No. 09-1205

IN THE

Supreme Court of the United States

KEITH SMITH AND SHIRLEY SPERLAZZA,
Petitioners,

v.

BAYER CORPORATION,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

PETER W. SIPKINS*
DORSEY & WHITNEY LLP
Suite 1500
50 South Sixth Street
Minneapolis, MN 55402
(612) 340-2600
sipkins.peter@dorsey.com

Counsel for Respondent

* Counsel of Record

[Additional Counsel Listed on Inside Cover]

June 24, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

PHILIP S. BECK
ADAM L. HOEFLICH
CAROLYN J. FRANTZ
BARTLIT BECK HERMAN
PALENCHAR & SCOTT LLP
54 West Hubbard Street
Suite 300
Chicago, IL 60610
(312) 494-4400

SUSAN A. WEBER
JAMES R.M. HEMMINGS
SIDLEY AUSTIN LLP
1 South Dearborn Street
Chicago, IL 60603
(312) 853-7000

RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether absent class members who were adequately represented in class certification proceedings are bound by a final judgment denying class certification.

2. Whether the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, and the authority vested by the All Writs Act, 28 U.S.C. § 1651, permit a district court to enjoin adequately represented absent class members from relitigating in state court a final judgment denying class certification that is enmeshed with a substantive ruling of law.

RULE 29.6 DISCLOSURE

Bayer Corporation is a wholly owned subsidiary of Bayer AG. No publicly held company owns more than 10% of the stock of Bayer AG.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

STATUTES

RULES

SCHOLARLY AUTHORITY

TABLE OF AUTHORITIES – continued

OTHER AUTHORITY Page

Blank Page

BRIEF IN OPPOSITION

This case arises from an attempt by petitioners Keith Smith and Shirley Sperlazza to relitigate in West Virginia state court certification of the same putative class denied certification by the federal court overseeing the Baycol product liability multi-district litigation ("MDL"). Baycol is a cholesterol-reducing medicine that respondent Bayer Corporation voluntarily withdrew from the market in 2001.

It is undisputed that petitioners are identically situated to the named plaintiff in the underlying federal court case: none suffered an injury caused by Baycol. All nevertheless asserted class economic loss claims on the theory that proof of injury is not required to pursue these claims, and that neither they nor anyone else in the State of West Virginia would have filled a Baycol prescription, had they known then what they know now.

Applying well-settled principles under the All Writs Act and Anti-Injunction Act, and even more well-settled standards for granting equitable relief, the United States District Court for the District of Minnesota (Davis, C.J.) enjoined petitioners from relitigating certification of a West Virginia economic loss class. The district court held that petitioners were absent members of the putative class previously denied certification in federal court and that petitioners were bound by that final judgment because their interests had been adequately, indeed vigorously, represented. The district court further held that petitioners were seeking to relitigate a substantive issue enmeshed with the court's class certification decision. The court therefore barred petitioners from relitigating class certification in West Virginia state court, but narrowly tailored its

injunction so as not to hinder their pursuit of individual claims. A unanimous panel of the court of appeals (Murphy, Smith, Benton, JJ.) affirmed.

Petitioners ask this Court to review their claims that: (I) petitioners have a due process right to relitigate judgments denying class certification because absent class members can be bound only if a class is certified (Pet. 20-31); and (II) the relitigation exception to the Anti-Injunction Act does not apply because a West Virginia state court might certify a putative class denied certification in federal court (*id.* at 7-19). The court of appeals rejected these judicially inefficient "'heads-I-win, tails-you-lose'" arguments,[1] holding that constitutionally adequate representation binds absent class members to a final judgment denying class certification and that petitioners cannot evade the relitigation exception by speculating that another court might decide an underlying question of substantive law, and consequently class certification, differently.

The judgment below is narrow and does not warrant this Court's review. First, none of this Court's decisions supports petitioners' claim that adequately represented – in fact, identically situated – absent class members are not bound by a final judgment denying class certification and therefore may relitigate the issue until they find a court that will certify their proposed class. Although petitioners claim a circuit split on this issue, there is none. Petitioners rely on cases in which the absent class members were not adequately represented in the initial class action; therefore, the decisions

---

[1] Pet. App. 11a (quoting *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 767 (7th Cir. 2003)).

denying class certification would not be given preclusive effect in any circuit.

Second, none of the decisions cited by petitioners supports their claim that, where a final federal judgment denying class certification is enmeshed with substantive rulings of law, absent class members may relitigate the intertwined substantive holdings and class certification decision in state court. The decisions from this Court and from other circuit courts cited by petitioners involve cases in which the underlying judgment was not enmeshed with substantive holdings or was not final.

Third, certiorari should be denied because the circumstances of this case are unlikely to recur. If petitioners' lawsuit were filed today, it would be removed under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, and adjudicated in federal court alongside other cases seeking certification of the same class. The enactment of CAFA significantly reduces the chances of parallel class actions in state and federal courts, and further dramatically reduces the likelihood that the issues presented here will recur.

This case is anomalous in another important way. Petitioners waited seven years after filing their lawsuit before seeking class certification. During the intervening years, Bayer settled the claims of more than 3,100 persons who suffered rhabdomyolysis, the side effect that led to the withdrawal of Baycol, for $1.17 billion, and vigorously contested the lawsuits of tens of thousands of plaintiffs who did not suffer that side effect. Virtually all of the latter cases have been terminated without compensation. Petitioners apparently held back in the hope that Bayer would change its position and settle no-injury claims in the waning days of the Baycol litigation. In so doing,

petitioners created the unusual situation in which a class decision in the MDL obtained sufficient finality to have preclusive effect while their state court class claims remained unresolved. These unusual circumstances cast a long shadow over the fairness of further review by this Court.

For all these reasons, the petition for certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

1. Baycol (cerivastatin) is a prescription cholesterol-reducing medicine that Bayer distributed in the United States with the approval of the United States Food and Drug Administration from 1997 to 2001. *See In re Baycol Prods. Litig.*, 218 F.R.D. 197, 201 (D. Minn. 2003) (summarizing Baycol history). Baycol is a "statin," a member of the same family of medications as Lipitor, Zocor, and Crestor. *See id.*

Like all other statins, Baycol has been associated with muscle aches and pains, as well as more serious side effects, such as rhabdomyolysis (a severe breakdown of muscle tissue where the substances released into the bloodstream may overwhelm the kidneys). *See id.* Baycol's labeling warned about these and other side effects, including the risk of using another class of lipid-lowering drugs (called "fibrates") concurrently with Baycol. Ultimately, the Baycol labeling contraindicated concurrent use of Baycol and one fibrate, gemfibrozil, "due to a risk for rhabdomyolysis."[2] Nevertheless, Bayer continued to receive reports of rhabdomyolysis in patients who were being prescribed Baycol with gemfibrozil. Bayer

---

[2] *See, e.g.*, July 2000 Label, *available at* http://www.accessdata.fda.gov/drugsatfda_docs/nda/2000/20-740S008_Baycol_prntlbl.pdf.

therefore voluntarily withdrew Baycol from the market in August 2001.[3]

2. Tens of thousands of state and federal court actions were filed after the withdrawal of Baycol. Pet. App. 37a. The Judicial Panel on Multidistrict Litigation established MDL-1431 in the United States District Court for the District of Minnesota to coordinate discovery and other pre-trial matters for federal court cases. *See In re Baycol Prods. Liab. Litig.*, No. 1431, 2001 WL 34134820, at *1-2 (J.P.M.L. Dec. 18, 2001). From the first year of this litigation, the district court supervised a settlement program that to date has paid $1.17 billion to 3,144 claimants who suffered rhabdomyolysis, the specific side effect that led to the withdrawal of Baycol from the market.

Bayer has vigorously litigated all other claims, including cases alleging injuries other than rhabdomyolysis and cases seeking economic recovery for plaintiffs, like petitioners, who benefited from and were not injured by Baycol. Bayer has won defense victories in each of the six Baycol cases tried to juries, all in state courts. Of the approximately 40,000 plaintiffs who filed Baycol cases (22,500 in federal court and 17,500 in state courts), fewer than 150 still have cases pending. Bayer has defeated motions for class certification in the MDL and other jurisdictions.[4]

---

[3] *See* "Dear Healthcare Professional" Letter (Aug. 8, 2001), *available at* http://www.fda.gov/downloads/Safety/MedWatch/SafetyInformation/SafetyAlertsforHumanMedicalProducts/UCM173692.pdf.

[4] *In re Baycol Prods. Litig.*, 218 F.R.D. at 202, 215-16 (denying certification of nationwide injury, medical monitoring, and economic loss classes); *Lewis v. Bayer AG*, 70 Pa. D & C.4th 52 (Pa. Ct. Com. Pl. 2004), *available at* 2004 WL 1146692, at *18-19 (denying certification of nationwide injury, medical monitor-

3. In addition to managing common issue discovery, the district court supervised case-specific discovery and motion practice in all MDL cases. In one such case, plaintiff George McCollins sought certification of a class of West Virginia Baycol purchasers, asserting claims for purported economic loss caused by Bayer's alleged breach of warranties and violation of the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W. Va. Code § 46A-6-101 *et seq.* Pet. App. 41a.[5] His doctor testified that Mr. McCollins did not suffer any injury as a result of Baycol, and that Baycol worked to reduce Mr. McCollins' cholesterol. *Id.* at 50a-51a.

---

ing, and economic loss classes, and Pennsylvania injury and medical monitoring classes); *Lewis v. Bayer AG*, No. 002353 (Pa. Ct. Com. Pl. Sept. 19, 2005) (unreported) (entering summary judgment for Bayer and against a Pennsylvania medical monitoring class); *Jensen v. Bayer AG*, No. 01 CH 13319, 2003 WL 22962431, at *5 (Cir. Ct. Cook Co., Ill. Dec. 15, 2003) (denying certification of nationwide personal injury, medical monitoring, and economic loss class); *De Bouse v. Bayer AG*, 922 N.E.2d 309, 313-19 (Ill. 2009) (ordering trial court to vacate certification of Illinois economic loss class and enter summary judgment against named plaintiff); *Cafky v. Bayer AG*, No. C-01-713 (Dist. Ct. Pottawatomie Co. Oct. 15, 2008) (unreported) (vacating certification of Oklahoma injury class); *see also In re Baycol Cases I & II*, No. B204943, 2009 WL 3353536, at *5-6 (Cal. Ct. App. Oct. 20, 2009) (reviewing the sustaining of a demurrer on, *inter alia*, California economic loss class claims, and dismissing the appeal on grounds that the appeal was untimely), *review granted*, No. S178320 (Cal. Feb. 18, 2010) (limited to time for appeal of the sustaining of the demurrer).

[5] Three plaintiffs brought the *McCollins* action in August 2001: Michael Black, Peggy Ann Mays, and George McCollins. *McCollins* was removed to federal court and transferred to the Baycol MDL. Developments subsequent to transfer – Ms. Mays being omitted from amended complaints, and Mr. Black's claims being dismissed with prejudice – left Mr. McCollins as the lone putative class representative.

On August 25, 2008, the district court denied class certification, concluding that individual issues of fact predominated because proof of economic loss claims under West Virginia law would require each putative class member to present "[i]ndividual evidence" sufficient "to determine whether the individual person benefitted from or was injured by Baycol." Pet. App. 45a. The district court assumed Mr. McCollins adequately represented the putative class. *Id.* at 41a.

The district court also entered summary judgment against Mr. McCollins on his individual claims. Pet. App. 46a-52a. Neither Mr. McCollins nor any absent class member appealed the judgment, which became final on September 25, 2008. *Id.* at 12a-13a, 26a.

4. Petitioners Keith Smith and Shirley Sperlazza moved for certification of a West Virginia economic loss class five days after the *McCollins* judgment became final. Pet. 3. Petitioners had filed their lawsuit (*"Smith"*) in the Circuit Court of Brooke County, West Virginia in September 2001. *Id.* at 2. The case could not be removed to federal court because petitioners and a third plaintiff sued two West Virginia defendants. *Id.* at 2 n.1. Those non-diverse defendants later were dismissed, but only after the one-year deadline for removal under 28 U.S.C. § 1446.[6] Bayer could not remove *Smith* under CAFA because the action was filed and the parties became diverse before CAFA's effective date. *See* Pub. L. No. 109-2, § 9, 119 Stat. at 14; *see also* 28 U.S.C. § 1332 notes (incorporating section 9 of CAFA).

---

[6] The third plaintiff, Nancy Gandee, settled her claim in July 2003, and the non-diverse defendants were dismissed at that time. Pet. 2 n.1.

The *Smith* complaint sought certification of a West Virginia class, asserting claims for personal injury, medical monitoring, and economic loss. Pet. 2-3. The doctor who treated both petitioners testified that they (like Mr. McCollins) experienced no side effects from Baycol and that Baycol reduced their cholesterol. Pet. App. 13a (petitioners' theory for recovery is "ability to recover for economic loss despite the absence of physical injury").

On September 30, 2008 – seven years after filing their complaint – petitioners finally moved for class certification, asking the Circuit Court of Brooke County, West Virginia to certify an economic loss class of West Virginia Baycol purchasers, asserting claims for breach of warranty, common law fraud, and violation of the WVCCPA. Pet. 3. Petitioners did not seek to certify personal injury and medical monitoring claims, thereby narrowing their putative class to overlap with the class denied certification in the final *McCollins* judgment. Pet. App. 13a.

5. Bayer moved the district court to enjoin petitioners from relitigating the denial of certification of a West Virginia economic loss class. Pet. App. 5a, 21a. The district court held that the proposed injunction fell within the scope of the relitigation exception to the Anti-Injunction Act because: (a) the economic loss class that petitioners sought to certify was identical to that denied certification in *McCollins* and presented the same threshold issue of substantive law, *id.* at 25a-26a; (b) petitioners were absent class members of the putative *McCollins* class, *id.* at 31a-32a; (c) petitioners' interests in obtaining certification of a West Virginia economic loss class were adequately represented by Mr. McCollins, *id.*; and (d) the *McCollins* denial of class certification was final, *id.* at 26a-29a.

The district court also held that petitioners were subject to the court's jurisdiction because they were absent members of the putative *McCollins* class whose interests in securing class certification were adequately represented by Mr. McCollins. Pet. App. 24a-32a. After concluding that the balance of equities supported the issuance of an injunction to protect its final judgment in *McCollins*, the district court enjoined petitioners from "seeking certification of an economic loss class of West Virginia Baycol purchasers." *Id.* at 34a. Of particular importance, nothing in the district court's order hinders petitioners from pursuing their individual claims in West Virginia state court. *Id.* at 15a, 16a.

The Eighth Circuit affirmed without dissent. On *de novo* review, the panel held:

- The class claims asserted by the *Smith* plaintiffs were identical to those in *McCollins* and were "'enmeshed'" with the same substantive issue of West Virginia law as in *McCollins*, Pet. App. 8a (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978));
- The relitigation of class certification by the *Smith* plaintiffs "would undermine [the] conclusion of substantive state law properly made by the district court," *id.*;
- No substantive difference between the federal standard for class certification and its West Virginia counterpart justified a retesting of the *McCollins* class claims in a West Virginia state court, *id.* at 7a-10a; and
- The *Smith* plaintiffs were absent members of the *McCollins* class, who were bound *in personam* by the denial of class certification because any limited due process interest in

> securing certification of a West Virginia economic loss class was protected by the adequate representation of Mr. McCollins, petitioners' right to appeal the *McCollins* decision, and petitioners' continuing right to pursue their individual claims, *id.* at 13a-15a.

Emphasizing the importance of finality to the just and efficient administration of multidistrict litigation (Pet. App. 12a), the court of appeals held that the district court properly invoked the relitigation exception to the Anti-Injunction Act and the authority of the All Writs Act, and exercised sound discretion in crafting a narrow injunction that protected its order in *McCollins*. *Id.* at 16a-17a.

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied for three reasons. First, the judgment below does not conflict with this Court's decisions relating to the exercise of personal jurisdiction over absent members of a putative class. None of those decisions holds, as petitioners argue, that an absent class member's interest in relitigating class certification is entitled to the same level of procedural protection as his claim on the merits. Moreover, neither of the appellate court judgments cited by petitioners on the question of personal jurisdiction conflicts with the holding here – that an adequately represented absent class member is bound by a decision denying class certification.

Second, the judgment below does not create a conflict with decisions of this Court or any court of appeals concerning the Anti-Injunction Act. None of the decisions cited by petitioners involves protection of a final federal judgment denying class certification

where, as here, that judgment is based on a conclusion of substantive law.

Finally, the particular circumstances that led to the issuance of this injunction are unlikely to recur. The enactment of CAFA greatly reduces the possibility of identical classes being litigated in state and federal courts. Moreover, the federal judgment denying class certification became final and preclusive only because petitioners waited seven years to press their class claims in state court. That situation is anomalous and therefore the prospective importance of the decisions of the courts below is exceedingly limited. For all these reasons, certiorari should be denied.

I. Petitioners contend that they cannot be bound by the injunction because they were not named parties in *McCollins* and did not receive notice or the opportunity to opt out. Pet. 20-31 (relying on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)). They freely acknowledge that their rationale would allow absent class members to benefit from a decision to certify while remaining free to relitigate time and again a judgment denying class certification. *Id.* at 25-27, 29-31. Petitioners contend that, in rejecting this lopsided view of the law, the Eighth Circuit decision conflicts with precedents of this Court and two courts of appeals. *Id.* at 20-31. Petitioners are mistaken.

The Eighth Circuit held that "[t]he nature and degree of due process protections necessary to establish personal jurisdiction depends on context." Pet. App. 15a. In the context of denial of class certification, adequate representation and the rights to appeal and to pursue their individual claims "satisfy due process and are sufficient to bind them in

personam to the district court's certification decision." *Id.*[7]

A. Contrary to petitioners' claim, this judgment does not conflict with the precedents of this Court. In *Shutts*, this Court held that absent class members cannot be bound to a decision on the merits in an action for damages unless they receive notice and the opportunity to opt out of the class. *Shutts*, 472 U.S. at 806-14; Pet. 21-22 (quoting *Shutts*). Here, the lower courts did not decide the merits of the claims of absent class members. Pet. App. 15a-16a, 32a-34a. Petitioners are free to pursue their individual causes of action. *Id.* at 15a, 16a. Petitioners are barred only from relitigating class certification. *Id.* at 5a, 15a, 16a, 34a.[8]

As the Seventh Circuit observed in enjoining absent class members from relitigating the denial of class

---

[7] *See generally Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (procedural due process is contextual and depends not only on the nature of the right to be protected, but also the burdens of providing greater levels of procedural protection).

[8] This decision is consistent with other opinions of this Court recognizing that "[n]onnamed class members . . . may be parties for some purposes and not for others. The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002) (holding absent class members may appeal class-related decisions without first intervening to obtain "named party" status because absent class members have an interest in those decisions); *see also* 5 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 16.01 (4th ed. 2002) ("Absent class members are parties for purposes of being bound by the judgment, receiving the benefit of the tolling of the statute of limitations, meeting the venue requirements, and having standing to appeal from decisions and to object to and enforce settlements.") (footnotes omitted).

certification in another MDL, "no statute or rule requires notice, and an opportunity to opt out, before the certification decision is made; it is a post-certification step." *In re Bridgestone/ Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 769 (7th Cir. 2003) (holding federal denial of class certification binds adequately represented absent class members); *see also* Fed. R. Civ. P. 23(c)(2) (requiring notice for "certified" classes); *Pan Am. World Airways, Inc. v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 523 F.2d 1073, 1079 (9th Cir. 1975) ("notice . . . may not issue before a class action has been certified"); *Farmers Coop. Co. v. United States*, 90 Fed. Cl. 72, 73 (Fed. Cl. 2009) ("Plaintiff does not cite, and this court is not aware of, a single case wherein a federal court permissibly notified potential plaintiffs of an on-going case before class certification.").

Petitioners also contend that the judgment below conflicts with this Court's proscription of "virtual representation" – the practice by which a decision on the merits in a non-class claim is applied to bar relitigation of the same issue by another plaintiff. *See Taylor v. Sturgell*, 128 S. Ct. 2161 (2008). *Taylor*, however, explicitly carved out from this prohibition properly conducted class actions. *Id.* at 2167. Petitioners therefore cannot demonstrate a conflict between the decision below and this Court's precedents.

B. Petitioners next assert that the judgment below conflicts with Eleventh and Third Circuit opinions characterizing absent class members as "strangers" to proceedings once class certification has been denied. Both cases are distinguishable.

1. Petitioners cite the Eleventh Circuit's decision in *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 471 F.3d 1233 (11th Cir. 2006), to support their claim

of a circuit split. Pet. 23-24. But in *Bayshore,* the putative class had not been adequately represented in the underlying case in which certification was denied. 471 F.3d at 1245 n.27.[9] Therefore, under Seventh and Eighth Circuit precedents, absent class members would not have been bound by the decision denying class certification. Indeed, contrary to petitioners' contention that "there is no language in [*Bayshore*] indicating that its decision . . . would have been different if class certification had been denied" for any reason other than the inadequacy of the putative class representative (Pet. 23 n.53), the *Bayshore* court favorably cited the Seventh Circuit's decision in *Bridgestone/Firestone,* which held that adequately represented members of a class denied certification in federal court should be enjoined from relitigating class certification in state court. 471 F.3d at 1245 n.27.

2. Petitioners also rely on the Third Circuit's decision in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 134 F.3d 133 (3d Cir. 1998), another case in which there was no

---

[9] Petitioners contend that the district court's determination that Mr. McCollins adequately represented absent class members is a "*post hoc* judgment" forbidden by *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988). Pet. 23 n.53. There, this Court required "that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court" for the relitigation exception to apply. 486 U.S. at 148. But *Chick Kam Choo* was not discussing the findings needed to determine whether the exercise of the Court's injunctive authority was consistent with due process, only whether the actual issue sought to be relitigated had been decided. Here, the issue shielded from relitigation – the denial of certification of a West Virginia economic loss class – was unquestionably decided in *McCollins.* Pet. App. 13a-14a, 41a-46a.

finding that the interests of absent class members had been adequately represented in the federal class proceedings. *Id.* at 138-39. Although *General Motors* stated that absent class members were not parties before the court where certification had been denied in the underlying case (*id.* at 141), the circumstances were considerably different from this case: appellants in *General Motors* sought an injunction of a final state court class settlement through which more than 5.7 million people already had resolved their claims. *Id.* at 139-40. The Third Circuit has not been called on to address a situation in which adequately represented absent class members were seeking to relitigate the denial of class certification – the circumstance presented in *Bridgestone/Firestone* and in the present case.

C. Finally, petitioners assert that their due process rights were violated because they were unaware of the *McCollins* case and judgment and therefore could not appeal. Petitioners' present unsworn assertion is doubtful. Pet. 4. *McCollins* was filed in West Virginia state court one month before petitioners filed their own case, and petitioners' counsel had another case pending in the Baycol MDL at the time of the *McCollins* judgment. Pet. App. 3a-4a; Pet. 4 n.4.[10] Whether petitioners actually knew about the *McCollins* judgment, of course, does not warrant review.

II. Petitioners next contend that application of the relitigation exception to the Anti-Injunction Act conflicts with decisions of this Court and certain courts of appeals. Again, this claim is wrong.

---

[10] The district court entered summary judgment against the plaintiff in *Ballard v. Bayer Corp.*, No. 03-cv-5984 (D. Minn.), on October 24, 2008.

The Anti-Injunction Act bars injunctions directed to state courts, except in three specific circumstances. 28 U.S.C. § 2283. One of those circumstances – the "relitigation exception" – explicitly permits the issuance of an injunction to "protect or effectuate [the] judgments" of a district court, *id.*, a principle "founded in the well-recognized concepts of *res judicata* and collateral estoppel." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988); *see also Rivet v. Regions Bank of La.*, 522 U.S. 470, 478 n.3 (1998).

The district court decided in *McCollins* that a West Virginia economic loss class could not be certified because West Virginia substantive law required plaintiffs individually to prove injury and causation and individual issues of fact therefore predominated. Pet. App. 41a-46a. In later enjoining the *Smith* class certification proceedings and in affirming that injunction order, the district court and Eighth Circuit concluded that petitioners sought to relitigate that same legal issue in pursuing class certification in state court. *Id.* at 7a-12a, 25a-26a.

A. Petitioners first contend that the decisions below conflict with *Chick Kam Choo*, which upheld the injunction of claims already adjudicated in federal court, but ruled that the injunction should be narrowed to exclude claims dismissed under the federal *forum non conveniens* doctrine. 486 U.S. at 148-51. As the Eight Circuit concluded (Pet. App. 10a-11a), *Chick Kam Choo* is distinguishable.

1. Unlike *Chick Kam Choo,* petitioners here seek to relitigate in state court the district court's substantive determination of an issue of law, which was a necessary predicate to the court's class certification ruling. It is well-established that "a certification determination 'involves considerations that are enmeshed in the factual and legal issues

comprising the plaintiff's cause of action.'" Pet. App. 8a (quoting *Coopers & Lybrand,* 437 U.S. at 469).

To decide whether common issues of fact predominated here, the district court had to determine the evidence necessary to prove the alleged economic loss claims under West Virginia law. Pet. App. 43a-45a. The district court therefore examined the West Virginia consumer fraud statute (the WVCCPA) and concluded that individual proof of actual injury and proximate causation would be required for each class member. *Id.*[11]

As the court of appeals explained, "[t]his conclusion has a preclusive effect and is inseparable from the certification question. That [petitioners] may disagree with the district court's legal conclusions about the WVCCPA is unavailing." Pet. App. 10a (footnote omitted) (citing *Liberty Mut. Ins. Co. v. FAG Bearings*

---

[11] Petitioners are mistaken in suggesting that consideration of these issues involved an improper adjudication on the merits. Pet. 17-18. It is settled that "the principle that district courts should not evaluate the merits of plaintiffs' claims should not be talismanically invoked to artific[i]ally limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden" under Rule 23. *Babineau v. Fed. Express Corp.*, 576 F.3d 1183, 1190 (11th Cir. 2009) (internal quotation omitted) (alteration in original). *Accord Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 380-81 (5th Cir. 2007); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001). The decisions that petitioners cite stand only for the unremarkable proposition, not at issue in this matter, that class certification decisions and decisions on the merits are separate. *See, e.g., Deposit Guar. Nat'l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 336-40 (1980) (distinguishing interests in pursuing substantive claims and class claims); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-04 (1980) (noting that class claims and substan-tive claims are "two separate issues").

Corp., 335 F.3d 752, 763 (8th Cir. 2003)); *accord Starker v. United States*, 602 F.2d 1341, 1347 n.3 (9th Cir. 1979) ("The correctness of the ruling in [the prior action] is irrelevant for collateral estoppel purposes.").

2. Petitioners contend that, because the West Virginia Supreme Court certified an economic loss class in *In re West Virginia Rezulin Litigation*, 585 S.E.2d 52 (W. Va. 2003), West Virginia class certification standards must be different from federal standards. *See* Pet. 14-17. However, West Virginia's class certification rule tracks Federal Rule 23. *Compare* W. Va. R. Civ. P. 23, *with* Fed. R. Civ. P. 23; *cf. Chick Kam Choo*, 486 U.S. at 148-51 (difference in federal and state *forum non conveniens* standards was undisputed).[12] Moreover, *Rezulin* held only that a difference in the amount of damages is not enough to establish predominance of individual issues of fact. Pet. App. 9a-10a, 25a. Several federal cases follow the same approach.[13]

For these reasons, *Chick Kam Choo's* holding with respect to the preclusive effect of federal *forum non conveniens* law does not support petitioners' claim that class certification decisions are not entitled to preclusive effect in the very different circumstances presented here.

B. Petitioners also contend that the decision below conflicts with opinions of the Third and Fifth

---

[12] Petitioners note that Federal Rule 23 decisions are persuasive but not binding on West Virginia courts. Pet. 14-17 (citing *Rezulin*). But this does not establish a substantive difference in class certification standards. Pet. App. 7a

[13] *See, e.g., Seijas v. Republic of Arg.*, ___ F.3d ___, 2010 WL 2105132, at *3 (2d Cir. May 27, 2010); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975).

Circuits. Pet. 10-12 (quoting *Gen. Motors*, 134 F.3d at 146, and *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996)). However, in both cases, the courts of appeals held that the underlying decisions denying class certification lacked the finality to have preclusive effect. *Gen. Motors*, 134 F.3d at 146; *J.R. Clearwater*, 93 F.3d at 179. Here, in contrast, the finality of the underlying *McCollins* judgment is not in dispute.

Moreover, the underlying decision in *General Motors*, reversing certification of a settlement class, was not based on substantive conclusions of state law, as is the case here. Pet. App. 11a n.6 (discussing *Gen. Motors*, 134 F.3d at 146). Similarly, nothing in *J.R. Clearwater* suggests that relitigation of a class certification decision can be used collaterally to attack a conclusion of substantive law underlying a final federal court judgment denying class certification. To the contrary, *dicta* in *J.R. Clearwater* focus on the discretionary aspects of class certification decisions, not on certification decisions grounded in holdings of law, like this one. 93 F.3d at 178-79.

C. Petitioners also contend that the court below erred in applying a collateral estoppel bar because the *Smith* complaint contains a cause of action for common law fraud that was not included in *McCollins*. Pet. 10. This is an argument for error correction and does not warrant review by this Court. In any event, petitioners cannot avoid issue preclusion on this basis because "'[t]he same cause of action framed in terms of a new legal theory is still the same cause of action.'" *See* Pet. App. 10a n.5 (quoting *Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1015 (8th Cir. 2002)); *accord Taylor*, 128 S. Ct. at 2171 ("Issue preclusion . . . bars 'successive litigation of an issue of fact or law actually litigated and

resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim.") (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001)).

III. Finally, certiorari should be denied because the circumstances that led to issuance of the injunction are unlikely to recur.

A. This case is a relic of pre-CAFA class action and removal law. The case was not removable when filed in 2001 because petitioners sued West Virginia defendants involved in treating one of the three plaintiffs. By the time those non-diverse parties were dismissed, the one-year window for removal had passed. Pet. 2 n.1; 28 U.S.C. § 1446(b). This set the stage for litigation of parallel classes in state and federal courts.

That would not be the case today. Five years ago, Congress enacted CAFA, opening the federal courts to putative class actions in which the amount in controversy exceeds five million dollars, minimum diversity exists and the proposed class exceeds 99 persons. 28 U.S.C. § 1332(d)(2) & (5)(b).[14] Under current law, this case would be removed, *see id.* § 1453(b), and transferred to the Baycol MDL, where the district court would address certification of a West Virginia economic loss class in *McCollins* and *Smith* at the same time. There would be no need for the district court to protect its final class certification ruling from relitigation in state court.

---

[14] Since federal jurisdiction was broadened by CAFA, the number of federal class actions has increased significantly. *See* Emery Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts* 1-3 (Apr. 2008), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf.

The enactment of CAFA has dramatically reduced the risk of duplicative parallel class litigation in state and federal courts. This Court should not expend its limited resources reviewing a dispute that would not exist had petitioners' action been filed after 2005.

B. The circumstances that led to issuance of this injunction are anomalous for another reason: it is unusual that an MDL class certification decision be adjudicated and become final before class certification is litigated in state court. Here, petitioners filed their lawsuit in September of 2001, but did not move for class certification until September of 2008.

In the intervening years, the MDL court supervised all common issue discovery; supervised the national Baycol mediation and settlement program; ruled on (denied) the MDL plaintiff steering committee's motion for certification of a national class; ruled on *Daubert* motions challenging expert testimony on issues of general applicability; supervised case-specific written and medical record discovery; conducted a pilot program in an effort to prepare a sample of cases for trial; when none of the pilot program cases survived to go to trial, required plaintiffs to produce individual case-specific expert reports in support of their claims; and only then moved to case-specific depositions and motion practice in the remaining cases.

Petitioners made the tactical decision to move slowly on class certification, in the apparent hope that Bayer would change its settlement position and start paying no-injury claims in the final stages of the Baycol litigation. It is only because of petitioners' delay that the *McCollins* decision denying class certification was reduced to a final judgment before petitioners filed their motion for class certification. Indeed, *McCollins* was one of only approximately 75

cases in the Baycol MDL that survived to the stage of individual motion practice.

There are very few instances in which a federal class certification decision will achieve sufficient finality to support an injunction against state court plaintiffs seeking class certification. Because the circumstances of this case are so unusual, review by this Court is not warranted.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

PETER W. SIPKINS*
DORSEY & WHITNEY LLP
Suite 1500
50 South Sixth Street
Minneapolis, MN 55402
(612) 340-2600
sipkins.peter@dorsey.com

PHILIP S. BECK
ADAM L. HOEFLICH
CAROLYN J. FRANTZ
BARTLIT BECK HERMAN
PALENCHAR &
SCOTT LLP
54 West Hubbard Street
Suite 300
Chicago, IL 60610
(312) 494-4400

SUSAN A. WEBER
JAMES R.M. HEMMINGS
SIDLEY AUSTIN LLP
1 South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Counsel for Respondent

* Counsel of Record

June 24, 2010