2011, two proposals appeared to be leading the debate, one originating in the House of Representatives and the other in the Senate. The House bill was introduced in July 2010 by Representative Javier Corral Jurado, of the PAN party, the currently governing party.[5] It would have given standing to file class actions to a number of public officials and entities, including the President of the Nation, the Attorney General's Office, municipalities, and public prosecutors, civil and consumer associations, as well as any single individual in Mexico (art. 7). It had no class certification or admissibility rules. Under this bill, a defendant would have been given ten days to answer a complaint, which would have been followed by a short evidentiary phase. The judge would then decide the case on the merits within ninety days (arts. 25 and 26). In addition, the proposal expressly rejected the *loser pays rule*—traditionally applicable in Mexico as well as in most civil law jurisdictions—proposing instead that the defendants be bound to pay the plaintiffs' attorney's fees and expenses if they lose the case, while the plaintiffs would do so only if it is proven that they brought the action in bad faith (arts. 47-49).[6]

The Senate bill was introduced by Senator Murillo Karam of the PRI, the largest party in the House of Representatives.[7] Senator Murillo had been involved in a previous attempt to draft a class action law in 2008, when he headed a Senate Task Force charged with drafting a bill. The Task Force did not complete the task, however, because it failed to reach a consensus. But Senator Murillo came out of the task force as the "champion" of class actions in the Senate, which gave his 2010 proposal significant credibility.

This is the bill that eventually became law. But the ultimate law bears little resemblance to the original Murillo bill introduced in September 2010. In its original form, Senator Murillo's 2010 bill provided that class actions would only be available for matters related to consumer and environmental protection, antitrust activities, and financial services (art. 578). In addition, all class actions would be structured as opt-out models, allowing class members to opt-out at any time prior to the issuance of the final decision in the case (art. 594). Standing to bring the action was given to the Federal Consumer and Environment Protection Agencies, the National Commission for the Protection of Users of Financial

continued page 9

Supreme Court Narrowly Interprets the Relitigation Exception of the Anti-Injunction Act

by J.B. Tarter

In *Smith v. Bayer Corp.*,[1] the Supreme Court unanimously held that a federal district court could not enjoin a state court from considering whether to certify a class action.[2] The Court applied two of its precedents in the non-class action setting to invalidate an injunction issued pursuant to the "relitigation exception" of the Anti-Injunction Act.[3]

Smith concerned litigation arising out of Bayer's cholesterol-lowering drug Baycol. After Baycol was pulled from the market in 2001, numerous suits were filed around the country in both state and federal courts. The federal cases were consolidated for pretrial purposes in the District of Minnesota pursuant to 28 U.S.C. § 1407.

In 2001, George McCollins filed suit in West Virginia state court against Bayer. One month after McCollins filed suit, Keith Smith, along with another plaintiff, filed suit against Bayer in a different West Virginia state court.[4] Both suits alleged that Bayer's sales of Baycol violated West Virginia consumer protection laws and sought to represent a class of all West Virginians who had purchased Baycol.

In 2002, Bayer removed McCollins's suit to federal court, and then the Judicial Panel on Multidistrict Litigation transferred the case to the District of Minnesota for coordinated pretrial proceedings. Bayer was unable to remove Smith's suit because Smith had sued non-diverse defendants along with Bayer.[5]

For the next six years, the two cases—the MDL in Minnesota and Smith's action in West Virginia state court—proceeded along separate tracks. The MDL Court reached the class certification question first. It denied McCollins's motion for certification of a class under Federal Rule of Civil Procedure 23 because the West Virginia claims would require proof of actual injury for each plaintiff: thus, individual issues of fact would predominate over common issues.[6] After denying class certification, the MDL Court dismissed McCollins's individual suit for failure to demonstrate actual injury.

After that dismissal, Bayer moved the MDL Court to issue an injunction prohibiting the West Virginia court from entertaining Smith's motion for class certification. Bayer argued that the injunction was necessary to prevent "relitigation" of the issue that the MDL Court had just decided—namely, that individual issues predominated under West Virginia law. Bayer

contended, and the district court agreed, that Smith was bound by the MDL Court's order because Smith was an unnamed member of the putative class. The district court granted the injunction, and the Eighth Circuit affirmed.[7]

The Eighth Circuit held that the injunction was appropriate because the questions of class certification were the same and Smith was an unnamed member of McCollins's proposed class. Smith sought review in the Supreme Court. Smith argued that the injunction was improper because the actions involved different questions and because he was not a party to the MDL Court proceedings. The Supreme Court agreed with Smith on both counts.

On the first question, the Supreme Court held that while both proposed classes sought to represent West Virginia purchasers of Baycol on claims of violations of West Virginia law, Smith's motion for class certification under the West Virginia Rules of Civil Procedure raised issues that were different from those decided by the MDL Court's denial of McCollins's motion for class certification under the Federal Rules. Although the text of West Virginia Rule of Civil Procedure 23 and Federal Rule of Civil Procedure 23 are substantially similar, the West Virginia Supreme Court has held that the state rule is not necessarily interpreted in a manner identical to the federal rule.[8] Thus, the Supreme Court concluded that the issue decided by the MDL Court was not identical to the issue sought to be enjoined from consideration in Smith's suit.

The Supreme Court held that the injunction violated the Anti-Injunction Act for a second, independent reason. For the relitigation exception of the Anti-Injunction Act to apply, the party in the second suit (in which a proceeding is sought to be enjoined) must have been a party in the first suit, subject to a "handful of discrete and limited exceptions."[9] This derives from the principle that every party deserves his or her day in court, and unless the party was present in the first proceeding, he or she had no ability to defend their interest. Smith qualified as an unnamed member of McCollins's proposed class (the class the MDL Court declined to certify). But, the Court held, that did not make him a party to the suit under the normal definition of who constitutes a party. And because the MDL Court specifically ruled there was no proper class under Rule 23, Smith did not qualify as a party under the exception to the rule that allows for claim preclusion to work against one who was a member of a properly conducted class action.

The decision in *Smith* is narrow and not surprising. The Supreme Court applied two of its precedents from the non-class action context to the class action context. On the first question, as to identity of issues, the Court relied heavily on *Chick Kam Choo v. Exxon Corp.*[10] In *Chick Kam Choo*, a federal district court in Texas dismissed a suit on *forum non conveniens* grounds and then issued an injunction preventing the plaintiff from pursuing her claims in Texas state court because it had already held that Texas was an inconvenient forum. The Fifth Circuit affirmed; the Supreme Court reversed. The Court held that because Texas state *forum non conveniens* law was not identical to its federal counterpart, the court's ruling that a federal court in Texas was an inconvenient forum was a separate issue from whether a Texas state court was an inconvenient forum under state law.[11] *Smith*'s first holding is simply an application of *Chick Kam Choo* to the class action context.

Smith's second holding can be viewed as a logical application of *Taylor v. Sturgell*.[12] *Taylor* concerned the doctrine of "virtual representation" for claim preclusion. Under general operation of law, claim preclusion operates only when the parties are the same in the two proceedings. Several circuits had created a concept of "virtual representation" that allowed a second party's suit to be foreclosed if there was sufficient identity with a first suit's parties.[13] The Supreme Court rejected this concept, holding that claim preclusion is proper only when there are identical parties in the two suits or if a few narrow, well-defined exceptions are met (such as the plaintiff in the second suit being the agent for the plaintiff in the first suit).

One of the exceptions is that all members of a class are considered parties of a "properly conducted class action."[14] Applying *Taylor* to the question in *Smith*, the Court concluded that because there was never a certified class, Smith was not a party to McCollins's suit, and thus the doctrine of claim preclusion did not apply.

Courts handling large class actions are understandably interested both in judicial economy and assisting the parties in reaching a final and complete resolution of their dispute. But *Smith* reinforces that unless a class is certified, non-parties (even non-parties alleging identical claims) are not bound by the MDL Court's rulings. Furthermore, the definition of what qualifies as an "identical question" is now more restrictive than ever.

Although *Smith* reversed the Eighth Circuit's affirmance of the injunction issued by the MDL Court, the actual effect of *Smith* on class action practice is likely

to be limited. As even the Court recognized, the concerns about serial federal and state court class action litigation have been minimized by expanded federal jurisdiction under the Class Action Fairness Act of 2005, which creates federal jurisdiction in sizeable class actions with minimal diversity of citizenship. As Bayer argued to the Court, if these suits had been filed after enactment of the Class Action Fairness Act, both suits would have been removable, and thus both Smith's and McCollins's motions for class certification would have been decided by the MDL Court. Furthermore, even if there had not been an MDL proceeding, once removed, Federal Rule of Civil Procedure 23 would have governed both suits; hence the identical question would have been raised. Even more fundamental, once the cases were removed, the Anti-Injunction Act would not be relevant to whether an injunction should issue, because the Anti-Injunction Act concerns only injunctions enjoining state court proceedings.

For class action practitioners, *Smith* counsels that the best way to avoid repetitive litigation is to try to procedurally combine suits before class certification is decided rather than waiting until one court declines class certification and then seeking an injunction. Since *Smith* was decided this year, several district courts have already cited *Smith* in declining to issue injunctions.[15]

In light of the Class Action Fairness Act, *Smith* may have the greatest impact in non-class action litigation. Rather than being a case about class actions, *Smith* is about how to interpret the Anti-Injunction Act. And the Court has instructed lower courts that the relitigation exception of the Anti-Injunction Act is to be construed very narrowly. For the exception to apply, it must be the exact same issue in both cases, and the parties in the second case must have been actual parties in the first case.

Smith is a reminder and clarification of the requirements that must be met before any injunction may issue under the relitigation exception of the Anti-Injunction Act. The two suits must involve the *same* parties, and the issue must be *identical*, not simply similar. While these are stringent requirements to satisfy, it is unsurprising to many Supreme Court observers. A strict interpretation of the exceptions of the Anti-Injunction Act defers to the mutual sovereignty of state and federal court systems and enforces the precept that federal interference in state courts should be minimal.

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Endnotes

1 131 S. Ct. 2368 (2011).

2 While the other Justices joined Justice Kagan's opinion in full, Justice Thomas joined only parts I and II-A of the opinion. Justice Thomas did not join the part of the opinion holding that Smith was not a party to McCollins's suit.

3 The Anti-Injunction Act provides: "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.

4 The Supreme Court noted that neither Smith nor McCollins knew about each other's suit. 131 S. Ct. at 2373.

5 As discussed *infra*, Smith's suit was filed before the operative dates of the Class Action Fairness Act of 2005, 119 Stat. 4.

6 McCollins's suit initially sought class certification under the West Virginia rules, but since the case was removed to federal court, it was converted to a request for certification under the federal rules because federal procedural rules apply once a case has been removed. *See* 131 S. Ct. at 2374 n.2.

7 *In re* Baycol Prods. Litig., 593 F.3d 716 (8th Cir. 2010).

8 *In re* W. Va. Rezulin Litig., 585 S.E.2d 52 (W. Va. 2003).

9 131 S. Ct. at 2379.

10 486 U.S. 140 (1988).

11 In a separate part of the *Chick Kam Choo* opinion, the Court held that a more limited injunction that concerned only a Texas state law claim that the federal court had actually decided would be proper. 486 U.S. at 150-51.

12 553 U.S. 880 (2008).

13 The actual articulation of "virtual representation" varied from circuit to circuit, and involved different variations of a multi-factor test. *See* 553 U.S. at 889-90.

14 553 U.S. at 894.

15 *See* Rhodes v. Advanced Prop. Mgmt. Inc., Civil No. 3:10-cv-826 (JCH), 2011 WL 3204597, at *1 (D. Conn. July 26, 2011); Fharmacy Records v. Nassar, No. 05-72126, 2011 WL 2847602, at *1 (E.D. Mich. July 18, 2011); *In re* Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig., No. MDL-1703, No. 05 C 4742, 2011 WL 2745772, at *1 (N.D. Ill. July 11, 2011); *see also* Thorogood v. Sears, Roebuck & Co., 2011 WL 768649, at *1 (U.S. June 27, 2011) (vacating and remanding case to Seventh Circuit to reconsider in light of *Smith*).