‘Bad Vehicles’ Could Cause Crash in Class Actions

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In U.S. Supreme Court parlance, a "bad vehicle" is a case whose factual or procedural posture exerts an adverse influence on the legal rule that the justices announce and apply. As we all know, the court does not issue legal rulings sua sponte. Rather, it can only decide specific cases selected from the pool of petitions seeking review at any given time.

Almost all of those petitions have "warts" of some kind — factors that give a real-world gravitational tug to the lofty legal questions being considered. Those factors are often factual or atmospheric issues (like a particularly odious litigant seeking relief), or perhaps procedural quirks, with which the justices must grapple in the course of applying a legal rule. When sufficiently pronounced, those factors can influence the scope and tone of the legal rule itself that is announced.

From the perspective of plaintiffs class action attorneys, the Supreme Court picked three exceedingly bad vehicles by which to consider important questions relating to class actions. Each of the three cases carries atmospheric "baggage" that could push the justices to announce a legal ruling limiting class action practice in different respects.

Smith v. Bayer Corp.

One bad vehicle could expand the preclusive effect of denials of class certification. From 1997 to 2001, Bayer distributed a cholesterol-reducing drug called Baycol. Bayer voluntarily withdrew the drug in light of concerns about its side effects.

Not surprisingly, a flood of lawsuits followed the recall. Those lawsuits were consolidated in the District of Minnesota by the Multidistrict Litigation Panel. One of them sought to certify a class of Baycol purchasers residing in West Virginia which, before removal, had been filed in the state court there. The putative class sought damages for economic loss caused by Bayer's alleged breach of warranties and violation of the state's consumer-protection statute. In August 2008, the district court granted Bayer's motion to deny class certification, because individual issues of fact predominated, and entered summary judgment for Bayer, because the claimants' economic-loss theory was invalid under West Virginia law.

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A mere five days later, *Smith v. Bayer Corp.* was filed in West Virginia state court. Seeking identical relief through identical claims as the recently rejected class action, the *Smith* plaintiffs added two West Virginia residents as defendants to preclude removal to federal court.

Undeterred, Bayer sought an injunction from the MDL court in Minnesota pursuant to the relitigation exception of the Anti-Injunction Act (which allows a federal court to issue orders "to protect or effectuate its judgments"). The Minnesota district court agreed with Bayer and enjoined the *Smith* plaintiffs from relitigating the certification of a class of West Virginia residents on an economic-loss theory. [The injunction expressly permitted each plaintiff to pursue any such claims on an individual basis.] After the 8th Circuit affirmed this ruling, the *Smith* plaintiffs successfully petitioned the Supreme Court to address the issue.

Plaintiffs' class action lawyers across the country might soon wish the court had passed on the case, which they should view as a bad vehicle on several levels:

• From all appearances, the *Smith* plaintiffs are simply trying to get a second bite at the apple after suffering an adverse judgment in the MDL court. Their lawsuit was filed five days after the MDL ruling, and it raises the same procedural and substantive issues. West Virginia's version of Rule 23 (class-action certification) is substantively identical to the federal version.

• To prevail, the *Smith* plaintiffs have to convince the justices, essentially, to impose massive limitations on the "virtual representation" of potential class members in class certification litigation — which would eliminate finality in class-certification litigation until the last class member has taken a shot. The court will be loathe to endorse serial relitigation of class-certification determinations.

• The justices might subconsciously be looser with their (critical) language because this specific issue is unlikely to recur. The Class Action Fairness Act of 2005 permitted removal of class actions to federal court, even absent complete diversity, which would have eliminated Bayer's need to resort to the Anti-Injunction Act. (Unless there is a substantial number of pre-2005 class actions being litigated, this begs the question why the court agreed to hear the case in the first place.) In the years to come, negative Supreme Court dicta might germinate into negative holdings in the lower courts.

• The MDL court's ruling permitted individual claims to proceed in state court. It did not deny anyone a day in court; it simply enjoined the use of the class action mechanism, which somewhat enervates the plaintiffs' appeals to fairness.

• The *Smith* plaintiffs did not claim to have suffered any physical injury. The plaintiffs acknowledged that Baycol worked for them by reducing their cholesterol, as advertised, but they nonetheless demanded damages because Bayer's recall indicated that the product did not work well for everyone in violation of the product's warranties and representations. This is a highly unappealing theory of liability and will not motivate any justice to work hard to preserve the plaintiffs' claims.

Wal-Mart v. Dukes

The bad news continued for the plaintiffs' class-action bar when the Supreme Court agreed to hear *Wal-Mart v. Dukes* . Wal-Mart is the nation's largest private employer. In a 6-5 en banc ruling, the 9th U.S. Circuit Court of Appeals affirmed certification of a staggeringly large class of more than a million people — every female employee in every job classification for any period of time since 1998 at any of Wal-Mart's 3,400 stores — alleging gender discrimination. Specifically, the plaintiffs seek to hold Wal-Mart responsible for gender stereotyping and discrimination that allegedly occurred as a result of the store's practice of delegating near-total discretion to individual managers across the country. The Supreme Court has been asked to reverse the lower courts' class-certification decision.

This case is a bad vehicle for an obvious reason — the lower courts here certified the largest employment-discrimination class action in history. The class consists of over a million people seeking billions of dollars, among other relief. It is no hyperbole to say that plaintiffs' lawyers could not have assembled a bigger class with which to litigate the question of "how big is too big?" The size is so big, in fact, that the plaintiffs essentially are forced to adopt a position that there can be no limits at all on the size of a class — an extreme position that other cases would not necessarily have forced them to take before the court.

The bad vehicle gets even worse, though, because of the diffuse nature of the alleged discrimination here. The plaintiffs are not attacking a single Wal-Mart policy, applied from the top-down at its stores across the country; rather, they are making a much more unwieldy claim to litigate through the class action mechanism, namely, that each individual manager in each of Wal-Mart's thousands of stores practiced gender stereotyping and discrimination. The proposed claim practically screams that individual issues of fact will predominate.

The plaintiffs' best hope to avoid a bad ruling is a threshold procedural issue that might derail the justices' consideration of the class-size question — an unusual circumstance in which one bad vehicle lurks within another. The lower courts certified this class action under Fed. R. Civ. P. 23(b)(2), which governs class actions to obtain injunctive or declaratory relief. The plaintiffs in this case are seeking that relief, despite the fact that many putative class members lack standing for such relief because they no longer work at Wal-Mart. But the plaintiffs are also seeking compensatory and punitive damages, and the 9th Circuit nonetheless allowed Rule 23(b)(2) to be used by inventing a new test (assessing whether the monetary or equitable claims were "superior in strength"). This test not only conflicts with tests applied in other circuits, but it also conflicts with the 9th Circuit's own test employed prior to this case. Plaintiffs' class action lawyers may wish for a restrictive ruling on this question in the hopes that it might cause the court to pass on the class-size question.

AT&T Mobility v. Concepcion

Last November, the court heard argument in *AT&T Mobility v. Concepcion* , which some commentators have pegged as the case that could kill class actions forever. California courts declared AT&T's subscriber contract to be unconscionable, in large part, because it required claims to be arbitrated on an individual basis rather than resolved on a class-wide basis in any forum.

At oral argument, the justices appeared wary of disturbing the California courts' interpretation of state contract law. If so, plaintiffs' class action lawyers would have dodged a bullet because this case, like the others considered above, is a bad vehicle for assessing whether an arbitration provision is unconscionable.

The case is a bad vehicle for several reasons, including:

• The arbitration agreement at issue in this case contains what one federal judge called "perhaps the most fair and consumer-friendly provisions this court has ever seen." The agreement guarantees that consumers do not pay anything to arbitrate disputes and that they shall not receive less than $7,500 (plus twice their attorney fees) if an arbitrator awards them more than AT&T's final settlement offer. Indeed, the district court here noted that the agreement incentivized AT&T to make excess payments to customers, like the plaintiffs in this case, who claimed only modest damages. The district court also found that "a reasonable person may well prefer" dispute resolution under this agreement over participation in a class action. The plaintiffs gave themselves a high hurdle in proving that this is a contract so unfair that it "shocks the conscience."

• In addition to the solicitous terms of the agreement, the plaintiffs did not claim a viscerally offensive injury. They contended that, because AT&T advertised that their cellular phones would be "free" under a particular plan, they were injured by having to pay about $30 in sales tax on that phone. This will likely fail to generate any fervor among the justices to find a way to rule in favor of the class-action plaintiffs.

• The California courts seemed to apply different rules to this case than the ones they usually employ to evaluate unconscionability. For instance, the substantive fairness of a contract is usually judged by reference only to the parties before the court; here, the courts judged the arbitration agreement based on its effect on non-parties. And a showing of substantive unfairness usually requires terms that are "shocking to the conscience," yet the district court concluded that a reasonable person might prefer this arbitration agreement to other legal remedies.

The only thing working in the plaintiffs' favor is the Supreme Court's general reluctance to intervene in a state court's interpretation of its own state's law. As former Vice President Gore would argue, however, the court sometimes will disregard that limitation if it views the misinterpretation of state law to be sufficiently egregious and important.

Bad Vehicles

No one can predict the results in these three cases with certainty. One thing that can be known, though, is that the cases are bad vehicles for plaintiffs' class action lawyers. Those bad vehicles might lead the Supreme Court to announce a legal rule — peppered with a hostile tone and harmful dicta — that could reverberate far beyond each individual case.