[J-88-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

ANDREA D. WILKES, DAVID H. EHRENWERTH AND CHARLES K. CLARK, AS TRUSTEES OF THE MARK E. AND MYRNA L. MASON IRREVOCABLE TRUST, MARK E. MASON AND MYRNA L. MASON,	: Nos. 11 & 12 WAP 2005
	: Appeal from the Order of the Superior Court, entered May 26, 2004, at Nos. 126 WDA 2003 and 153 WDA 2003, reversing the Order of the Court of Common Pleas of Allegheny County entered December 24, 2002 at No. GD 00-0745.
v.	:
	: 851 A.2d 205 (Pa. Super. Ct. 2004)
PHOENIX HOME LIFE MUTUAL INSURANCE COMPANY, A CORPORATION AND BALANCED EQUITIES, INC., A CORPORATION,	:
APPEAL OF: PHOENIX HOME LIFE MUTUAL INSURANCE COMPANY, A CORPORATION	: ARGUED: September 12, 2005

CONCURRING OPINION

MR. CHIEF JUSTICE CAPPY **DECIDED: JULY 18, 2006**

I join the Majority Opinion in all respects save for its discussion of the purported choice of law issue regarding which state's issue preclusion law applies, as well as its treatment of the scope of review afforded to the settlement of an out-of-state class action suit.

Addressing the choice of law issue first, I see no reason to shroud the issue of which state's res judicata law would apply in this matter in a fog of ambiguity. See Maj. Op. at 15-17. In my view, Article IV, Section One of the United States Constitution, best known as the

Full Faith and Credit Clause, and the pertinent jurisprudence of the United States Supreme Court, sweep away any uncertainty in this area and answer the issue definitively.[1]

The United States Supreme Court repeatedly has spoken to the purpose, policy, and function of the Full Faith and Credit Clause. The Court's view on these concepts is aptly summarized in Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n, wherein the Court stated:

> the concept of full faith and credit is central to our system of jurisprudence. Ours is a union of States, each having its own judicial system capable of adjudicating the rights and responsibilities of the parties brought before it. Given this structure, there is always a risk that two or more States will exercise their power over the same case or controversy, with the uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue. Recognizing that this risk of relitigation inheres in our federal system, the Framers provided that 'Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.' U.S. CONST., art. IV, § 1. This Court has consistently recognized that, in order to fulfill this constitutional mandate, 'the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.'

455 U.S. 691, 703-704 (1982) (quoting Hampton v. McConnel, 16 U.S. 234, 235 (1818)). The Full Faith and Credit Clause therefore upholds the integrity of a decision properly rendered in one state court by affording it the same effect in a sister state's court. In Durfee v. Duke, the Supreme Court stayed true to this principle, stating in clear terms that "full faith and credit thus generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it." 375 U.S. 106, 109 (1963) (emphasis supplied).

The Majority Opinion, however, claims this Court may speak to the issue of "determining which jurisdiction's res judicata doctrine should prevail in an instance in which

[1] The Full Faith and Credit Act implements the protection of the United States Constitution's Full Faith and Credit Clause. 28 U.S.C. §1738.

the prior lawsuit arose in another jurisdiction." See Maj. Op. at 15. I find such a claim to be at odds with not only the Full Faith and Credit Clause of the United States Constitution and applicable precedent of the United States Supreme Court, but also with the role of this Court in following the construction and interpretation of the federal Constitution. Hall v. Pa. Bd. of Probation and Parole, 851 A.2d 859, 863 (Pa. 2004) ("It is beyond cavil that this Court is bound by the determinations of the United States Supreme Court on … the construction and interpretation of the federal constitution.").

The Majority cites Barnes v. Buck, 346 A.2d 778 (Pa. 1975), as an instance illustrating this Court's vacillation in this area of the law. See Maj. Op. at 15 n.9. Respectfully, I differ with the Majority's reading of Barnes, as I view the Barnes decision to be in harmony with the well-settled principles set forth in Durfee. See Barnes, 346 A.2d at 363 ("The decree of the Ohio court … is entitled to full faith and credit in the courts of Pennsylvania … That is, we must give it the same recognition and res judicata effect as it would receive in the courts of Ohio.") In Barnes, this Court gave proper heed to the Full Faith and Credit Clause and the United States Supreme Court's construction thereof by determining if an Ohio court would have given preclusive effect to a prior decision from an Ohio court.[2]

[2] Although I agree with the Majority's point that, in Commonwealth ex rel. McClintock v. Kelly, 134 A. 514 (Pa. 1926), this court used a Pennsylvania claim preclusion analysis to determine the effect of a prior Maryland decision, I do not think that McClintock is persuasive in illustrating this court's indecision as to which state's res judicata analysis applies. A close read of McClintock reveals that this court, like the Superior Court opinion in this matter, utilizes the Pennsylvania analysis without regard for the United States Supreme Court's Full Faith and Credit Clause jurisprudence. The McClintock decision, in this regard, is curious, as one of the federal cases it purports to rely upon, Reynolds v. Stockton, reiterates the well-settled rule in this area: "[F]ull faith and credit demanded is only that faith and credit which the judicial proceedings had in the other State in and of themselves require." Reynolds v. Stockton, 140 U.S. 254, 264 (1891).

The Majority further supports its contention that the law is unsettled as to whether the Full Faith and Credit Clause requires a state to apply the res judicata rules of the state rendering the judgment by citing to a variety of academic publications.[3] These academic sources do not add anything to the inquiry in this case as they each specifically support the general principle that a state must give the same preclusive effect to a judgment as would the rendering state. Regardless of the points that they espouse, commentaries from professors and law students, however learned, can in no way diminish the fact that both the Supreme Court of the United States and of this Commonwealth, as well as a good number of courts throughout the country, have spoken clearly to this issue, holding that the Full Faith and Credit Clause requires a state to apply the res judicata principles of the state rendering the judgment. See, e.g., Darfee v. Duke, *supra*, and Barnes v. Buck, *supra*.

As it is settled that the Full Faith and Credit Clause of the United States Constitution requires this Court to utilize New York's res judicata analysis in determining whether the decision in Michels v. Phoenix Home Life Mut. Ins. Co., No. 5318-95, 1997 N.Y. Misc. LEXIS 171 (N.Y. Sup. Ct. January 3, 1997), bars Appellees' suit, I am unwilling to characterize this as a choice of law issue. Respectfully, therefore, I reserve myself from this discrete portion of the Majority's analysis. Nevertheless, as the Majority indeed utilizes the New York res judicata formulation, as it must, I agree with the resolution of that facet of the opinion.

Similarly, while I agree with the result reached by the Majority with respect to Appellees' attack on the adequacy of the Michels settlement notice, I cannot agree with the proposition that this Court may engage in what the Majority terms a "de novo" review of the adequacy of the class notice in Michels. See Maj. Op. at 21 n.13, and 22. As the briefs in

[3] The articles merely expound theories concerning peripheral issues such as, *inter alia*, whether a court may give a *more* preclusive effect to a judgment than the rendering state and whether a state is bound to give preclusive effect to the judgment of a federal court under the Full Faith and Credit Clause. As these articles address issues not present in this case, I am puzzled by their inclusion in the Majority's opinion.

this matter reveal, there is a spirited debate amongst courts and commentators regarding whether a foreign court's class action due process determination[4] is subject to collateral review in another state court. See Appellants Brief at 32-41; Appellees' Brief at 44-50; Appellants Reply Brief at 14-17. Our Court has not yet addressed this issue. The Majority acknowledges this divide in its summation of the parties' arguments on this issue. Nevertheless, the Majority concludes in this matter of first impression that this court may engage in a "de novo" review.

As stated above, this issue is the focus of a scholarly dispute, as well as a split among both U.S. Circuit Courts of Appeal and state appellate courts. See, e.g., Epstein v. MCA, Inc., 179 F.3d 641, 648 (9th Cir. 1999) (plurality opinion advocating narrow collateral review of rendering court's due process determinations); Stephenson v. Dow Chemical, 273 F.3d 249 (2d Cir. 2001) aff'd in relevant part by equally divided court, 539 U.S. 111 (2003) (permitting a merits-based attack by absent class members not specifically covered in prior determination); Fine v. America Online, Inc., 743 N.E.2d 416, 421-24 (Ohio Ct. App. 2000) (adopting Epstein); Hospitality Management Associates, Inc. v. Shell Oil Co., 591 S.E. 2d 611 (S.C. 2004) (same); State v. Homeside Lending, Inc., 826 A.2d 997 (Vt. 2003)(citing Stephenson with approval); Sara Mauer, Dow Chemical Co. v. Stephenson: Class Action Catch 22, 55 S.C.L.REV. 467 (2004); 18A Charles Alan Wright, et al., Federal Practice and Procedure: Jurisdiction 2d § 4455, at 486 (2d ed. 2002) (describing the Epstein position as reflecting "the deeper currents that are sweeping class litigation along towards uncertain destinations" and warning that Epstein's "new view … must confront many problems").

[4] Due process determinations by a class action court are those which the United States Supreme Court has deemed necessary to bind absent class members. Phillips Petroleum v. Shutts, 472 U.S. 797 (1985) (holding that notice, opportunity to be heard, a right to opt out, and adequate representation are necessary to bind absent class members to the judgment of the rendering class action court).

Appellants, on the one hand, advocate this Court to follow the Epstein line of decisions and thus limit Appellees' ability to collaterally attack the Michels court's ruling with respect to the adequacy of the class action notice approved by the New York court. According to Epstein, collateral second-guessing by courts outside of the original forum is inappropriate. Review by a second court under the Epstein model is limited to determining "whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a full and fair opportunity to litigate the claim or issue." Epstein, 179 F.3d at 648-49. Under this view, absent class members' due process rights are not protected by collateral review in a second court, but rather by the initial certifying court, direct appeal within that state's courts, and, ultimately, the United States Supreme Court. Id. at 648, citing Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1558 (3d Cir. 1994). The Ninth Circuit thus has held that "where the certifying court makes a determination of the adequacy of representation in accord with Shutts this determination is not subject to broad collateral review." Epstein, 179 F.3d at 648. As acknowledged by the South Carolina Supreme Court in Hospitality Management, important policy reasons support this limited type of review:

> It would run counter to the class action goals of efficiency and finality to allow successive review of issues that were, in fact, fully, and fairly litigated. Moreover, second guessing the fully litigated decisions of our sister courts would violate the spirit of full faith and credit.

Hospitality Management Associates, Inc. v. Shell Oil Co., 591 S.E. 2d at 659-60 citing Fine, 743 N.E.2d at 421.

Appellants claim the Michels court engaged in an extensive, in-depth analysis of the adequacy of due process protections, particularly with respect to the adequacy of the class notice. See Michels,1997 N.Y. Misc. LEXIS 171, at *38-*54. Indeed, Michels recited the standard set forth in Shutts, and, after detailing the facts surrounding the adequacy of the notice provided therein, found "[t]he content and method of notice thus constituted due,

adequate and reasonable notice to all Class Members and satisfied the requirements of due process, [New York's statute] and the Rules of this Court." Id. at *49-*50.

Conversely, Appellees advocate the approach adopted in Stephenson, which holds that a subsequent court may engage in broad collateral review of due process determinations of the prior court. See Stephenson, 273 F.3d at 257-61. Appellees contend they are permitted to engage in a collateral attack on the Michels court determination that the notice was inadequate because of Phoenix's alleged fraud, and consequently, Appellees were never aware of any claims they may have had until after the opt-out period and after the relief made available under the Settlement Agreement was no longer available. Appellees argue that the Stephenson court found the notice inapplicable to the absent plaintiffs in that matter because the prior courts never made a due process determination targeted to them and therefore they were entitled to collaterally attack the due process determination. Appellees argue they are similarly situated to the absent plaintiffs in Stephenson, and therefore, the Michels determination on the adequacy of class action notice was not binding upon them.

The instant parties demonstrate their awareness and understanding of this schism. For example, Appellants dedicate several pages of their briefs to explaining the significance of the Epstein rationale and its adherents (See Appellants' Brief at 33-35; Reply Brief at 12-17); while Appellees' take lengths in diminishing Epstein and emphasizing the Stephenson rationale. (See Appellees' brief at 44-50). The Majority's approach is in accord with the approach espoused in Stephenson. Like Stephenson, the Majority engages in a broad, merits-based, or as it terms a "de novo" review of the notice question. I, however, would support a limited collateral review of this issue, one that comports with Epstein. The Majority attempts to support its approach by diminishing the instructive value of the Epstein opinion, claiming that it is but the "non-precedental view set forth by a single judge who authored the lead opinion in Epstein." Maj.Op. at 24. To the contrary, the rationale underlying the

Epstein opinion has been discussed and recently adopted by the courts of two sister states. Hospitality Management Associates, Inc. v. Shell Oil Co., 591 S.E.2d 611 (S.C. 2004); Fine v. America Online, Inc., 743 N.E.2d 416, 421-24 (Ohio. Ct. App. 2000).

The Majority further attempts to weaken the instructive value of Epstein in this case by asserting that it and Stephenson may "not necessarily represent a schism in the law" but rather, the two cases are products "of the differing tasks and factual circumstances facing the two courts." See, Maj. Op. at 27. To the contrary, courts and commentators view Epstein and Stephenson as espousing two contradictory legal tests as to the level of collateral attack permissible on a class action judgment:

> Thus it remains an open, and hotly litigated, question as to whether limited collateral review is required on the Shutts due process requirements in a class action case (*see* Epstein III), or whether a broader, merits-oriented collateral review is permitted (*see* Stephenson). In addition to the conflict in the federal circuits as exemplified by Epstein III and Stephenson, there is also disagreement amongst state courts and legal scholars.

Hospitality Management, 591 S.E.2d at 619. As there is a split in the law and this is a matter of first impression for this Court, our decision will have far-reaching consequences. I believe that the narrow review espoused by Epstein upholds the very principles underlying class action litigation, efficiency and finality, while also promoting judicial economy and comity with our sister states. As such, I believe that this Court's holding should be in line with this approach.

Consistent with the Epstein approach, I would look to whether the Michels court adopted and followed adequate procedures to ensure that the due process rights of the absent plaintiffs were protected. The Michels court indeed engaged in an exhaustive review of the adequacy of the class notice, one that, in many respects, parallels that of the Majority. Because I am satisfied that the Michels court adopted the appropriate procedures for ensuring the due process rights of absent class members were protected, I am not willing to engage in collateral second-guessing. By this statement however, I am not subscribing to the view that a rendering court in a class action suit can insulate itself from review with a

summary conclusion that the due process concerns were satisfied. In my view, the rendering court must engage in a substantive analysis of whether the rendering court established and employed the appropriate procedural safeguards in order for the absent plaintiffs to be bound by the determinations of the rendering court. If the rendering Court employed such an analysis, its determination should not be second-guessed by another court.

Given that the Michels court engaged in such an analysis, and my belief that limited collateral review is consistent with the spirit of the class action mechanism and the Full Faith and Credit Clause, I would find the Michels determination on the adequacy of the class notice to be binding upon Appellees. While the result I independently reach on this issue is similar to that of the Majority, I disassociate myself with the rationale underlying the Majority's conclusion in this regard.