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IN THE SUPREME COURT OF THE UNITED STATES

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KEITH SMITH, ET AL., :

Petitioners : No. 09-1205

v. :

BAYER CORPORATION :

- - - - - x

Washington, D.C.

Tuesday, January 18, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

RICHARD A. MONAHAN, ESQ., Charleston, West Virginia; on behalf of Petitioners.

PHILIP S. BECK, ESQ., Chicago, Illinois; on behalf of Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 09-1205, Smith versus Bayer Corporation.

Mr. Monahan.

ORAL ARGUMENT OF RICHARD A. MONAHAN
ON BEHALF OF THE PETITIONERS

MR. MONAHAN: Mr. Chief Justice, and may it please the Court:

Petitioners Keith Smith and Shirley Sperlazza were not named plaintiffs in the prior Federal proceeding litigated by George McCollins. They never received notice of that prior proceeding; they never received an opportunity to appear and be heard; they never received an opportunity to opt out; and they never received an opportunity to appeal the decision denying class certification.

No precedent of this Court would justify treating -- treating people as parties under preclusion principles under these circumstances. Recently, in Taylor v. Sturgell, this Court addressed the rule against nonparty preclusion and discussed the recognized exceptions. The Court in that case discussed a properly conducted class action as being one of the exceptions.

1 The Court, in discussing these preclusion
2 rules, noted that they are limited by due process
3 concerns, and the Court noted that the properly
4 conducted class action is an exception due to the due
5 process protections incorporated into Rule 23.

6 Obviously, this Court has discussed the due
7 process protections with class actions in prior cases,
8 particularly those dealing with 23(b)(3) classes in
9 cases such as Eisen and Shutts. The Court has noted
10 that whenever a class is certified notice must be
11 provided; the right to -- notice must be provided; they
12 must have the right to appear and be heard in person or
13 by counsel; they must have the right to opt out as well
14 as protection of adequate representations.

15 JUSTICE ALITO: Well, suppose a class action
16 based on diversity is filed in one of the Federal
17 districts in West Virginia, and the district court
18 denies class certification. The same plaintiff, the
19 same plaintiff's attorney, takes the old complaint,
20 writes in the name of the new named party, files exactly
21 the same complaint in another Federal -- in the other
22 Federal district in West Virginia. Would your argument
23 be the same? That can go forward, get another shot at
24 class certification?

25 MR. MONAHAN: Your Honor, under the -- yes,
Alderson Reporting Company

1 under those circumstances, as outlined by -- by Your
2 Honor.

3 JUSTICE GINSBURG: All you have to do is get
4 a new named plaintiff?

5 MR. MONAHAN: Yes, as long as it's not the
6 same party. If it's a different party -- and that --

7 JUSTICE GINSBURG: And it could be the same
8 attorney?

9 MR. MONAHAN: Yes, it could be the same
10 attorney. This Court noted that in Taylor v. Sturgell,
11 in South -- South Central Bell v. Alabama, and also as
12 discussed in the Richards case.

13 JUSTICE GINSBURG: Would the -- would the
14 decision that's saying -- saying Rule 23 standards have
15 not been met, the individual issues predominate over the
16 common issue -- doesn't that deserve some measure of
17 respect when the same thing is tried again?

18 MR. MONAHAN: Yes, Your Honor, but that
19 would be under stare decisis principles, we believe, and
20 that's the situation, since it is a different party,
21 since it's not the same party itself. And, certainly,
22 the district courts in West Virginia would look to other
23 district courts' opinions and would likely render them
24 persuasive -- or consider them persuasive under those
25 circumstances.

1 JUSTICE ALITO: But they have no obligation
2 to follow another district court opinion, do they?

3 MR. MONAHAN: Technically, no, Your Honor.
4 If the Fourth Circuit, for instance, had spoken on the
5 matter, though, and it was something that was decided by
6 the Fourth Circuit, or of course by this Court, then
7 clearly they would. And the --

8 JUSTICE GINSBURG: And this one was
9 determined by the multidistrict panel, right?

10 MR. MONAHAN: Yes. Yes, a district judge in
11 Minnesota. Yes, Your Honor.

12 Interestingly, in Taylor, this Court noted
13 that adopting a broad theory of virtual representation
14 based upon an identity of interests, adequate
15 representation, and a close relationship would -- would,
16 in essence, be equivalent to adopting a de facto class
17 action or recognizing a common law class action without
18 any of the procedural due process protections provided
19 by Rule 23.

20 Obviously, in dealing with these cases, the
21 main reason a certification is -- the main reason the
22 due process protection is provided upon certification is
23 to go ahead and justify binding the class members to any
24 judgment issued by the court at that point. Until you
25 have that, unless you have the certification and the due

1 process protections for a Rule 23(b)(3) class, until you
2 have those, the absent class members remain strangers to
3 the proceeding.

4 JUSTICE GINSBURG: But the absent class
5 members retain their individual right. I mean, they are
6 not being precluded as to their individual claim. It's
7 only they can't be a class representative.

8 MR. MONAHAN: That's -- that's true, Your
9 Honor. We submit, however, that any procedural rights
10 which have been recognized and adopted -- those
11 procedural rights, just as the substantive claim itself,
12 have to be adjudicated consistent with due process. And
13 West Virginia itself has adopted Rule 23 of the West
14 Virginia Rules of Civil Procedure, and that State has
15 the right to apply and interpret that rule as it sees
16 fit to manage its own docket and administrate its own
17 docket as it sees fit.

18 JUSTICE GINSBURG: Am I right to read the
19 supplemental brief as saying that now the West Virginia
20 Supreme Court agrees with the multidistrict panel on
21 what the content of West Virginia law is?

22 MR. MONAHAN: That's not correct, Your
23 Honor. All of the issues raised in our petition for
24 cert remain just as they were. At worst -- if *White v.*
25 *Wyeth* withstands petition for rehearing, at worst we

1 lose our CCPA claim. That certainly is a valuable claim
2 to us. I will not dispute that. But we also have a
3 common law fraud claim. We also have breach of warranty
4 claims, and those are still in existence.

5 And the critical fact of this case in that
6 regard is the question of whether or not a class may be
7 certified under West Virginia Rules of Civil Procedure
8 has never been litigated, has never been decided by any
9 court.

10 JUSTICE KAGAN: Well, Mr. Monahan, do you
11 mean by that that you would have a blanket rule that a
12 decision on Federal Rule of Civil Procedure 23 can never
13 be preclusive as to a State Rule of Civil Procedure 23?

14 MR. MONAHAN: Your Honor, I believe it would
15 depend upon whether or not that State has said that not
16 only are we going to look at these Federal decisions as
17 being persuasive, but we're going to consider ourself
18 bound by the decisions of the Fourth District or the
19 United States District Court for the Southern District
20 of West Virginia.

21 JUSTICE KAGAN: Well, suppose the State
22 says: We will not consider ourselves bound; we do have
23 our own law with respect to Rule 23, but sometimes we'll
24 go along with the Federal rule and sometimes we won't.
25 Is it then up to the courts to actually try to determine

1 whether the -- the West Virginia court in this case
2 would have gone along, would have interpreted its own
3 rule of civil procedure the same way that the Federal
4 court interpreted the Federal rule?

5 MR. MONAHAN: Well, for instance, what Your
6 Honor suggested is essentially what the West Virginia
7 Supreme Court of Appeals does. I mean, they will --
8 they will consider them to be persuasive. They will
9 consider them -- but in their In re Rezulin case, the
10 court noted -- the court actually criticized the circuit
11 judge for relying exclusively on Federal decisions
12 denying class certification in medical device or
13 prescription drug cases. And the court noted that, you
14 know, although we will look at those rules and they may
15 be persuasive, they are not binding or controlling on
16 us, and that's because we do not want our legal analysis
17 to be nothing more than a mere Pavlovian response to
18 Federal decisional rules.

19 JUSTICE ALITO: What is -- what is the
20 difference between the Federal law and the West Virginia
21 law on the class certification issue? Not the
22 application to this particular complaint, but as to the
23 -- the standard. What do you see as the difference
24 between the Federal standard and the West Virginia
25 standard?

1 MR. MONAHAN: The main difference, Justice
2 Alito, is that our court has -- and they cite this in
3 In re Rezulin, for instance. They cite Newberg on Class
4 Actions as one of the authorities to support this
5 principle, but they note that in -- in our court that
6 normally challenges based upon reliance, causation, and
7 damages will not bar certification on a predominance
8 basis, because those go to the right of the individual
9 to recover, but not to the overall liability issues of
10 the defendant, which it believes can be addressed as
11 common issues in many cases and save the court an
12 extreme amount of time addressing those common issues.

13 Now, the court indicates that if individual
14 trials need to be conducted later on, on any of those
15 issues, if there are truly individual issues that need
16 to be resolved concerning those claims, individual
17 trials can be accomplished.

18 JUSTICE SOTOMAYOR: On the ground that the
19 court here, the Federal court, decided that there
20 weren't predominant issues based mostly on the fact
21 that, like the Virginia court has now, it's decided that
22 there is no economic loss, what were the differences?

23 What were the differences here? How would
24 the difference in standard play out here?

25 MR. MONAHAN: Well, for instance -- and this

1 is an interesting aspect of this case -- that the
2 court's not only trying to bind us on the procedural
3 ruling but is also trying to bind us in a substantive
4 ruling as to what the elements of the claims in West
5 Virginia are and as to what's needed to prove those
6 claims.

7 For instance, the Eighth Circuit has -- has
8 held that, in looking at the district court's opinion,
9 that it has held that an actual physical injury is
10 required, that economic loss alone is not enough.

11 Clearly, that's not consistent with West Virginia law.

12 An economic loss alone can be sufficient. In West --

13 JUSTICE SOTOMAYOR: The -- I'm sorry. I
14 don't mean to cut you off. But you're really arguing
15 that due process requires the same treatment,
16 essentially, of notice and an opportunity to be heard
17 that we are giving to a substantive decision that blocks
18 a future member from pursuing his or her claim, correct?

19 MR. MONAHAN: Yes, very similar, Your Honor.
20 I mean, in this circumstance -- I mean, these rights are
21 provided. These procedural rights, once they are
22 created, are being provided, and they can't be taken
23 away without due process. West Virginia has recognized
24 the right to -- to proceed in our court under our rule,
25 and not -- you don't have a guarantee --

1 JUSTICE SOTOMAYOR: You're almost treating
2 it as a property right, and -- and you're basically
3 saying we're equating it with, essentially, a property
4 right.

5 MR. MONAHAN: Well, I think -- I think what
6 I'm trying to say, Your Honor, is that these type of
7 procedural rights -- whenever you have a substantive
8 claim which is a property right, and you seek to
9 litigate them, you shall have available to you all the
10 Rules of Civil Procedure which have been adopted and
11 recognized, and those procedural elements of the claim
12 should be treated or adjudicated just the same as a
13 substantive claim, consistent with due process.

14 JUSTICE SOTOMAYOR: If we disagree with you,
15 because there is a difference of some sort between
16 procedure and substantive rights, then what would
17 command the due process violation in a situation in
18 which the Federal litigation has applied essentially the
19 same standard that the State has and there has been
20 adequate representation on the procedural question,
21 where no substantive right of a plaintiff has been
22 extinguished?

23 That's a lot of conditions, but those are
24 the three conditions of this case. So, what in due
25 process requires that outcome, your outcome?

1 MR. MONAHAN: Well, I believe that the
2 basic -- because we are not the same party, we believe
3 the basic elements of just the notice and the right to
4 be heard, which our party has never had. May I --

5 JUSTICE SOTOMAYOR: You're extinguishing a
6 substantive right. If I return to my question of what
7 makes a procedural right substantive --

8 MR. MONAHAN: Well, this particular
9 procedural right is very closely connected -- I mean,
10 one of the main purposes of a class action is to level
11 the economic playing field and to enable people with
12 small individual claims to aggregate them in order to
13 seek justice. Without those --

14 JUSTICE SOTOMAYOR: Actually not true. The
15 plaintiff here received the same thing. The issue is
16 how much money the lawyers are going to receive,
17 really --

18 MR. MONAHAN: Well --

19 JUSTICE SOTOMAYOR: -- because plaintiff
20 gets their attorney's fees, gets a statutory violation
21 amount, which is going to be the same whether it's in a
22 class action or an individual action, so it's really not
23 the plaintiff who stands to win.

24 MR. MONAHAN: No, Your Honor, what --
25 what -- the assumptions you just made I don't believe

1 are correct in this -- in this particular case, because,
2 one, obviously if we lose the CCPA claim in light of the
3 White case, there would be no statutory attorney fees.
4 And even if we had the CCPA claim, it's -- the court has
5 discretion. It may award them. There's no requirement
6 that it do so, no requirement whatsoever.

7 And how can anybody bring -- any lawyer
8 trying to bring one of these small damage claims -- if
9 the damages are only \$100, \$200 per plaintiff, for
10 instance, how could any lawyer justify facing a
11 defendant such as Bayer in a complex product liability
12 action? Just the cost alone of having experts, of doing
13 discovery -- all those matters would greatly exceed the
14 value of the claim itself. So the class action is the
15 only way in which to aggregate the claims and level the
16 economic playing field for everybody.

17 The other thing, I would note for the common
18 law fraud claim, West Virginia does have a bad-faith
19 exception for attorney fees, but that depends on the
20 degree of fraud that the court finds, and that -- that,
21 in and of itself, is discretionary.

22 CHIEF JUSTICE ROBERTS: What if -- how far
23 does your procedural right extend? Let's say in the
24 second action, the court says, look, we've been through
25 all this before; we have had a million pages of

1 discovery from the prior action, no protective order at
2 all. So while, if you were the first person here,
3 you're entitled to, you know, 10 interrogatories,
4 because we've been through this before, I'm going to say
5 you can look at all the discovery that's there, but you
6 only get 5 interrogatories.

7 Now, do you say no, no, no, I'm entitled to
8 the same procedural rights I'd have if I were here
9 first? Is that right?

10 MR. MONAHAN: Your Honor, I think the court
11 does have some flexibility, depending upon the
12 procedural rule at issue. And -- and, in essence, the
13 court is applying almost essentially the stare decisis
14 type of principles there. We have resolved this exact
15 discovery issue before, the exact arguments --

16 CHIEF JUSTICE ROBERTS: So now it's not only
17 that you're entitled to your day in court substantively;
18 you're -- you're entitled to your day in court
19 procedurally as to some procedural aspects but not
20 others?

21 MR. MONAHAN: Well, I certainly think the
22 Court needs to examine the procedural aspect and its
23 importance, and the part that it plays. I mean, for
24 instance, one of the problems we have in this situation
25 is that normally res judicata and collateral estoppel do

1 not normally apply to mere procedural rulings. They're
2 not normally used for that purpose.

3 Most cases where they are used for that
4 purpose are cases where a dismissal has occurred based
5 upon a procedural ruling or a procedural failing. And
6 whenever they apply collateral estoppel and res
7 judicata, it's almost -- every case I've seen deals with
8 the exact same party in another proceeding. And there
9 they preclude them. But here is a totally different
10 party. And the issue under West Virginia law has never
11 been litigated by any court.

12 JUSTICE BREYER: A totally different
13 party -- if a person, say an intervenor, joins a
14 litigation late, and there have been a lot of procedural
15 rulings, I guess that that intervenor takes the case as
16 he finds it. Now, he could go to the judge and say:
17 Judge, I want you to reconsider your procedural ruling
18 in light of the fact I'm here.

19 How does the situation I've just sketched
20 differ from this one? I mean, you have a client who's
21 coming to the litigation late. He's separate from the
22 litigation, I know, but he could send a representative
23 to the judge and say: Judge, I want you to reconsider
24 in light of the fact I'm joining. Now, I know I'm not
25 joining; in fact, I'm bringing a different case.

1 But I'm thinking of the -- of the Chief
2 Justice's hypo, here and I'm -- and I'm trying to apply
3 it. And is your client analogous to that person who
4 joins litigation late?

5 MR. MONAHAN: No, Your Honor, because -- I
6 mean, for instance, this Court has noted -- and they
7 noted it, I believe in the -- you noted it in the
8 Richards case. The Chase National Bank v. Norwalk and
9 Martin v. Wilks has noted that a stranger to litigation
10 has no duty to seek to intervene in the case; however,
11 they can; they can seek to intervene if they have
12 notice, if they so choose.

13 If you take that affirmative step to
14 intervene, knowing what has happened in that case, you
15 obviously have notice of the case because you're
16 choosing to intervene. And if you seek to intervene
17 having that notice, then you take it as you find it.

18 Now, you can certainly ask the court to
19 reconsider because you want to raise new arguments, but
20 there would be no obligation to do so.

21 JUSTICE GINSBURG: Here you have a different
22 forum. You pick up a different plaintiff, and you go to
23 a different forum. How -- and I guess your answer is
24 that you could go on and on and on until -- until maybe
25 you find a judge who will certify this class.

1 MR. MONAHAN: Your Honor, I don't -- I don't
2 believe so. I don't believe that's the case because
3 there are limitations to that. One would be, I think,
4 if you filed at another Federal court, for instance,
5 Rule 23 would be the same legal standard. Federal Rule
6 23 is the same legal standard in all Federal courts.

7 JUSTICE GINSBURG: But we have a new
8 plaintiff, so that plaintiff wouldn't have had notice
9 and an opportunity to be -- to be heard.

10 MR. MONAHAN: For preclusion purposes,
11 that's correct. But I think the Federal court certainly
12 would look at those cases for stare decisis purposes in
13 looking as to whether or not the class should be
14 certified under the same legal standard.

15 Now, here we do have a different forum. We
16 have the State of West Virginia, as a separate
17 sovereign, has its own rights to do this. But, once --
18 once -- if a class would be denied in West Virginia at
19 one time, I believe that the chances of having another
20 one succeed are very low, because courts will look to
21 those stare decisis principles.

22 JUSTICE GINSBURG: Yes, but there are 50
23 States.

24 MR. MONAHAN: I'm sorry, Your Honor?

25 JUSTICE GINSBURG: There are 50 States. And

1 if -- and if the plaintiff was asking for a nationwide
2 class action.

3 MR. MONAHAN: Yes, Your Honor, and the issue
4 with that, though, is this Court has -- in Taylor v.
5 Sturgell, for instance, which Your Honor authored, the
6 Government argued in that case that, you know, we should
7 adopt this virtual representation theory because of
8 repetitive litigation. We had this FOIA request. Any
9 person out there can file asking the government for
10 these documents, and the government may have to go on
11 thousands of times, millions of times, conceivably, to
12 do this.

13 And this Court note -- noted that the threat
14 of repetitive litigation is not sufficient to justify
15 adopting a new exception to the rule against nonparty
16 preclusion.

17 JUSTICE ALITO: What kind of notice do you
18 think due process would require? If the court in which
19 the case was first filed thought, I'm not going waste --
20 I don't want to waste my time on this class
21 certification issue if it's just going to be re-
22 litigated over and over and over again, so I want to
23 provide sufficient notice so that the members of a class
24 will be bound by my -- by my class certification issue,
25 what -- what would have to be done? Would they all have

1 to be given individual notice and asked to opt out?

2 MR. MONAHAN: Your Honor, I -- I believe so.
3 I believe -- I mean, consistent with Shutts, this
4 Court's ruling in Shutts and Eisen, I think they would,
5 because once they had the notice and that they would
6 decide not to opt out, then they would be bound by any
7 ruling that the -- that the court issues there. But
8 if -- if they don't have that opportunity, especially
9 whenever -- and this case also involves the
10 Anti-Injunction Act, of course, the principles of
11 federalism and comity, and any question under the
12 Anti-Injunction Act, any doubt, should go against
13 issuing injunctions.

14 And the -- the exceptions to that Act are
15 narrowly construed in light of principles of federalism,
16 and because we do have a separate State here and we're
17 trying to apply or seek State relief and seek the State
18 rules and follow the State rules, I do believe you would
19 need the same notice that we have in Shutts, the notice,
20 the opportunity to appear, and the opportunity to opt
21 out.

22 Now, certainly, other issues -- if we're
23 talking about policy concerns, another thing that I
24 would note is that in CAFA recently -- whenever Congress
25 adopted CAFA, certainly if they believe that basing

1 one -- using one class denial in Federal court as a
2 basis to preclude all other similar classes seeking --
3 seeking certification, if they thought that was
4 consistent with due process, certainly they could have
5 considered adopting that as part of CAFA. But they
6 chose to deal with it in a very different way, a very
7 different manner, and that was to go ahead and change
8 the jurisdictional status in diversity cases, make
9 minimal diversity and allow removal with certain -- you
10 know, certain exceptions for certain discretionary ones,
11 stay at home and local controversy exceptions, but they
12 didn't -- I mean, that's how they chose to deal with it.

13 Now, certainly, we would admit that since
14 CAFA has been enacted, the chance -- certainly, there's
15 not nearly as many of these cases which will occur where
16 this would -- where this will be an issue, because many
17 large classes now will get removed. And --

18 JUSTICE KAGAN: When -- when Congress
19 enacted CAFA, did Congress think about this precise
20 issue, the issue that Justice Ginsburg is raising about
21 a lawyer going from State to State with a different
22 named plaintiff? Was that -- was that part of what
23 Congress was reacting to?

24 MR. MONAHAN: Yes, Justice Kagan, it's my
25 understanding that that was something they were

1 concerned about. And they were concerned about, again,
2 some States being too permissive in granting class
3 certifications, and they were worried about some of
4 those same factors.

5 But, you know, one of the primary concerns
6 on all -- in CAFA itself, though, was protecting the
7 absent class members' rights, and this Court's noted
8 those same rights in *Amchem* and *Ortiz*. In many of its
9 cases, your cases, you've noted that that's a principal
10 concern. And this Court has heightened the standard in
11 those class -- class settlement certifications for the
12 court to make sure that each and every element and
13 requirement is met, to ensure that -- that the
14 settlement itself is fair to all class members,
15 including the absent class members, and that, you
16 know -- and that the attorney fees are fair.

17 JUSTICE ALITO: Wouldn't it be a violation
18 -- wouldn't it be a violation of due process if Congress
19 enacted a statute or if there were a rule adopted that
20 said that the first ruling on class certification by a
21 Federal court binds all members of the class in any
22 other Federal litigation? Would that be a -- then they
23 would retain their individual claims, but there could
24 not be another -- another class action -- another class
25 action filed. Would that be a due process violation?

1 MR. MONAHAN: In all other Federal cases, I
2 believe that that might survive a due process challenge,
3 because you're limiting it to the same legal standard in
4 those cases. Certainly, I think you could -- because --
5 because it would be applying, though, to absent class
6 members who were not truly parties, I believe some of
7 those due process concerns could be raised.

8 But you certainly would not have the
9 elements of the federalism; you would not have the
10 different legal standard that we have with State courts
11 applying their own rules.

12 JUSTICE ALITO: Well, is there a due process
13 right to have class action?

14 MR. MONAHAN: Your Honor, this Court has
15 noted a procedural right to seek class certification.
16 There is no right to have one. We have to meet the
17 requirements in order to --

18 JUSTICE ALITO: But what if Congress just
19 decided to get rid of class actions altogether? Would
20 that be unconstitutional?

21 MR. MONAHAN: Your Honor, I -- I certainly
22 would hope that they would provide notice and an
23 opportunity for people to come and make their arguments
24 and to argue both sides of the question. But, no, I
25 don't believe so.

1 JUSTICE BREYER: Did it ever happen -- did
2 you ever come across an instance before where in a
3 Federal court a judge in the district court says, no,
4 you can't have a certification, no; and then a different
5 plaintiff went to a different Federal court in a
6 different part of the country and asked for a similar
7 certification? Have you ever found anything like that
8 in precedent, that it's in two Federal courts rather
9 than the State/Federal?

10 MR. MONAHAN: Yes, Your Honor. I believe
11 that maybe Thorogood, the recent Thorogood case out of
12 the Seventh Circuit, might involve something similar to
13 that.

14 JUSTICE BREYER: And did they say -- did
15 they say in -- in that case that the second judge is
16 bound as a matter of stare decisis, or is he bound as a
17 matter of collateral estoppel?

18 MR. MONAHAN: Based on a collateral estoppel
19 preclusion principles, Your Honor, which --

20 JUSTICE BREYER: So it's the same issue as
21 here?

22 MR. MONAHAN: Well, it's even somewhat
23 worse, in my opinion, because not only did they have a
24 different party, but they went from a nationwide class
25 to a statewide class, and that itself is -- you know,

1 that's -- even Bridgestone that would be all right
2 under.

3 JUSTICE SCALIA: Of course, you -- you would
4 say that the subsequent plaintiff is not bound if he was
5 not given notice and an opportunity to opt out, even if
6 he came back to the same court, right?

7 It would be a stupid thing to do.

8 MR. MONAHAN: Yes, Your Honor.

9 JUSTICE SCALIA: And he's probably going to
10 lose, but you'd say he's not bound, right?

11 MR. MONAHAN: Yes. Yes, that's because he's
12 not the same party, but the legal standard would be the
13 same, and it would not be a wise move.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Beck.

16 ORAL ARGUMENT OF PHILIP S. BECK

17 ON BEHALF OF THE RESPONDENT

18 MR. BECK: Mr. Chief Justice, and may it
19 please the Court:

20 The core issue here is whether absent class
21 members can be bound by a denial of class certification
22 where there was adequate representation on that issue
23 but not notice and opportunity to be heard.

24 JUSTICE KAGAN: When you say "on that
25 issue," Mr. Beck, on what issue? Because I think that

1 there is an argument in this case that the West Virginia
2 approach to class certification is different from the
3 Eighth Circuit's approach, that Rezulin would not have
4 been the way that the Eighth Circuit would have
5 approached the class certification question.

6 MR. BECK: The issue that was decided and
7 preclusive was the issue of predominance, Your Honor,
8 and what happened there is that Judge Davis, the judge
9 who was supervising the multidistrict litigation, he
10 made a determination under West Virginia law as to
11 what's required to make out an economic loss claim, and
12 he concluded that what is required is individual proof
13 of injury as well as individual proof of causation. And
14 then he went on to describe what kind of evidence would
15 be necessary to do that.

16 So he made a legal determination, and then
17 he went -- and then after looking at what kind of
18 evidence would be required -- excuse me -- made a -- I
19 think a mixed law and fact determination that, given
20 that, individual issues would predominate over common
21 issues. His -- his interpretation of West Virginia law
22 was later vindicated by the West Virginia Supreme Court
23 in White, where they held that -- that there is a
24 requirement of individual proof of injury, which had
25 been contested by Petitioners, and it's clear that it's

1 going to require the same exact kind of inquiry.

2 So what we have is that there's no
3 suggestion in Rezulin or anywhere else that the
4 predominance requirement under the West Virginia version
5 of Rule 23, which is essentially identical to the
6 Federal version, has any other content that's different
7 from the Federal version.

8 In Rezulin, there's a suggestion that when
9 -- that the West Virginia courts would treat differences
10 in -- in damages or reliance as less significant than
11 some Federal courts, but nothing at all that suggests in
12 any way that if the underlying cause of action requires
13 individual proof of injury and causation, that somehow
14 that common questions are going to predominate over
15 individual questions. There's no suggestion of that.

16 JUSTICE GINSBURG: We couldn't know. We
17 couldn't -- when they went to the West Virginia Supreme
18 Court, that was before this White v. Wyeth. They were
19 arguing a question of substantive law: What do we have
20 to show in order to get damages, when we say we weren't
21 hurt by the drug? We're saying -- we're not saying we
22 didn't get any benefit from it; we're just saying we
23 paid more money for it than we should because it wasn't
24 of the quality that it was represented to be.

25 When the Federal judge said, having to make
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1 a determination of West Virginia law, no, it's not the
2 law; you have to show causation, some harm to you. But
3 then when they -- when these plaintiffs went to the West
4 Virginia court, that was still an open question of West
5 Virginia law, and the West Virginia courts might have
6 decided it differently than the Federal court, right?

7 MR. BECK: Yes. Well, yes -- when the
8 Federal district judge made the determination, it was in
9 Mr. McCollins's case, and he's called upon to resolve
10 questions of State law just like courts are every day in
11 diversity actions. And he resolved the question of
12 State law, what's required by the West Virginia Consumer
13 Credit and Protection Act.

14 JUSTICE GINSBURG: But sometimes Federal
15 judges -- they try their best, but they're not the last
16 word on what the State law is.

17 MR. BECK: And some -- and, Your Honor, if
18 -- if for example, Judge Davis had found as he did in
19 McCollins, and then he had issued the same injunction,
20 and then the White case had come down the other way,
21 that -- that says that there is no requirement of
22 injury, then conceivably the Petitioners could have gone
23 back to Judge Davis and asked for relief from his
24 injunction. And then we'd have an interesting
25 question --

1 JUSTICE GINSBURG: Not these Petitioners.

2 They weren't parties to the case before --

3 MR. BECK: No, but they were -- they were
4 parties to the injunction proceeding. They were the
5 defendants in the injunction proceeding. So they're
6 subject to an injunction, and then -- then the law
7 changes, or the law is declared differently by the West
8 Virginia Supreme Court.

9 Nothing would have precluded them from
10 coming back in front of Judge Davis and said:

11 Respectfully, sir, you -- you were wrong in your
12 prediction, and we'd like to be relieved from the
13 injunction.

14 And then we'd have a very interesting
15 question about whether being correct or incorrect is --
16 is something that can eliminate the law of preclusion,
17 because normally if -- if a party is precluded, they're
18 not allowed to say I shouldn't be precluded because I
19 think the judge made a mistake on the law. But we don't
20 have that here because, in fact, Judge Davis was
21 vindicated on the content of West Virginia law.

22 JUSTICE KAGAN: Mr. Beck, I'm -- I'm not
23 sure that White answers the question that I asked,
24 because White decided a matter of substantive liability,
25 and the question I asked was whether the approach to

1 class certification was different in the Eighth Circuit
2 and in West Virginia.

3 MR. BECK: Yes.

4 JUSTICE KAGAN: If you look at Rezulin, if
5 you compare to it some Eighth Circuit cases, there seems
6 to be a difference in at least tone, shall we say, about
7 the extent to which a finding is required that common
8 issues predominate.

9 MR. BECK: I think that, actually, Judge
10 Davis took into account the difference in tone, and he
11 looked very carefully at Rezulin, and he said that what
12 Rezulin was focusing on was individual questions of
13 damages, which defendants often argue is enough so that
14 individual questions predominate, individual questions
15 of reliance, which we also often argue mean that
16 individual questions predominate.

17 But he said this is different, because this
18 is -- in order to prove liability, they've got to
19 establish individual injury, which means, on a
20 person-by-person basis, either that they were harmed by
21 the drug or that the drug didn't work to lower their
22 cholesterol as -- as it was supposed to, and they have
23 to show that whatever the violation of the Consumer
24 Fraud Act was is causally linked there.

25 And he said that's a different animal from
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1 questions of reliance and damages. And -- and I've
2 heard or read no conceivable explanation about how,
3 under any standard of predominance, you could have
4 common questions predominating when every single member
5 of the class is going to have to examine the medical
6 records to see whether their cholesterol came down,
7 whether they suffered any side effects, and -- and if
8 their cholesterol didn't come down and they did suffer
9 side effects, how that could be linked to a violation of
10 the Consumer Fraud Act.

11 So what Judge -- Judge Davis didn't depart
12 from Rezulin at all. Judge Davis said: This goes to
13 core questions of liability, and as I interpret the West
14 Virginia statute, in order to establish liability,
15 they're going to have to show that on an
16 individual-by-individual basis.

17 And the relevance of White is that he's
18 correct. Of course, White even goes further and says,
19 because of that, there's no cause of action under the
20 West Virginia Consumer Credit and Protection Act.

21 JUSTICE GINSBURG: How do you answer that
22 they have claims that do not involve the consumer,
23 whatever it is; that they have fraud claims and some
24 other kind of claims?

25 MR. BECK: A warranty claim, Your Honor.

1 There was also a warranty claim in the McCollins case,
2 the original Federal case. Their warranty claim is no
3 different, and the requirements of a warranty claim are
4 no different.

5 Fraud, obviously, requires individual proof
6 of injury and causation. The fraud is -- I mean, the
7 Consumer Fraud Act is -- is an effort to make it easier
8 for plaintiffs to make out a cause of action. If you
9 can't make out a cause of action under the Consumer
10 Fraud Act, it certainly can't be made out under fraud.

11 And in terms of preclusion law, what the
12 Eighth Circuit observed was that when there's the -- the
13 same core set of facts that make out a cause of action,
14 adding another label to it doesn't change the preclusion
15 analysis.

16 JUSTICE GINSBURG: Mr. Beck, if you're right
17 about issue preclusion, then if Bayer had gone into the
18 West Virginia court and said, West Virginia court, Judge
19 Davis has decided this case in Minnesota Federal
20 District Court -- issue preclusion -- that's one thing,
21 but what was used here was quite a heavy gun, and that
22 is the -- an empty suit injunction, which seems to say:
23 We're not going to trust the West Virginia court to
24 apply issue preclusion. We're going to stop that court
25 from proceeding altogether.

1 And the anti-suit injunction is -- it's a
2 very strong weapon, and even though it's the -- the
3 clients who are being precluded, it's really saying to
4 another court: We're not even going to let you get to
5 this question; we're going to stop you.

6 So maybe you could be right about preclusion
7 but wrong about use of the anti-suit injunction.

8 MR. BECK: Well, Your Honor, the -- any time
9 that someone invokes the re-litigation exception to the
10 Anti-Injunction Act, by definition, an alternative would
11 be to go into the second court and -- and just simply
12 plead preclusion. That would always be available. And
13 if that were sufficient, then there would be no
14 re-litigation exception to the Anti-Injunction Act.

15 Here's a reason why it's very important in a
16 case like this: Under their theory, they -- they could
17 not only file a class action in one county in West
18 Virginia, and then if we couldn't get an injunction but
19 we pled preclusion, and if -- and if we prevailed, they
20 could file one in another county. And in West Virginia,
21 county judges don't look to judges from other counties
22 as stare decisis.

23 And so they could go, under their approach,
24 to another county, and that judge might agree with us.
25 And then they go to another county, and eventually

1 they're pretty confident that they'd find one judge in
2 one county in West Virginia who would reject our
3 preclusion analysis and allow the case to go forward.
4 And in West Virginia, we have no right to have an appeal
5 heard. There is no intermediate appellate court, and
6 there's no appeal of right to the West Virginia Supreme
7 Court.

8 JUSTICE KENNEDY: Well, of course, you're
9 arguing the principle. What would have happened if the
10 class had gone -- those who wanted to be in the class
11 had gone first to the West Virginia court, and the West
12 Virginia court had denied class certification? Would
13 that preclude a later Federal court from granting class
14 certification?

15 MR. BECK: If the -- if the West Virginia
16 court had denied class certification on an issue that is
17 present in Rule 23, then it would be preclusive under
18 Rule 23. It would be under the full faith and credit
19 statute, where Federal courts have to give full faith
20 and credit to State judgments to the same extent that --
21 that a State would.

22 If, however, Your Honor, the court said in
23 West Virginia, well, they meet all of the requirements
24 of our Rule 23, but under West Virginia law, we have
25 discretion to deny a class even if they meet all the

1 requirements of Rule 23, then that would be an
2 interesting question, because under Federal procedure,
3 under this Court's opinions, if someone meets all the
4 requirements of Rule 23, then class certification is
5 appropriate.

6 JUSTICE KAGAN: Mr. Beck, the re-litigation
7 exception of the Anti-Injunction Act speaks in terms of
8 judgments. Why is the denial of class certification a
9 judgment?

10 MR. BECK: I'm not sure that it would be
11 in -- in the mine-run case, but we don't have it. We --
12 one of the reasons that this case is unusual is that we
13 actually have a real-life final judgment that
14 incorporates the denial of class certification.

15 JUSTICE KAGAN: But the judgment, if I
16 understood it correctly -- there was just a
17 contemporaneous summary judgment motion, and the court
18 granted summary judgment as well. But the denial of
19 class certification isn't responsible for the judge's
20 dismissal of the suit.

21 MR. BECK: Well, but it is -- it is merged
22 into the judgment. It's explicitly a part of the
23 judgment. It's in the judgment itself. I think it's
24 our Joint Appendix 83, is it?

25 JUSTICE KAGAN: So that sounds like a very
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1 contingent answer to my question. If that were not the
2 case, if it -- if it was the denial of a class
3 certification, but then the action proceeds as a
4 non-class litigation, you think that there would be no
5 judgment, and so the Anti-Injunction Act would not
6 apply?

7 MR. BECK: No, Your Honor. I think that
8 would be a tougher question. It's posed in some of the
9 other cases percolating up, the Thorogood case, for
10 example, or some of them out of the Seventh Circuit.

11 I think that, under normal preclusion
12 analysis, decisions that have not reached the point
13 where there's a formal final judgment can still be given
14 preclusive effect if they're sufficiently final, that a
15 court says it's exceedingly unlikely that we could
16 reconsider. There's another --

17 JUSTICE GINSBURG: That's true about --
18 that's true about preclusion, but -- and so that you
19 might go into the West Virginia court and say this
20 second plaintiff should be precluded, but as Justice
21 Kagan pointed out, you're dealing with the
22 anti-injunction statute --

23 MR. BECK: And I --

24 JUSTICE GINSBURG: -- that talks about
25 judgment.

1 MR. BECK: And I was about to say, Your
2 Honor, that -- that under the Anti-Injunction Act, it
3 might actually be a different analysis, and because the
4 issue isn't present here, we haven't briefed it, but I
5 could see under the -- looking at the statutory language
6 of the re-litigation exception that talks about
7 judgments and also looking to the federalism concerns
8 that -- that inform the -- the Anti-Injunction Act, one
9 could argue, in an appropriate case, that whatever the
10 law is as to preclusion generally, when it comes to the
11 Anti-Injunction Act, we're going to require more in the
12 form of a -- of a formal judgment that -- that
13 incorporates the particular ruling. As I said, that's
14 not our case, but I could --

15 JUSTICE KAGAN: Oh, but why isn't it really,
16 because here what happened was that there was a denial
17 of class certification and there was a granting of a
18 summary judgment motion at one and the same time? But
19 the thing that was responsible for getting the case out
20 of court was the granting of the summary judgment
21 motion, not the denial of class certification. That was
22 extraneous to the judgment that the case was dismissed.

23 MR. BECK: Well, I think it's actually --
24 while -- while it was collateral to the summary judgment
25 motion on Mr. McCollins's individual claim, it's

1 actually essential to the judgment in -- in terms of
2 including it, in terms of who's bound by -- by -- by the
3 judgment. If class certification had been -- we -- we
4 need to know once the judge has ruled on class
5 certification, whether he's granted it or denied it, in
6 order to know who's affected by the judgment on the
7 merits and otherwise.

8 And if he had granted the motion to certify
9 the class, then there would be one set of effects coming
10 out of a final judgment. If he denies the motion to
11 certify the class, there's a different set of effects
12 that come out of that judgment.

13 So, it is essential to the judgment, in our
14 mind, and, incidentally, the essential-to-the-judgment
15 point under preclusion law is not one that -- that the
16 Petitioners have ever raised below. It's not one that
17 is in their questions presented or their cert petition
18 or their brief. So this isn't an issue that -- that
19 they've preserved or argued, but we do believe, quite
20 clearly, that the class certification denial was an
21 integral part of the final judgment, and -- and,
22 obviously, it's in there on its terms.

23 JUSTICE SOTOMAYOR: Counsel, under the
24 Anti-Injunction Act, would it permit a blanket
25 injunction that says, against all future State court

1 class proceedings across the United States? Could a
2 court just order a re-litigation bar?

3 MR. BECK: I don't believe so, Your Honor.
4 I think that -- I think that in this Court's Chick Kam
5 Choo decision, there was an emphasis that under the
6 Anti-Injunction Act you have to have, you know, the same
7 issue litigated, and there was a concern about whether
8 there was a significant difference in standards.

9 JUSTICE SOTOMAYOR: That's my question to
10 you.

11 MR. BECK: Yes.

12 JUSTICE SOTOMAYOR: So articulate what we're
13 comparing when we're saying that the re-litigation bar
14 can apply to a procedural ruling.

15 MR. BECK: Yes.

16 JUSTICE SOTOMAYOR: We started a little bit
17 on the question. Is there any requirement that that
18 issue have been fully and fairly adjudicated in the
19 prior proceedings?

20 MR. BECK: Oh, I think -- I think that for
21 the -- for -- for preclusion to apply, even before one
22 gets to the Anti-Injunction Act, there's a requirement
23 that the issue be fully and fairly litigated. I think
24 that -- I think the focus would be, as Judge Davis's
25 was, is there a difference in -- in the class

1 certification procedures that would -- that would result
2 in a -- in a different outcome, given the particular
3 issue that's been decided. So that -- so that there --
4 you know, I could conceive of issues that would be
5 dispositive in a Federal court on class certification
6 that would have nothing to do with --

7 JUSTICE SOTOMAYOR: All right. Let's
8 take --

9 MR. BECK: -- with certification in State
10 court.

11 JUSTICE SOTOMAYOR: You talked about
12 different standards. Your adversary said that, in this
13 State, reliance doesn't need to be proven. Let's assume
14 that fact. And the district court's ruling here was
15 based on a reliance requirement and said no predominance
16 because each individual plaintiff will have to prove
17 reliance. Does that become the same -- a different
18 standard or not?

19 MR. BECK: Judge Davis's opinion was not
20 based in any way on reliance.

21 JUSTICE SOTOMAYOR: I -- I -- I'm posing it
22 as a hypothetical.

23 MR. BECK: Oh, I'm sorry. I'm sorry.

24 JUSTICE SOTOMAYOR: As a hypothetical.

25 MR. BECK: If -- if a State court had said

1 that this thing, that -- that reliance, or whatever,
2 that is talked about so much in Federal courts, we don't
3 care about that, that's not part of our standard,
4 then -- then that would be -- and that was the basis of
5 the Federal court's decision, then I think you would be
6 applying different standards, and under Chick Kam Choo,
7 there wouldn't be preclusion.

8 JUSTICE SOTOMAYOR: You see, the problem is
9 that I don't know how you get and when you get to the
10 question of whether reliance needs to be proven or not,
11 if you're going to bar the State court from reaching
12 that -- that substantive question, not that substantive
13 issue, but that substantive question --

14 MR. BECK: The --

15 JUSTICE SOTOMAYOR: -- which is not very
16 different from here, which is, what does economic loss
17 require in terms of proof?

18 MR. BECK: Well, we're -- we're moving now
19 from what is in Rule 23 in Federal and State
20 jurisprudence to what is the underlying cause of action
21 when we -- when -- you know, whether reliance is a part
22 of the claim. We keep saying "reliance" and --

23 JUSTICE SOTOMAYOR: Well, I'm shifting them
24 only to try to get --

25 MR. BECK: Okay.

1 JUSTICE SOTOMAYOR: -- a sense of what
2 different standards mean --

3 MR. BECK: Okay. And -- and --

4 JUSTICE SOTOMAYOR: -- to you, and how we
5 articulate that rule in a way that doesn't preclude --
6 doesn't permit the barring --

7 MR. BECK: I think --

8 JUSTICE SOTOMAYOR: -- of claims when
9 there's a different standard.

10 MR. BECK: I think -- I think, Justice
11 Sotomayor, that you have to distinguish between Rule 23
12 and the underlying State law that's the subject of the
13 lawsuit. And any time a -- a Federal court is looking
14 at whether a class action can be certified for a
15 violation of State law, it has to make a determination
16 of whether -- of what State law is in terms of how you
17 prove a violation, what the elements are. And that's
18 what -- that's just -- you have to do that every single
19 day.

20 And you make that kind of determination, and
21 then you move to the next step of whether that should be
22 preclusive, which is when Rule 23 comes into play. And
23 I think that's the point where you say, are the State
24 standards under Rule 23 different from the Federal
25 standards?

1 JUSTICE SCALIA: I'm -- I'm the -- I'm the
2 party trying to bring the later class action, and you
3 tell me I can't do it because somebody else sought a
4 class action, and -- and it -- and it was denied. And I
5 say: Well, I don't care. I -- you know, that's
6 somebody else. That was not me. I was not -- and not
7 only was I not a party to that case, I think that person
8 had a lousy lawyer, and had I chosen the lawyer, we
9 wouldn't have lost that point.

10 What's your response to that? You cannot
11 even say, as you can where the class has been certified,
12 well, at least there was a determination by some judge
13 that the absent parties were adequately represented.
14 There hasn't been even that determination.

15 MR. BECK: Well, Your Honor, there was that
16 determination in this case at the injunction stage.
17 They did claim -- they -- they said, well, was this --
18 was this lawyer from West Virginia who made exactly the
19 same arguments that they made, was he -- did he
20 adequately represent our interests?

21 JUSTICE SCALIA: Well, you do that ex post.

22 MR. BECK: Well, I think, under the --

23 JUSTICE SCALIA: You want to litigate this
24 later, and --

25 MR. BECK: Well, adequacy, of course, is
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1 part of Rule 23 analysis, but it's also independently a
2 part of preclusion law analysis, where in order to be
3 precluded -- for a nonparty to be precluded, then you
4 have to do the analysis that's called for in Taylor v.
5 Sturgell, where you have to say in order to preclude a
6 nonparty, does it meet the two-part test of Taylor v.
7 Sturgell?

8 The first part: Were their interests
9 aligned? Here their interests were perfectly aligned.
10 And then the second part is an either/or: Did the party
11 in the first action understand herself -- in this case
12 himself -- to be acting in a representative capacity, or
13 did the court take care to protect the interests of the
14 nonparties?

15 CHIEF JUSTICE ROBERTS: But that's a very
16 subjective decision whether the lawyer is -- right here.

17 MR. BECK: I'm sorry.

18 CHIEF JUSTICE ROBERTS: -- whether the --
19 the lawyer is adequate or not. People have different
20 views about what kind of lawyer they want, and I can see
21 somebody who doesn't even know that this action is going
22 on saying: Well, I don't care if you think the lawyer
23 is adequate. I don't think he is. Besides I wanted my,
24 you know, brother-in-law to be the lawyer.

25 MR. BECK: Well -- and in every preclusion

1 case there's a -- there's a question about adequacy, and
2 it focuses not on whether someone likes the lawyer or
3 they've got a brother-in-law who is a lawyer. It
4 focuses on whether the parties' interests are aligned,
5 and McCollins's interests were identical to Mr. Smith's
6 and Ms. Sperlazza's. And it -- and it points to whether
7 Mr. McCollins understood that he was acting in a
8 representative capacity and to whether Judge Davis took
9 care to protect the interests of nonparties.

10 So it doesn't say that everybody gets to
11 pick their own lawyer. If that were the rule, there
12 would be no law of preclusion because nobody would ever
13 pick the same lawyers.

14 My -- one other point I want to make --

15 JUSTICE SCALIA: But it -- I'm sorry.

16 CHIEF JUSTICE ROBERTS: I was just going to
17 say -- it's odd to say you're precluded. The whole
18 point is the basic principle that you're entitled to
19 your day in court. And you're saying, well, you're not
20 entitled to your day in court if somebody else had a day
21 in court and they had a good lawyer.

22 MR. BECK: And -- and that is exactly the
23 question that's posed by the law of nonparty preclusion,
24 and -- and as this Court's opinion in Taylor v. Sturgell
25 said, there are circumstances where a nonparty can be

1 precluded based on litigation from someone else, and
2 I -- I referenced the test, and the first point I wanted
3 to make --

4 JUSTICE SCALIA: How can you -- how can you
5 possibly find that in the first action the lawyer
6 understood that he was acting in a representative
7 capacity?

8 MR. BECK: Well, it's the --

9 JUSTICE SCALIA: He tried to act in a -- but
10 -- but his representation was denied.

11 MR. BECK: It's the party rather than the
12 lawyer, and -- and it's when -- when he commenced that
13 litigation and when he litigated the issue that we're
14 talking about, of class certification, there's no doubt
15 in the world that he is -- that he understood himself to
16 be acting on behalf of a class. That -- that's why he
17 was litigating class certification.

18 And -- and, Your Honor, what we -- we have
19 here also, because we're -- we're kind of verging into
20 the due process analysis, you have to start with the
21 question of what is the interest that's at stake here.
22 The injunction doesn't forbid any -- any plaintiff from
23 pursuing their individual claim or arguing anything they
24 want about underlying West Virginia law. It only
25 precludes them from going forward in a class action, and

1 that is --

2 JUSTICE GINSBURG: But that's -- that's
3 often theoretical because on these small claims, it's
4 class action or nothing. Nobody's going to pay a lawyer
5 to go to court with a \$100 case.

6 MR. BECK: These I don't think fall in that
7 category, Your Honor. There's -- it's \$200 statutory
8 penalty per violation, which means per prescription
9 refill. There's -- there's attorney's fees on top of
10 that; there's punitive damages on top of that. The
11 McCollins case in Federal court was that kind of case,
12 and he pled that he satisfied the jurisdictional amount
13 of \$75,000. But even if it's a small claim, the -- that
14 doesn't mean that the opportunity to litigate it in a
15 class action and join other parties is a property
16 interest that implicates due process protections. That
17 is --

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 Thank you.

20 Mr. Monahan, you have 4 minutes remaining.

21 REBUTTAL ARGUMENT OF RICHARD A. MONAHAN

22 ON BEHALF OF THE PETITIONERS

23 MR. MONAHAN: In this case, the MDL court
24 did not seek to bind any parties. The decision was deny
25 class certification; the decision was not to bind any

1 absent class members.

2 Moreover, in cases talking about adequate
3 representation, such as *Hansberry v. Lee* and the
4 *Richards* case, one of the things this Court noted was
5 that normally you have a judgment that indicates who it
6 purports to bind. There's nothing in the district
7 court's initial judgment indicating that the absent
8 class members are bound by the denial of class
9 certification, nothing whatsoever.

10 In *Devlin v. Scardelletti*, which they say
11 supports their opinion, clearly it supports our
12 position, because that was a case dealing with a
13 certified class settlement, where there was objections.
14 And because the objections were made and overruled, this
15 Court noted that those people could appeal directly
16 without having to intervene in that case. And --

17 JUSTICE GINSBURG: Well, you have to -- I
18 think you would concede that the Seventh Circuit's now
19 two decisions, one in *Bridgestone* and then the other in
20 *Thorogood* -- the Seventh Circuit thinks it can do this.

21 MR. MONAHAN: Yes, Your Honor, and the
22 Seventh Circuit, for instance, in *Bridgestone*, which --
23 which the Eighth Circuit relied on in this case,
24 indicated that adequate representation was one of the
25 factors, our right to appeal was one of the factors, and

1 then our individual claims still existing, consisted
2 sufficient due process. But, one, we had no notice, so
3 how can we appeal anything if we don't know it exists?
4 And this Court has noted that in many cases, in Mullane
5 and Richards and throughout, that if you have no notice
6 of a matter, how can you ever have an opportunity to be
7 heard, because you don't know about it?

8 Now, as to adequate representation, that was
9 something I wanted to turn to --

10 JUSTICE KENNEDY: But just on notice, does
11 the record show when the client first came to the
12 attorney?

13 MR. MONAHAN: Your Honor, our case was filed
14 in September 2001. The McCollins case was filed in
15 August 2001, and nobody knew about the other one at all.
16 I mean, these cases were filed almost the same time,
17 less -- less than a month apart in different counties,
18 different attorneys, different named plaintiffs.

19 I did want to note in Devlin v.
20 Scardelletti, Justice Scalia noted in his dissent that
21 not even petitioners were advancing "the novel and
22 surely erroneous argument" that absent class members
23 were considered parties before class certification.

24 JUSTICE BREYER: Do we know that in the
25 record, that the attorneys didn't even know about each

1 other's cases? Is that borne out? I mean, is that an
2 issue?

3 MR. MONAHAN: Your Honor, we've argued that
4 throughout. We knew nothing about it. And see, the MDL
5 proceeding -- we had, like, one or two cases that were
6 filed, individual actions where the plaintiffs did not
7 want to seek class action status, and those got removed
8 to Federal court and transferred. The MDL court
9 provides notice of the orders affecting all cases in
10 general and then provides you with orders in your own
11 case. You do not get orders about other individual
12 cases. So we never knew about McCollins when it was
13 seeking class certification.

14 I would note that the White case here in no
15 -- no way vindicates the district court. The White case
16 did say that reliance did not have to be proven if you
17 have fraudulent concealment or suppression. Rather, the
18 standard is all you have to do is you have to show:
19 Would an objectively reasonable person have bought the
20 product had they known all of the information that was
21 concealed and suppressed? And, clearly, that can be
22 dealt with on a common basis.

23 But a confusing aspect here, it seems like
24 many people try to argue that for class actions that you
25 have to have all common issues or else you can't have

1 one. And that's unfortunate because I'm not aware of
2 any class action where you don't have at least --

3 JUSTICE GINSBURG: Can I just go back to
4 what you said before? I thought the West Virginia
5 Supreme Court said you can't have actions for drugs
6 under the consumer whatever.

7 MR. MONAHAN: Yes, they added -- they added
8 a syllabus point 6, the last paragraph of the opinion, a
9 paragraph that says that, from now on, the --
10 prescription drug purchasers cannot have such a claim.
11 And that was unknown to anybody. It was not raised as
12 part of a certified question and had not been litigated
13 or argued. So that's part of the petition for
14 rehearing, is my understanding.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel,
16 counsel.

17 The case is submitted.

18 (Whereupon at 12:05 p.m., the case in the
19 above-entitled matter was submitted.)

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