federal counterparts is readily demonstrated by merely contrasting the decisions in the Rezulin MDL proceedings, *In re Rezulin Products Liability Litigation*,³⁶ as well as the District Court's own decision in *McCollins*,³⁷ both applying Fed.R.Civ.P. 23 to deny class certification of an economic-loss claim based on breach of express and implied warranties and violation of the WVCCPA involving pharmaceutical products, with the West Virginia Supreme Court of Appeals' decision in *In re West Virginia Rezulin*

³⁵ See *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d at 180 (“a Texas court might well exercise this discretion in a different manner. It is our considered view that the wide discretion inherent in the decision as to whether or not to certify a class dictates that each court-or at least each jurisdiction-be free to make its own determination in this regard”); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 146 (“[O]ur construction of Rule 23 and application to the provisional settlement class is not controlling on the Louisiana court, because it is not bound by our interpretation of Rule 23”); *Allen v. Stewart Title Guar. Co.*, No. 06-cv-2426, 2007 WL 916859, at **1-2 (“a Pennsylvania court may exercise its discretion regarding class certification in a different manner than a federal court”).

³⁶ 210 F.R.D. 61 (S.D.N.Y. 2002).

³⁷ *In re Baycol Prods. Litig., McCollins v. Bayer Corp.*, MDL NO. 1431, No. 02-0199, ___ F.R.D. ___, 2008 WL 7416660 (D.Minn. Aug. 25, 2008) (Davis, C.J.). Appen. at 35a-52a.

Litigation,³⁸ reversing a trial court's denial of such a class certification under W.Va.R.Civ.P. 23.³⁹

Indeed, before beginning its analysis in *In re West Virginia Rezulin Litigation*, the West Virginia Supreme Court of Appeals cautioned:

The circuit court, in its order denying class certification, appears to have relied almost exclusively on federal cases interpreting Rule 23 of the Federal Rules of Civil Procedure-and denying class certification-in drug or medical device actions. As we made clear . . . “[a] federal case interpreting a federal counterpart to a West Virginia rule of procedure may be

³⁸ 585 S.E.2d 52 (W.Va. 2003).

³⁹ The Eighth Circuit's attempt to refute this argument by contending that the district court's decision in *McCollins* (i.e., that common issues did not predominate on questions of causation) was based on different grounds than the West Virginia Supreme Court of Appeals' decision in *In re West Virginia Rezulin Litigation* (i.e., that common issues did predominate on questions of damages) is largely a distinction without significance. See *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d at 723 n. 4.; *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, MDL 1431, No. 02-0199, 2008 WL 7425712 at * 3. Appen. at 10a n.4; 25a. Appellants' counsel were lead counsel in *In re West Virginia Rezulin Litigation* and as officers of the Court can assure this Court that the defendants argued and the trial court held in that case that individual issues predominated over common issues on all questions of liability, causation, and damages. All this Court need do to verify this point is read the West Virginia Circuit Court's decision, *In re West Virginia Rezulin Litigation*, No. Civ.A. 00-C-1180-H, 2001 WL 1818442 (W.Va. Cir.Ct., Raleigh County, Dec. 13, 2001) (Hutchison, J.), which was reversed by the West Virginia Supreme Court of Appeals.

persuasive, but it is not binding or controlling.” Our reasoning for this rule is to avoid having our legal analysis of our *Rules* “amount to nothing more than Pavlovian responses to federal decisional law.” . . . ⁴⁰

Second, the fact that a court must be aware of the elements of substantive state-law claims in order to conduct its determination of the “common question” and “predominance” prongs of a Rule 23 analysis does not transform the analysis from a procedural ruling to a substantive one. This Court has consistently held that a party’s “right to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.”⁴¹ Accordingly, this Court has explained that it “view[s] the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment.”⁴²

⁴⁰ *In re West Virginia Rezulin Litig.*, 585 S.E.2d at 61 (citations omitted).

⁴¹ *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980). See also *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 402 (1980) (explaining that a plaintiff who seeks class certification presents two separate issues for judicial resolution, one being the claim on the merits and the other being the procedural claim that he is entitled to represent a class); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (noting that “Rule 23’s requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure ‘shall not abridge, enlarge or modify any substantive right,’ 28 U.S.C. § 2072(b).”); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (same).

⁴² *Roper*, 445 U.S. at 336.

The Court has also expressly held that a court in conducting a Rule 23 analysis should not make rulings on the merits of substantive claims: “We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”⁴³ There can be no doubt that a Rule 23 determination is a “rigorous analysis”⁴⁴ that “generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.”⁴⁵ But the complex nature of the analysis does not alter the procedural nature of the Rule 23 determination⁴⁶ or

⁴³ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974).

⁴⁴ *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

⁴⁵ *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

⁴⁶ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, No. 08-1008, ___ U.S. ___, 2010 WL 1222272, at **8-10 (March 31, 2010) (discussing procedural nature of Rule 23 and its compliance with Rules Enabling Act, 28 U.S.C. § 2072(a)).

permit a court to resolve on the merits the substantive claims of a plaintiff.⁴⁷

⁴⁷ See Fed.R.Civ.P. 23 advisory committee's note to 2003 amendments ("Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense, it is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis."); *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005) ("Class certification hearings should not be mini-trials on the merits of the class or individual claims. ... At the same time, however, '[g]oing beyond the pleadings is necessary, as the court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'" (internal citations omitted)); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (2004) ("The analysis of Rule 23 must focus on the requirements of the rule, and if findings made in connection with those requirements overlap findings that will have to be made on the merits, such overlap is only coincidental. The findings made for resolving a class action certification motion serve the court *only* in its determination of whether the requirements of Rule 23 have been demonstrated. . . . The jury or factfinder can be given free hand to find all of the facts required to render a verdict on the merits, and if its finding on any facts differs from a finding made in connection with class action certification, the ultimate factfinder's finding on the merits will govern the judgment."); *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984) ("While it is true that a trial court may not properly reach the merits of a claim when determining whether class certification is warranted, ... this principle should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements." (internal citation omitted)).

II. The Eighth Circuit's Opinion Conflicts With Decisions Holding That An Injunction Cannot Be Issued Under The Relitigation Exception To The Anti-Injunction Act When The District Court Lacks Personal Jurisdiction Over The State-Court Litigants Who As Absent Class Members Were Not Parties To The Prior Federal Proceeding That Resulted In Denial Of Class Certification And Were Never Afforded The Due-Process Protections Provided To Absent Members Of A Class When Class Certification Is Granted.

This Court has consistently recognized the time-honored principle that everyone should have his own day in court and that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. As explained by this Court:

[A] person who was not a party to a suit generally has not had a “full and fair opportunity to litigate” the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the “*deep-rooted historic tradition that everyone should have his own day in court.*” *Richards [v. Jefferson County]*, 517 U.S. 793, 798, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996)] (internal quotation marks omitted). Indicating the strength of that tradition, we have often repeated the general rule that “*one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of*

process.” *Hansberry [v. Lee]*, 311 U.S. 32, 40, 61 S.Ct. 115, 85 L.Ed.2d 22 (1940)]. See also, e.g., *Richards*, 517 U.S., at 798, 116 S.Ct. 1761; *Martin v. Wilks*, 490 U.S. 755, 761, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989). . . .⁴⁸

Accordingly, “a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party.”⁴⁹

In *Phillips Petroleum*, this Court explained the procedural due-process protections owed absent plaintiffs:

In this case we hold that a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, “reasonably calculated,

⁴⁸ *Taylor v. Sturgell*, 128 S.Ct. at 2171 (emphases added).

⁴⁹ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) (also noting, at 807, “a chose in action is a constitutionally recognized property interest possessed by each of the [absent class-action] plaintiffs”).

under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” . . . The notice should describe the action and the plaintiffs’ rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an “opt out” or “request for exclusion” form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members. . . .⁵⁰

In recognition of these principles, at least two United States Circuit Courts of Appeals⁵¹ have refused to recognize the existence of personal jurisdiction over absent members of a class—the certification of which had been denied—for purposes of enjoining or estopping the absent members from seeking class certification in another court. As explained by the Third Circuit in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*:

But here, in the wake of our judgment in *GM I*, there is no class pending before the MDL court, and thus, virtually none of the 5.7 million class members in Louisiana are before this Court in any respect, and there is no basis upon which

⁵⁰ *Phillips Petroleum*, 472 U.S. at 811-12 (citations omitted).

⁵¹ *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 141; *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d at 1245.

we can infer their consent. . . . To be more precise, the Louisiana class members are not parties before us; they have not constructively or affirmatively consented to personal jurisdiction; and they do not, as far as has been demonstrated, have minimum contacts with Pennsylvania. Therefore, *due process deprives us of personal jurisdiction and prevents us from issuing the injunction* prayed for by appellants.⁵²

The Eleventh Circuit has similarly held in *In re Bayshore Ford Trucks Sales, Inc.*:⁵³

Here, the district court refused to grant class certification in the Bayshore Action . . . *Once this decision was made, Westgate became a stranger to the Bayshore Action. . . . The denial of class certification limited the court's in*

⁵² 134 F.3d at 141 (emphasis added; footnote omitted).

⁵³ Any attempt to distinguish *Bayshore* from this case because class certification had been denied in *Bayshore* due to inadequate representation is a red herring. While it is true that inadequate representation was the reason for denial of class certification in *Bayshore*, there is no language in that opinion indicating that its decision regarding a lack of personal jurisdiction over the absent class members would have been different if class certification had been denied for any other reason. Furthermore, it must be stressed in this case that the district court never made an express finding of adequate representation in its decision denying class certification in *McCollins*. The district court should not be permitted to make a *post hoc* judgment as to such a critical issue. 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).

*personam jurisdiction solely to the parties appearing before it, namely the Bayshore Dealers and Ford. Consequently, the denial could not have been binding on Westgate.*⁵⁴

In an effort to argue that the Petitioners should be treated the same as the plaintiffs who brought the *McCollins* case (or their privities) and that Petitioners have been accorded all necessary due-process protections, the Eighth Circuit has adopted the reasoning of the Seventh Circuit in *In re Bridgestone/Firestone, supra*. In *Bridgestone/Firestone*, the court held that its prior reversal of the certification of a nationwide-class action⁵⁵ could not be used to estop and enjoin absent members of the class from seeking certification of statewide classes in state courts.⁵⁶ But the court then held that absent members of the class could be estopped or enjoined under the relitigation exception of the Anti-Injunction Act from seeking certification of nationwide classes of the same claims in state courts; provided that the absent members were adequately represented by the named litigants and class counsel.⁵⁷

The reasoning of this latter holding of the Seventh Circuit in *Bridgestone/Firestone* is unpersuasive, and

⁵⁴ 471 F.3d at 1245 (emphases added; citation and footnote omitted).

⁵⁵ *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).

⁵⁶ *Bridgestone/Firestone*, 333 F.3d at 766.

⁵⁷ *Ibid.*, 333 F.3d at 766-69.

the Eighth Circuit's reliance upon it in this case is misplaced. The Seventh Circuit largely justified its holding on the basis that "unnamed class members have the status of parties for many purposes and are bound by the decision whether or not the court otherwise would have had personal jurisdiction over them."⁵⁸ In support of this proposition, the Seventh Circuit cited two decisions of this Court, *Devlin v. Scardelletti*,⁵⁹ and *Phillips Petroleum, supra*.

Because this Court acknowledged in *Devlin* that "[n]onnamed class members . . . may be parties for some reasons and not for others" and that they have the right to appeal certain class decisions without first intervening to obtain party status,⁶⁰ the Seventh Circuit reasoned that any absent class members could have sought a writ of certiorari from its adverse ruling denying class certification and, therefore, should be bound by the ruling.⁶¹ The Seventh Circuit reasoned that any other approach would result in a "heads-I-win, tails-you-lose situation."⁶² While this reasoning may be sound in cases where class certification is granted and the absent class members have been given notice of the class action and declined their right to opt

⁵⁸ *Id.*, 333 F.3d at 768.

⁵⁹ 536 U.S. 1 (2002).

⁶⁰ *Devlin*, 536 U.S. at 7-10.

⁶¹ *Bridgestone/Firestone*, 333 F.3d at 768.

⁶² *Id.*, 333 F.3d at 767. The Eighth Circuit adopted that reasoning in this case. *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d at 723-24; Appen. at 11a.

out, it makes entirely no sense in cases where class certification has been denied and no notice has ever been provided to the absent members.

How are citizens in West Virginia suppose to even know that there is a case seeking certification of a West Virginia class in a district court in Minnesota if they are never accorded notice? And, if they have no knowledge of that case even existing, let alone of any rulings therein, how are they suppose to exercise their option of seeking a writ of certiorari concerning any adverse rulings? In that situation, any right or ability to seek review is purely imaginary. Under those circumstances, an absent member of the class is not being prevented from getting the proverbial, prohibited “two bites at the apple” but is being robbed of his entitlement to a single bite. Nothing in *Devlin*, supports that draconian result or otherwise states that absent class members are considered parties or their privities in cases where class certification is denied and the absent class members accordingly are never even accorded notice.

The fact that this Court in *Phillips Petroleum* ruled that absent class members are not entitled to the full panoply of due-process rights accorded defendants does not detract from the importance of those minimum rights to which they are entitled. The significance of the right to receive notice, the right to appear, the right to opt out, and the right to be adequately represented that are afforded class members upon certification of a class cannot be understated.⁶³

⁶³ See *Phillips Petroleum*, 472 U.S. at 811-12.

Rather than recognizing the significance of the above principles and the inherent unfairness in treating absent members of a class the same regardless of whether class certification had been denied or granted, the Seventh Circuit essentially ignored the inequity of the above harsh realities and simply held that its ruling was not affected by the fact that such absent class members had never received notice or the right to opt out because such rights do not accrue unless certification is granted.⁶⁴

This Court's recent holding in *Taylor v. Sturgell*, *supra*, supports Petitioners' position and sheds light upon the Seventh Circuit's error. After reemphasizing the importance of the principles that everyone should have his own day in court and that one is not bound by a judgment *in personam* in a litigation in which he has not been made a party by designation or service of process, this Court acknowledged that "the rule against nonparty preclusion is subject to exceptions" and that "[r]epresentative suits with preclusive effect on non parties include *properly conducted class actions . . .*"⁶⁵ The Court then distinguished the broad doctrine of virtual representation from the recognized exceptions to the rule against nonparty preclusion, specifying that "[i]n the class-action context, these limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23."⁶⁶

⁶⁴ *Bridgestone / Firestone*, 333 F.3d at 769.

⁶⁵ *Taylor*, 128 S.Ct. at 2172 (citing *Martin*, 490 U.S. at 762 n. 2; Fed.R.Civ.P.23) (emphasis added).

⁶⁶ *Ibid.*, 128 S.Ct. at 2176.

As discussed above, these procedural safeguards are only afforded class members upon certification of a class.⁶⁷ A properly conducted class action cannot exist unless and until class certification is granted in accordance with the standards set forth in Rule 23. Until that point, all that exists is an individual lawsuit with a plaintiff seeking class-action status and appointment as a class representative. Upon denial of class certification, all that remains is the individual lawsuit.

The Court of Appeal for the Second District of California has recently recognized this exact point⁶⁸ in *Johnson v. GlaxoSmithKline, Inc.*⁶⁹

Emphasizing its rejection of a notion of virtual representation that authorizes preclusion based on identity of interests and some kind of relationship between parties and non-parties “shorn of the procedural protections prescribed” in the class action rules, the [United States Supreme] Court [in *Taylor*] noted those protections are “grounded in due process.” [*Taylor v. Sturgell*, 128 S.Ct. at 2176.]

The protections for absent class members prescribed by rule 23, of course, are afforded

⁶⁷ See Fed.R.Civ.P. 23; *Phillips Petroleum*, 472 U.S. at 811-12.

⁶⁸ Petitioners recognize that the relevant discussion of the court in *Johnson* is technically *dicta* since the court did not rely upon it in reaching its holding. But Petitioners submit that its discussion is nonetheless well-reasoned and persuasive.

⁶⁹ 83 Cal.Rptr.3d 607 (Ct.App.2ndDist. 2008).

*after a motion for class certification has been granted, not by the filing of a motion for certification that is denied. Similarly, the concept of a “properly conducted class action” suggests a class action that has been certified, following a hearing in which the named representatives have established they satisfy the requirements of rule 23, and then litigated to judgment or settled, not a individual lawsuit in which a motion for class certification was denied. Literally (and narrowly) read, therefore, Taylor v. Sturgell, supra, ___ U.S. ___, 128 S.Ct. 2161 would appear to preclude the use of collateral estoppel to bar absent putative class members from seeking class certification following the denial of a certification motion in an earlier lawsuit*⁷⁰

Additionally, any attempt to argue that absent members of a class do not suffer any real harm by being deprived of the opportunity to seek certification of a statewide class in state court because they still have the right to proceed with their own individual lawsuit⁷¹ also entirely misses the mark. This Court has recognized that the primary, beneficent purpose of Rule 23 is “vindication of ‘the rights of groups of people who individually would be without effective strength to bring their opponents into court at all’” due to the small monetary sums at issue as damages for each

⁷⁰ 83 Cal.Rptr.3d at 618 n. 8 (emphases added).

⁷¹ See *Bridgestone / Firestone*, 333 F.3d at 769; *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d at 725-26; *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, MDL 1431, No. 02-0199, 2008 WL 7425712 at * 6. Appen. at 14a-15a; 31a.

individual.⁷² If deprived of the opportunity to seek class certification, Petitioners will suffer irreparable harm because they will be deprived of any effective means by which to seek redress for their damages.

Interestingly, the alleged irreparable harm that Bayer Corporation will be required to endure if Petitioners prevail is that of being forced to deal with the repetitious litigation of defending the West Virginia class action. But what presents the greatest threat of repetitious litigation and potential inconsistent judgments: dealing with one West Virginia class action or thousands of individual lawsuits brought in courts across all of West Virginia? While the answer appears obvious, sadly Bayer Corporation knows that those thousands of individual lawsuits can never economically and efficiently be brought due to the small amount of individual damages at issue.

Lastly, it should be noted that the Eighth Circuit asserts that its decision is justified because of the special circumstances and responsibilities of an MDL court.⁷³ While there is no question that an MDL court has great responsibilities and should have sufficient discretion and flexibility to meet them,⁷⁴ it is an

⁷² *Amchem Prods., Inc.*, 521 U.S. at 617 (quoting Kaplan, Prefatory Note 497).

⁷³ *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d at 724 & 726. Appen. at 12a & 17a.

⁷⁴ Petitioners are aware of some courts using the “necessary in aid of its jurisdiction” exception to the Anti-Injunction Act in order to protect an MDL court’s settlement class. *See, e.g., In re General*

entirely different proposition to submit that an MDL court should be able to disregard due-process protections, ignore personal-jurisdiction requirements, and only pay lip-service to the elements of the doctrine of collateral estoppel in order to meet the relitigation exception to the Anti-Injunction Act—an exception that is to be narrowly construed in preference of permitting state-court litigation to proceed without interruption. No rule of law or exception should exist or be created to advance a proposition that is both untenable and that would result in a miscarriage of justice.

PRAYER FOR RELIEF

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. The Petition for Writ of Certiorari should be granted because, as previously explained, the Eighth Circuit's decision creates and/or adds to conflicts between Circuit Courts of Appeal on the important questions of (1) whether a district court can utilize the doctrine of collateral estoppel under the relitigation exception of the Anti-Injunction Act in order to estop and enjoin plaintiffs in state court from seeking certification of a statewide class under the state's procedural rules when the district court had previously denied certification of a similar, statewide class under federal procedural rules; and (2) whether a district court has personal jurisdiction over absent members of a once-proposed class—who never were

Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 134 F.3d at 144-45. But such exception was neither advanced in this case nor are the reasons for its invocation present.

afforded the due-process protections owed to class members in properly conducted class actions because of the court's denial of class certification—so as to permit it to estop and enjoin them from seeking class certification in state court.⁷⁵

Additionally, the decision of the Eighth Circuit also conflicts, at least indirectly, with two decisions of this Court that respectively hold (1) that the relitigation exception to the Anti-Injunction Act cannot be employed to enjoin consideration of the issue of whether a state court's procedural rules will grant litigants access to its courts on the basis that a federal court had denied access to such litigants on the basis of its own procedural rules; and (2) that a properly conducted class action is an exception to the rule against preclusion of nonparties because of the procedural due-process safeguards provided to absent class members upon class certification being granted.⁷⁶

⁷⁵ See Sup. Ct. R. 10(a).

⁷⁶ See Sup. Ct. R. 10(c).

Respectfully Submitted,

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