CLASSING UP THE RE-LITIGATION EXCEPTION?: FEDERALISM, INJUNCTIONS, AND CLASS ACTIONS IN *SMITH V. BAYER CORP.*, 131 S. CT. 2368 (2011)

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I. INTRODUCTION

Understanding the significance of the Supreme Court's decision in *Smith v. Bayer Corp.*[1] involves intellectual maneuvering through the complex topics of class actions, issue preclusion, federalism, and the Anti-Injunction Act, at the very least. Lisa McElroy of SCOTUSblog adeptly commentated, "As Justice Kagan joked when she announced the opinion from the bench, if you understand this ruling, you have a law degree and you've had a cup of coffee."[2] Nevertheless, this Note will attempt to do just that, to comprehend the consequences of the Supreme Court's ruling in *Smith.*

In *Smith*, the Supreme Court ruled the United States District Court for the District of Minnesota exceeded its authority under the re-litigation exception to the Anti-Injunction Act by enjoining the West Virginia state court from considering the class certification issue presented in Smith's case. This Note will argue that *Smith* was decided correctly, appropriately limiting federal courts' ability to issue injunctions against state courts poised to consider certifying similar classes with similar issues to classes denied in federal courts. In light of the sweeping reform of the Class Action Fairness Act of 2005 (CAFA), the Court's prevention of federal interference in state courts is a small but deserved victory for state courts.

Section II of this Note will introduce a basic background of class action procedural rules and the Anti-Injunction Act. Next, the modern developments in class actions that instigated the need for reform like CAFA will be examined, in addition to CAFA itself. Section III will break down the recent Supreme Court case of *Smith v. Bayer Corp.*, highlighting the Court's reasons for overturning the Eighth Circuit's prior decision. Finally,

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1. 131 S. Ct. 2368 (2011).
2. Lisa McElroy, *This Week at the Court in Plain English*, SCOTUSBLOG (Jun. 17, 2011, 3:58 PM), http://www.scotusblog.com/2011/06/plain-english/.

Section IV will then analyze *Smith*'s impact on state courts' jurisdiction, considering CAFA was not enacted in time to affect the ruling.

II. EXISTING LAW AND LEGAL BACKGROUND

A. Overview of the Relevant Procedural Rules

Detailing the Anti-Injunction Act, along with class action procedure and history, is essential to understanding the implications of the Supreme Court's holding in *Smith*. Decided subsequent to CAFA, *Smith* evaluates the ability of federal courts to enjoin state courts from hearing similar class action claims.

1. The Anti-Injunction Act

The Anti-Injunction Act, enacted in 1793, protects state courts from unnecessary interference by federal courts.[3] The statute states: "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."[4] As evident from its text, the Act has three narrowly defined exceptions. In *Smith*, the applicable exception was the exclusion allowing federal courts to issue injunctions for "protecting or effectuating judgments," also known as the re-litigation exception.[5] The re-litigation exception authorizes the use of an injunction to prevent state litigation of a claim or issue that was previously decided in federal court, based on claim and issue preclusion doctrines.[6] In *Smith*, the defendant essentially invoked the issue preclusion doctrine of collateral estoppel.[7] Plainly stated, "The principle is simply that later courts should honor the first actual decision of a matter that has been actually litigated."[8]

2. Class Action Litigation

Federal Rule of Civil Procedure 23 (Rule 23) supplies the process for class actions. Most states' class action procedural rules mirror Rule 23.[9] A

3. Smith v. Bayer Corp., 131 S. Ct. 2368, 2375 (2011).
4. 28 U.S.C. § 2283 (2012).
5. *Smith*, 131 S. Ct. at 2375.
6. *Id.*
7. 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4416 (2d ed. 2011).
8. *Id.*
9. *See* S. REP. NO. 109-14, at 13 (2005).

claim must meet the four threshold requirements before any class certification can take place.[10] The rule states:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: the class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims or defenses of the representative parties are typical of the claims or defenses of the class; and the representative parties will fairly and adequately protect the interests of the class.[11]

Rule 23 provides for two types of classes; thus, a proposed class must meet one of these definitions at the beginning, as well.[12] The first category provides for injunctive or declarative relief when the other party has acted or refused to act on grounds that apply generally to the class.[13] This type of class, after its creation in the 1966 amendment to Rule 23, was widely used for civil rights class action suits.[14] The second category, involved in *Smith*, allows for monetary relief where questions of law or fact are common to the class and predominate over any questions affecting individual members.[15] Whether a court certifies the class can make or break the case for either side, before any of the merits of the claims can be considered. As the Seventh Circuit opined, "[J]ust as a denial of class status can doom the plaintiff, so a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight."[16]

Class action litigation has significant benefits and detriments. At their best, class actions serve "the interests of consistency and finality by avoiding the possibility of inconsistent outcomes in separate trials of similar cases and resolving all claims in a single case that is binding on all class members."[17] By allowing individuals to combine their claims, class actions provide relief when bringing a claim individually would not be worth the cost.[18] Examining the negatives of class actions, "[I]f there is insufficient commonality of interest between the class members, class treatment can deprive [plaintiffs] and the defendant of an individualized determination of

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10. *See* FED. R. CIV. P. 23(a).
11. *Id.*
12. *Id.* at (a)(1-4), (b)(1)(A)-(B).
13. *Id.* at (b)(2).
14. Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1593-94 (2006).
15. *Id.*
16. Blair v. Equifax Check Serv., 181 F.3d 832, 834 (7th Cir. 1999).
17. Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 401 (2002).
18. *Id.*

their disputes."[19] Other detrimental aspects of class actions were highlighted by advocates for legislative reform.

B. The Modern Class Action Climate

CAFA became effective on February 18, 2005,[20] too late to impact *Smith*. CAFA has roots in several attempts to overhaul class action lawsuits.[21] In establishing the purposes for CAFA, the Senate and corporate advocates of reform bemoaned the amounts obtained for attorney's fees in comparison to the small damages awarded to the plaintiffs.[22] Congress also voiced concern with the toll increasingly frivolous actions were taking on the judicial system.[23] In its report, the Senate Judiciary Committee stated, "[C]urrent law enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests."[24] Because federal courts seemed to be less approving of class actions, more and more forum shopping occurred, resulting in class actions being brought increasingly in state courts.[25] Corporations argued state courts inappropriately were handing down rules in class actions against multi-state defendants that bound their activities throughout the country, having a national impact.[26]

A case brought in Williamson County, Illinois, *Avery v. State Farm Mutual Automobile Insurance Co.*,[27] was cited by many proponents of class action reform as the epitome of why reform was badly needed.[28] The court in that case certified a national class against State Farm, applying "the Illinois and Consumer Fraud and Deceptive Business Practices Act extraterritorially to the entire class."[29] However, the Illinois Supreme Court reversed this verdict, ruling the nationwide class should not have been certified in the first place.[30] These increasingly obvious negatives to class action litigation compelled Congress to make the changes defendants were looking for in CAFA.

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19. *Id.*
20. Robin Miller, Annotation, *Construction and Application of Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005)*, 18 A.L.R. FED. 2D 223 (2007).
21. Sherman, *supra* note 14, at 1594 n.6.
22. S. REP. NO. 106-420, at 8 (2000).
23. *Id.*
24. S. REP. NO. 109-14, at 4 (2005).
25. Sherman, *supra* note 14, at 1595.
26. *Id.*
27. 746 N.E.2d 1242 (Ill. App. Ct. 2001).
28. Sherman, *supra* note 14, at 1595 n.10.
29. *Id.*
30. Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 824 (Ill. 2005)

On the other hand, critics of the class action reform, characterized in the debates leading up to CAFA, argued against limiting state court class actions. First, these critics reasoned that adequate protections against forum-shopping were already provided for in Rule 23(e), and state court equivalents, as judicial approval was required when a voluntary dismissal or settlement was sought.[31]

Secondly, the opponents of the reform believed their counterparts overlooked the other purpose behind class actions, accountability of corporations and punishment for consumer harm.[32] Congressman William Delanhunt characterized this importance: "Class actions level the playing field, uniting ordinary citizens who could never undertake complex and costly litigation on their own."[33] At the federal level, there are more victims involved in the litigation, and it is so much more difficult to certify a class.[34]

In addition, the wrongs of class action litigation that the reformers purportedly sought to correct occurred at both the federal and state levels. Thus, the legislation did not necessarily fix that issue. As Congresswoman Stephanie Tubbs Jones argued, state court judges are just as qualified to deal with the complex issues as the federal judges.[35] These were the arguments in protest of what became CAFA.

C. The Class Action Fairness Act of 2005

Examining CAFA is important to understanding *Smith*, even though CAFA was enacted after the case commenced, because of its significant implications on class action procedure. CAFA amended the diversity jurisdiction statute, 28 U.S.C. § 1332, by inserting subsection (d).[36] This amendment allows federal courts to have jurisdiction when just 'minimal diversity' is present.[37] In order for minimal diversity to be present, any member of the plaintiff class must be a citizen of a state different from that of any defendant.[38] Second, the amount in controversy must exceed $5,000,000,[39] but claims of individual class members can be aggregated.[40] Additionally, the class must hold at least 100 class members.[41] Removal of

31. Anna Andreeva, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 U. MIAMI L. REV. 385, 401 (2005).
32. 149 CONG. REC. 14,590 (2003).
33. 149 CONG. REC. 14,593 (2003) (statement of Rep. William Delahunt).
34. 149 CONG. REC. 14,590 (2003).
35. 149 CONG. REC. 14,590 (2003) (statement of Rep. Stephanie Tubbs Jones).
36. Sherman, *supra* note 14, at 1595-96.
37. *Id.*
38. 28 U.S.C. § 1332(d)(2) (2012).
39. *Id.*
40. *Id.* § (d)(6).
41. *Id.* § (d)(5)(B).

class actions arising under the newly amended 28 U.S.C. § 1332 need not occur within one year of the commencement of the action, as normally required for removal under 28 U.S.C. §1446(b).[42] Furthermore, a defendant seeking removal need not have the consent of all defendants, and can be a citizen of the forum state.[43] These reforms create broad federal jurisdiction over class actions and provide for easier removal of a state class action to federal court.[44]

CAFA did grant exceptions in which federal courts would not have jurisdiction even though minimal diversity may be triggered, but they are vague. The first exception is known as the "home state exception."[45] The relevant text of the statute states, "A district court shall decline to exercise jurisdiction . . . over a class action in which . . . greater than two-thirds or more of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed."[46] One issue with this exception is that class action attorneys may attempt to define classes in terms of domicile rather than in more efficient terms such as purchasers of a product in the forum state.[47] Yet another problem with this exception is the fact the statute contains no definition for "primary defendant."[48] The only guidance provided by Congress is the concept from a 2003 Senate Committee Report of focusing on the "real target" of litigation and the defendant who would bear most of the cost.[49] The "local controversy" exception is very similar to the home state exception; essentially, the only difference is the relaxing of the requirement that the primary defendant be domiciled in the forum state.[50]

Another exception, known simply as "discretionary jurisdiction,"[51] states:

> [A] district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction . . . over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed.[52]

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42. Miller, *supra* note 20, at 223.
43. *Id*.
44. Sherman, *supra* note 14, at 1596.
45. *Id.* at 1598.
46. 28 U.S.C. § 1332(d)(4)(B) (2012).
47. Sherman, *supra* note 14, at 1598.
48. *Id.*
49. *Id.* at 1598-99.
50. *Id.* at 1600; s*ee generally* 28 U.S.C. § 1332(d)(4)(A) (2012).
51. Sherman, *supra* note 14, at 1602.
52. 28 U.S.C. § 1332(d)(3) (2012).

The statute requires the district court to consider six factors when exercising its discretion to decline jurisdiction.[53]

While CAFA addressed many criticisms of modern class action suits for money damages, it did not "address the difficult issues underlying the federal injunction of parallel state actions occurring subsequent to the judgment or settlement of a federal class-action lawsuit."[54] This potential gap is where the issue presented in *Smith* falls.

D. Precedent Decisions

1. Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers[55]

In this case, the Supreme Court set forth the importance of the Anti-Injunction Act and the standards by which the exceptions to it, such as the re-litigation exception, should be construed. The facts of this case are rather complicated. In 1967, a union began picketing a switching yard owned and operated by the railroad.[56] The railroad sought to have a federal court enjoin the picketing, but the federal judge declined.[57] However, the railroad was successful in obtaining an injunction against the picketing in state court.[58] The union, along with other unions, brought suit in federal court on the issue of whether the state injunction against picketing at the terminal next door to the switching yard was valid.[59] On appeal, in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, the Supreme Court decided the state injunction was inappropriate, and that the union had a federally protected right to picket at that particular terminal.[60] Subsequently, the union brought a motion in the state court to end the injunction preventing picketing at the switching yard, pursuant to *Jacksonville Terminal*.[61] The state court denied the motion and refused to dissolve the injunction against the picketing at the switching yard.[62] Rather than appeal the denial of the motion in state court, the union went back to federal court in an attempt to obtain an injunction against the state court.[63]

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53. *Id.* § (d)(3)(A)-(F).
54. Christopher D. Bayne, *From Anti-Injunction to Radical Reform: Proposing A Unifying Approach to Class-Action Adjudication*, 31 U. HAW. L. REV. 155, 160-61 (2008).
55. 398 U.S. 281 (1970).
56. *Id.* at 283.
57. *Id.*
58. *Id.*
59. *Id.* at 283-84; s*ee generally* Bhd. of R.R. Trainmen v. Jacksonville Terminal Co. 394 U.S. 369 (1969).
60. *Atl. Coast Line*, 398 U.S. at 284.
61. *Id.*
62. *Id.*
63. *Id.*

The district court granted the injunction, and the Court of Appeals for the Fifth Circuit affirmed.[64]

Upon appeal, the Supreme Court held the federal injunction was improper under the Anti-Injunction Act.[65] In its words:

> Based solely on the state of the record when the order was entered, we are inclined to believe that the District Court did not determine whether federal law precluded an injunction based on state law. Not only was that point never argued to the court, but there is no language in the order that necessarily implies any decision on that question.[66]

The Court examined the policy reasons behind the statute, declaring the Act a response to the need for setting limits between the dual systems of state and federal courts.[67] The Supreme Court spelled out a narrow scope for the re-litigation exception. It precludes claims that were actually heard by the federal court, not claims that could have been heard.[68] The Court, in *Smith*, cited to this case for guidance when applying the Anti-Injunction Act.[69]

2. Chick Kam Choo v. Exxon Corp.[70]

In this case, the plaintiff and her husband were residents of Singapore when the husband was killed there while repairing a ship owned by defendant.[71] Plaintiff brought suit in the U.S. District Court for the Southern District of Texas, presenting claims under the Jones Act, Death on High Seas Act (DOHSA), the general maritime law of the United States, and a Texas wrongful death statute.[72]

The district court granted the defendant's motion for summary judgment on the Jones Act claim, the DOHSA claim, and on the general U.S. maritime law claim.[73] Furthermore, the district court granted dismissal on *forum non conveniens* grounds, and provided the defendants submit to jurisdiction of Singapore courts. The Court of Appeals for the Fifth Circuit affirmed.[74]

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64. *Id*.
65. *Id*. at 284-85.
66. *Id*. at 290.
67. *Id*. at 286.
68. Andrea R. Lucas, *Balancing Comity with the Protection of Preclusion: The Scope of the Re-litigation Exception to the Anti-Injunction Act*, 97 VA. L. REV. 1475, 1506-08 (2011).
69. Smith v. Bayer Corp., 131 S. Ct. 2368, 2375-76 (2011).
70. 486 U.S. 140 (1988).
71. *Id*. at 142.
72. *Id*.
73. *Id*. at 143
74. *Id*.

Rather than commence litigation in Singapore, the plaintiff filed suit in Texas state court.[75] The state complaint alleged all of the previous claims in addition to a Singapore law claim.[76] However, the plaintiff voluntarily dismissed the federal law claims, leaving just the Texas and Singapore claims.[77] Defendants succeeded in removing the case to federal court on the basis of diversity of citizenship, but the Fifth Circuit ultimately held that complete jurisdiction did not exist and the case was returned to the U.S. District Court for the Southern District of Texas with instructions to remand it to state court.[78] Defendants requested an injunction to prevent the plaintiff and her attorneys from seeking to re-litigate in any state forum the issues finally decided in the federal court's initial 1980 *forum non conveniens* dismissal.[79] The district court granted the motion and issued a permanent injunction.[80] Plaintiff appealed, and the Fifth Circuit affirmed, holding the injunction fell into the re-litigation exception of the Anti-Injunction Act.[81] The Supreme Court granted certiorari.

The Supreme Court ruled the injunction exceeded the restrictions of the Anti-Injunction Act. While Congress has permitted injunctions when express authorizations by statute apply, "an essential prerequisite for applying the relitigation exception" is that the issues which the federal injunction precludes from state proceedings have actually been decided by the federal court.[82] The Court criticized the defendants' and lower courts' reasoning:

> 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 . . . . Moreover, the Court of Appeals expressly recognized that the Texas courts would apply a significantly different *forum non conveniens* analysis. Thus, whether Texas *state* courts are an appropriate forum for petitioner's Singapore law claim has not yet been litigated, and an injunction to foreclose consideration of that issue is not within the relitigation exception.[83]

The Supreme Court, in *Smith*, relied heavily on this test set forth in *Chick Kam Choo*, requiring federal courts to determine whether the state

75. *Id.*
76. *Id.*
77. *Id.* at 143-44.
78. *Id.* at 144.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 148.
83. *Id.* at 148-49.

court would apply a significantly different legal standard to the claims.[84] If a different legal standard would be applied in state court, then the claim has not yet been litigated.

III. EXPOSITION OF *SMITH V. BAYER CORP.*

A. The Facts

The underlying procedural issue emerged from the use of the pharmaceutical product Baycol, which was linked to thirty-one deaths in the United States.[85] In August 2001, George McCollins and two others filed a class action in West Virginia state court.[86] In September 2001, Keith Smith and Shirley Sperlazza filed similar state law claims against Bayer in West Virginia in a different county.[87] The plaintiffs in both of these suits were unaware of the other's pending suit.[88]

B. Procedure

In January 2002, Bayer removed the McCollins case to the United States District Court for the Southern District of West Virginia on the basis of diversity jurisdiction under 29 U.S.C. § 1332.[89] Then, the case was transferred to the U.S. District Court for the District of Minnesota in accordance with a preexisting order of the Judicial Panel on Multi-District Litigation, which consolidated all federal suits involving Baycol before a single district court judge for pre-trial procedure.[90] Meanwhile, Bayer could not remove Smith's case, as they had McCollins' case, because Smith had sued several West Virginia defendants in addition to Bayer, thus destroying complete diversity.[91] By 2008, the two cases had proceeded at roughly the same pace, and both courts were preparing to examine their respective plaintiffs' motions for class certification.[92]

In 2008, McCollins was the only class representative left, and he suffered no physical injury himself from the drug, but rather alleged economic loss caused by the defendants' breach of warranties as well as violations of the West Virginia Consumer Credit and Protection Act.[93] In

84. Smith v. Bayer Corp., 131 S. Ct. 2368, 2376-77 (2011).
85. *In re* Baycol Products Litig., 593 F.3d 716, 719 (8th Cir. 2010).
86. *Id.* at 720.
87. *Smith*, 131 S. Ct. at 2373.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 2374.
93. *In re* Baycol Products Litig., 593 F.3d 716, 720 (8th Cir. 2010).

the McCollins case, in United States District Court for the District of Minnesota, the defendants moved to deny class certification, and the district court granted the motion.[94] Since the showing of actual harm would likely vary from plaintiff to plaintiff, the district court reasoned the individual issues would predominate over common issues, making the action inappropriate for class treatment.[95] In addition, the district court granted summary judgment for the defendant as to McCollins' individual claims.[96] McCollins did not appeal.[97] After the conclusion of the McCollins case, Bayer moved the United States District Court for the District of Minnesota to enjoin the West Virginia state court from hearing Smith's motion to certify a class, under the re-litigation exception of the Anti-Injunction Act.[98] This was the first occasion that the plaintiffs realized each other's existence. The district court granted the injunction.[99]

The Court of Appeals for the Eighth Circuit affirmed.[100] In applying a textual comparison of West Virginia Rule 23 to the federal rule, the court of appeals found the state and federal certification rules were "not significantly different."[101] The Eighth Circuit attempted to distinguish the case from *Chick Kam Choo*, holding, "[A] forum non conveniens determination is different from what is at issue here, for class certification is often entwined with substantive conclusions of state law."[102] However, in footnote six, the court admits, "[T]his is not always the case."[103] The Eighth Circuit proclaimed, "Re-litigation in state court of whether to certify the same class rejected by a federal court presented an impermissible 'heads-I-win, tails-you-lose situation.'"[104] In addition, the court of appeals found that McCollins' class and Smith's class were "essentially" the same, because both are West Virginians who purchased the same product, Baycol, and both rely on the theory of economic loss without physical injury, which was rejected by the district court.[105]

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94. *Id.*
95. *Smith*, 131 S. Ct. at 2374.
96. *In re Baycol*, 593 F.3d at 720-21.
97. *Id.* at 721.
98. *Smith*, 131 S. Ct. at 2374.
99. *Id.*
100. *In re Baycol*, 593 F.3d at 726.
101. *Id.* at 723.
102. *Id.*
103. *Id.* at 723 n.6.
104. *Id.* at 723-24 (citing *In re* Bridgestone/Firestone, Inc., Tires Products Liab. Litig., 333 F.3d 763, 768 (7th Cir. 2003)).
105. *Id.* at 724.

C. Opinion of the Supreme Court

The Supreme Court granted certiorari on the question of "whether the federal court's rejection of McCollins' proposed class precluded a later adjudication in state court of Smith's certification motion."[106] The Court reversed the Eighth Circuit's holding and ruled that in issuing the injunction order to a state court, the federal district court exceeded its authority under the re-litigation exception to the Anti-injunction Act.[107]

The significant sub-issues discussed in *Smith* are first, whether the federal court decided the same issue as the one presented in the state court, and second, whether Smith must have been a party to the federal suit, or if not, fell into one of the few exceptions to the general rule against binding nonparties. The Court stressed the importance of protecting state courts from federal court abuse, stating, "Issuing an injunction under the re-litigation exception is resorting to heavy artillery."[108] The Court reasoned that any doubts as to whether a federal injunction against a state court is appropriate should be resolved in favor of permitting the state court to proceed.[109]

First, the Supreme Court did not agree with the lower court's finding that the West Virginia rule for class certification and corresponding federal rule were the same in this case. The district court ruled that the proposed class did not meet the requirements of Federal Rule 23.[110] However, the state court would have considered whether the proposed class satisfied West Virginia Rule 23.[111] If those two legal standards differed, then the federal court resolved an issue not before the state court and the re-litigation exception of the Anti-Injunction Act did not apply.[112] The Court reasoned that comparing the texts of the two statutes for similarity was an appropriate analysis, but how each respective court applies its rule must be examined as well.[113]

Applying the standard it set forth, the Court looked to West Virginia Supreme Court cases, and found it evident that the federal court and state court apply different tests in determining whether to certify a class, even though they have textually identical rules.[114] The federal court applied a strict test barring class certification when proof of each individual

106. Smith v. Bayer Corp., 131 S. Ct. 2368, 2376 (2011).
107. *Id.* at 2373.
108. *Id.* at 2375-76.
109. *Id.* at 2376.
110. *Id.* at 2377.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 2378.

plaintiff's injury is necessary.[115] Meanwhile, the West Virginia Supreme Court has used a balancing test of many factors and noted a single common issue in a case can outweigh individual plaintiff questions.[116]

The Court directly disregarded the Eighth Circuit's distinction between *Smith* and *Chick Kam Choo*:

> This case, indeed, is little more than a rerun of *Chick Kam Choo*. A federal court and a state court apply different law. That means they decide distinct questions. The federal court's resolution of one issue does not preclude the state court's determination of another. It then goes without saying that the federal court may not issue an injunction. The Anti-Injunction Act's re-litigation exception does not extend nearly so far.[117]

Next, the Court held that a court's judgment binds only the parties to a suit, subject to a few limited exceptions.[118] Thus, Bayer would have had to show that Smith and company were parties to the McCollins suit where the class certification was denied. Bayer attempted to argue that Smith was an unnamed member of a proposed but uncertified class, and, consequently, a party to the suit.[119] In the alternative, Bayer also argued the district court's judgment in McCollins' case bound Smith under the recognized exceptions against nonparty preclusion of members of class actions.[120]

The Court did not accept Bayer's circular argument. A non-named class member cannot be considered a party to a class action suit when the class is denied certification, thus preventing the suit from becoming class action litigation in the first place.[121] McCollins was denied the ability to represent persons such as Smith as a class, and so that judgment in no way made Smith a party.[122] In addition, the Court concluded the judgment against McCollins in the district court could not bind Smith on the basis of non-party preclusion, either.[123] The principle of non-party preclusion on which Bayer relied allowed unnamed members of a class action to be bound, even though they were not parties.[124] However, the Court pointed out that, because McCollins' class was denied certification, the case never became a class action.[125] A class action never existed because of the denial of class certification, and thus the principle allowing unnamed class

115. *Id.*
116. *Id.*
117. *Id.* at 2379.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 2379-80.
122. *Id.*
123. *Id.* at 2380.
124. *Id.*
125. *Id.*

members to be bound to the judgment was inapplicable.[126] The Court concluded, "Neither a proposed class action nor a rejected class action may bind nonparties."[127]

The Court found Bayer's policy argument the most compelling, but it was not enough to trump the law against non-party preclusion.[128] Bayer argued the holding in *Smith* would allow plaintiffs to try and certify the same class multiple times by simply switching out the plaintiffs' names in the complaint.[129] However, the Court found enough protection to prevent that problem in the structure and practice of the legal system in general, holding, "[O]ur legal system relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs."[130] In addition, the Court pointed out that Congress enacted CAFA in 2005, enabling defendants to remove to federal court any sizable class action involving minimal diversity of citizenship.

IV. ANALYSIS

In *Smith*, the Supreme Court properly limited the federal courts' ability to issue injunctions against state courts hearing similar class action claims to those class action claims already denied certification in federal courts. In protecting the state courts in this manner, the Supreme Court respected the federalism principles inherent in the Anti-Injunction Act. In addition, the Court followed precedent in limiting the scope of the re-litigation exception strictly to only those issues actually decided in the initial class action certification hearing and to only those parties involved. The *Smith* decision still has importance in the post-CAFA environment because class actions can still remain in state courts.

A. Protection of Federalism Principles

While this case was decided prior to the enactment of CAFA, it is impossible not to look at this decision without considering CAFA and its criticisms. The critics of CAFA and the Supreme Court in *Smith*, *Chick Kam Choo*, and *Atlantic Coast Line* stressed the historically important balance of the federal and state court interests. The Anti-Injunction Act is

126. *Id.*
127. *Id.*
128. *Id.* at 2381.
129. *Id.*
130. *Id.*

central to "the smooth operation of federalism,"[131] and the Supreme Court set forth the scope and standard for the re-litigation exception clearly.

For the judiciaries in the aforementioned cases, the expansion of the re-litigation exception was simply impermissible in light of the Anti-Injunction Act's intent to protect state court sovereignty from federal infringement. Referring to the Act's express exceptions, the Court in *Atlantic Coast Line* held, "Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction."[132] These federalism concerns implicated are not merely a policy argument for a court to consider, but rather are of constitutional importance, as the Court suggests. The Anti-Injunction Act "represents Congress' considered judgment as to how to balance the tensions inherent in . . . a [dual] system."[133] *Smith* was careful to maintain this balance.

Purely from a federalism perspective, if *Smith* had been decided differently, the federal courts would have broader powers under the re-litigation exception in class action litigation. Potentially, any time class certification would be denied in a federal court prior to, or concurrently with, a similar class certification hearing in a state court, the federal court could enjoin the state court from ruling on the class certification merely if its class action procedure "appeared" to be similar to the federal rule. By providing a test requiring the federal court to examine whether the state law, in both text and application, parallels the federal counterpart before granting an injunction, *Smith* protects state courts' rights to apply their own laws in the manner construed by them.[134]

The critics of CAFA would agree with this result. One of their arguments was that the increased removal and broadening of federal jurisdiction would prevent state courts from deciding their own substantive claims, leaving the claims for federal courts to decipher. During the congressional debates for CAFA, Representative Stephanie Tubbs Jones asked the poignant question, "If the foundation of our democracy relies on the strength and preservation of federalism and deference to State's rights, how can we support legislation that has as its backbone the notion that State judiciaries are not as competent as Federal courts?"[135] State courts can provide their own checks on class action abuse, just as the Supreme Court of Illinois reversed the lower courts' controversial decision in *Avery v. State*

131. Lucas, *supra* note 68, at 1476.
132. Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 287 (1970).
133. Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988).
134. *Smith*, 131 S. Ct. at 2377.
135. 149 CONG. REC. 14591 (2003) (statement of Rep. Stephanie Tubbs Jones).

Farm Mutual Automobile Insurance Co.[136] In *Smith*, the Court noted injunctions against state courts should be resorted to in very limited situations as a last resort, especially because "an injunction is not the only way to correct a state trial court's erroneous refusal to give preclusive effect to a federal judgment."[137] State appellate courts, as well as the Supreme Court, can reverse such errors.[138]

B. Following Precedent

Just as *Smith* adheres to federalism principles, the case also follows precedent regarding the re-litigation exception's scope. The Supreme Court abrogated the Eighth Circuit's reasoning and the inappropriate expansion of the re-litigation exception. While a *Virginia Law Review* article considers *Smith* as inconclusive as to the scope of the re-litigation exception,[139] the Court could not have been more clear.

The Eighth Circuit had attempted to work around the precedent set forth in *Chick Kam Choo* by distinguishing that ruling as a purely procedural legal standard. By defining class certification as a procedural standard that required more substantive state issue considerations, the Eighth Circuit attempted to distance the precedent's effect. Thus, because class certification required federal courts to consider and rule on some substantive state considerations, the claims brought as class actions similarly in state court could be enjoined, according to the court of appeals.

The Supreme Court in *Smith* did not find this distinction compelling. It reiterated *Chick Kam Choo*'s standard—that the issue must have actually been decided by the federal court to allow for the re-litigation exception to apply. Because the class certification rules differed in application between the federal and state courts, the issue could not be decided. While the Court, in its own words, found *Smith* to be a reiteration of *Chick Kam Choo*, the decision extended the standard of whether an issue has actually been decided in the federal court beyond questions of procedural or substantive considerations.

Likewise, *Smith* has more persuasive logic than the Eighth Circuit offered. The Eighth Circuit employed circular reasoning, finding that

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136. S. REP. NO. 109-14, at 4 (2005).

137. *Smith*, 131 S. Ct. at 2376 n.5.

138. *Id.*

139. Lucas, *supra* note 68, at 1509. Lucas stated:

> By the Court's own assessment, *Smith v. Bayer Corp.* is a simple rerun or application of *Chick Kam Choo*'s principles to the question of whether the 'same issue' is being litigated when dealing with parallel litigation of state and federal class certification, not a resolution of the circuit split over the appropriate scope of the re-litigation exception.

Id.

Smith was a party and bound by the federal suit that denied class certification. The Court easily poked holes in that argument. The Court could not discern how a person, not involved in the actual suit, but proposing a similar class to one that was denied, could therefore be bound by the denial of the separately proposed class. In other words, "Neither a proposed class action nor a rejected class action may bind nonparties."[140] By effectively stating precedent and highlighting the court of appeal's legal errors, the Supreme Court makes its decision seem effortless and straightforward.

C. Is *Smith* irrelevant after CAFA?

In short, CAFA does not necessarily make this case moot. Although CAFA creates broad federal jurisdiction over class actions,[141] some state class actions will survive through statutory exceptions, or lack of minimal diversity. Proponents of the bill tried to "debunk" the myth that every class action would be removed to federal courts.[142] In February 2005, Senate Report 109-14 cited a study performed on six states that had available relevant data for a five-year period, and found that 50% of class action rulings would not be removable under CAFA.[143]

With the vague exceptions to CAFA, plaintiffs may formulate their pleadings so as to avoid removal. Federal courts' reactions to these formulations have been neutral.[144] "So long as there is a legitimate justification beyond destroying federal justification for structuring the case in a particular way, however, the plaintiff remains the master of the complaint, and attempts to limit damages or joinder of parties will result in cases remaining in state court."[145] Plaintiffs can define the class to include only members within a state so as to fall within the home state or local controversy exceptions.[146]

Plaintiffs have also avoided federal jurisdiction by pleading less than the jurisdictional amount in controversy. The courts have been dealing with these pleadings in a divisive manner. Some circuits "take the 'plaintiff is the master of the complaint' approach," while other courts will not remand when they suspect forum shopping.[147] In sum, the vague exceptions to

140. *Smith*, 131 S. Ct. at 2380.
141. Sherman, *supra* note 14, at 1596.
142. *See* S. REP. NO. 109-14, at 45 (2005).
143. *See id.*
144. Georgene M. Vairo, *The Complete CAFA: Analysis and Developments Under the Class Action Fairness Act of 2005*, *in* 862 LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK 47, 150 (2011).
145. *Id*. at 150-51.
146. *Id.*
147. *Id.* at 149.

CAFA provide at least a small hope for plaintiffs seeking to keep their claims in state court. So perhaps the facts of *Smith* may not have been sufficient to prevent removal to federal court post-CAFA, but *Smith* provides some security for other state court class actions. *Smith* maintains a vital role, because the case provides state courts with protection and opportunities that were stripped away in CAFA.

V. CONCLUSION

Smith v. Bayer Corp. may be a small, but great hope for state courts in a time where they have seen their class action jurisdiction and the adjudication of their own laws escape to the federal courts. In following federalism arguments and the legal standard set forth in the precedent of *Atlantic Coast Line* and *Chick Kam Choo,* the Supreme Court correctly reversed the Eighth Circuit's erroneous decision.