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When May State Courts Exercise Personal Jurisdiction Over Nonresident Class Members

by Gene R. Shreve

Phillips Petroleum Co.

v.

Irl Shutts

(Docket No. 84-233)

Argued February 25, 1985

The Supreme Court's rulings on federal subject matter jurisdiction and on the scope of Rule 23 of the Federal Rules of Civil Procedure have restricted opportunities to bring small claim, large class consumer actions in federal court. With some success, plaintiffs have responded by bringing the same cases in state courts. But a concern which has long been relatively dormant now threatens to close the doors of state courthouses to many of these cases. Members of small claim consumer actions frequently come from many different states. May a state court exercise personal jurisdiction over nonresident class claimants without violating fundamental guarantees of fairness imposed by the Due Process Clause of the United States Constitution? This is the question posed in *Phillips Petroleum Company v. Shutts*.

ISSUES

In *Shutts*, the Supreme Court may consider as many as three issues. First, it will have to determine whether it may properly entertain a challenge to the Kansas court's personal jurisdiction over nonresident class members in the face of objections that the party opposing the class is without standing to make the challenge or that the challenge is premature. If the Supreme Court overcomes these objections, it must consider the challenge raised here to personal jurisdiction. Finally, should the Court conclude that Kansas properly exercised personal jurisdiction, it may have to determine whether the Kansas Supreme Court's application of its own substantive law to adjudicate the class claims was a choice of law permitted under the Constitution.

FACTS

For periods from 1974 to 1978, Phillips suspended royalty payments on gas obtained from a large number of leases while awaiting rate decisions from the Federal

Power Commission (now the Federal Energy Regulatory Commission). These "suspense royalties" were paid once Phillips received FPC approval for rate increases. Shutts and two others filed suit in Kansas state court individually and on behalf of a class of others from whom funds had been withheld—challenging the failure of Phillips to include interest in its eventual payments. The trial court certified a royalty-owner class and reduced it, by subtracting those who opted out or who could not be notified by first class mail, to approximately 28,100 members. The trial court determined the value of the average class claim to be under \$100. Citizenship of the class was scattered over many states. The affected gas leases were located in eleven states. The portions of Kansas residents in the class and of gas leases located in Kansas were comparatively insignificant. Phillips was neither incorporated nor had its principal place of business in Kansas.

After trial, the court determined that the class was entitled to interest on the suspense royalties during the period they were withheld by Phillips and set the interest rate. The Kansas Supreme Court modified the interest rate set by the trial court, but otherwise affirmed.

In a unanimous opinion, the Kansas Supreme Court (235 Kan. 195, 679 P.2d 1159 (1984)), rejected Phillips' argument that recent United States Supreme Court cases required minimum contacts sufficient to support personal jurisdiction between the court and nonresident members of the class. Instead, stated the court: "The element necessary to the exercise of jurisdiction over nonresident class members is procedural due process." The court went on to determine that the safeguards of procedural due process, notice to the passive (nonparticipating) members of the class and adequate representation of their interests by the class representatives, had been observed in *Shutts*.

The Kansas Supreme Court noted case developments which made it difficult to maintain small claim consumer actions in federal court. The Kansas court asked: "If the state courts will not hear the matter, who will grant relief?"

Turning to the choice of law question, the Kansas Supreme Court ruled that it could apply Kansas law to determine the merits of the case even though the forum state's contacts with the parties and the controversies were not extensive. The court reasoned that, because contacts were diffused over so many states, efficiency and uniformity would be served by applying the law of

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the forum and that, because it had not found compelling reasons for applying different law, the presumption that the forum should apply its own law had not been overcome.

BACKGROUND AND SIGNIFICANCE

The most significant question raised in *Shutts* may be whether the United States Supreme Court will decide to apply limitations on courts' personal jurisdiction, heretofore designed to protect nonresident defendants, to limit the authority of courts to adjudicate the claims of passive, nonresident members of a plaintiff class.

Shutts thus brings a further complication to an area of the law already in a state of flux. In *International Shoe Co. v. State of Washington* (326 U.S. 310 (1945)), the Supreme Court held that the Due Process Clause allowed jurisdiction over nonresident defendants who could not be found and served in the forum state—as long as doing so was fair under the circumstances of the case. The Supreme Court has struggled since to make this rather inchoate standard intelligible. With only one exception, the Court did not strike down an assertion of judicial jurisdiction in the thirty years following *International Shoe*. Then, in a series of cases (*Shaffer v. Heitner* (433 U.S. 186 (1977)), *Kulko v. Superior Court of California* (436 U.S. 84 (1978)), *World-Wide Volkswagen Corp. v. Woodson* (444 U.S. 286 (1980)) and *Rush v. Savchuck* (444 U.S. 320 (1980)), the Court increased due process protections available to nonresident defendants.

Now, the Supreme Court seems intent on clarifying and refining its position on the permissible limits of personal jurisdiction. The Court decided three personal jurisdiction cases last term: *Keeton v. Hustler Magazine, Inc.* (104 S.Ct. 1473 (1984), *Preview* 1983-84 term, pp. 57-60); *Calder v. Jones* (104 S.Ct. 1482 (1984), *Preview*, 1983-84 term, pp. 111-13); and *Helicopteros Nacionales de Columbia v. Hall* (104 S.Ct. 1868 (1984) *Preview*, 1983-84 term, pp. 57-60). And, in addition to *Shutts*, the Supreme Court has recently heard argument on still another personal jurisdiction case: *Burger King Corp. v. Rudzewicz* (*Preview*, 1984-85 term, pp. 215-16).

Through all these developments, the Supreme Court has remained silent until now concerning the possible implications of its evolving due process doctrine on courts' power to adjudicate the claims of nonresident class members. The view taken by a number of courts and commentators and by the American Law Institute in its *Restatement (Second) of Judgments*, section 41 (1982), is that the due process concerns of notice and adequate representation reflected in such cases as *Hansberry v. Lee* (311 U.S. 32 (1940)) and *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950)) pose the proper standard for measuring the fairness of an adjudication of the claims of passive members of a state court class. If these concerns are satisfied, then this view attaches no importance to the fact that contacts between the forum

state and nonresident members of the class are so tenuous that existing law would have prevented jurisdiction over the same persons had they been defendants. Some courts and commentators, however, have taken the opposing view. They argue that passive, nonresident class claimants may run the same risk as nonresident defendants of being bound by the proceeding and therefore should be protected by the same due process restraints on the court's personal jurisdiction. They argue that the passive character of class membership status—typically, class members take no action with reference to the suit prior to the classwide adjudication—makes it inappropriate to regard nonresident class members as having consented to the court's jurisdiction by presenting their claims for adjudication there.

Finally, *Shutts* may provide an occasion for the Supreme Court to return to a subject which recently left it divided: choice of law and the Constitution. In its plurality decision, *Allstate Insurance Co. v. Hague* (449 U.S. 302 (1981)), a majority of the Court was unable to agree on a standard by which the Due Process or Full Faith and Credit Clauses of the Constitution would restrain excessive favoritism of the forum's own law in the choice of law process.

Some of the decisional alternatives presented to the Supreme Court in *Phillips Petroleum Company v. Shutts* are as follows:

1. The Supreme Court may uphold the challenge to the Kansas court's personal jurisdiction by declaring its decisions rendered to protect nonresident defendants also apply in this case. Using these decisions, it could conclude that the minimum contacts standard set out in such cases as *Kulko* and *World-Wide Volkswagen* has not been met. The Court might take this approach if it views the procedural due process protections of notice and adequate representation as insufficient to accommodate entirely the concern that passive, nonresident class members be fairly treated. This approach might also permit the Court to give some weight in its analysis to problems of uncertainty created for the party opposing the class in such cases.
2. Or, the Supreme Court might decide that any suggestion of detriment to the interests of nonresident class members might more appropriately be made by the class members themselves. The Court could reason that, to the extent that class members have not consented to jurisdiction by being claimants in the case, they will later be free to question personal jurisdiction over them by collaterally attacking the class judgment. This could lead the Court to conclude that the defendant lacks standing to raise the jurisdictional challenge or that the challenge is premature.
3. Even if Phillips overcomes problems of standing or prematurity, the court may agree with the Kansas Supreme Court and the American Law Institute that recent personal jurisdiction precedents should not be

extended to protect passive, nonresident members of a plaintiff class. The Court may see the refusal of these persons to opt out of the class as an informed decision to litigate in the class action forum. The Court may note that such acquiescence is usually sufficient to resolve due process concerns about the preclusive effect of a class judgment upon members of the class and may reason that the refusal to opt out should similarly be regarded as consent to the court's jurisdiction.

4. If the Supreme Court concludes that the Kansas court properly exercised personal jurisdiction over the claims of passive nonresident class members, it may find it necessary to decide the challenge to the Kansas Supreme Court's choice of its own substantive law. The Supreme Court may conclude that the substantive policies intended to be advanced by Kansas law are not implicated by the facts of the *Shutts* controversy and, therefore, the Kansas Supreme Court was unjustified in applying its own law. Or, it may conclude that policies underlying Kansas law did suggest an interest to be realized by applying that law in *Shutts* and the Kansas Supreme Court's choice of its own law was therefore constitutionally permissible. Even if the Supreme Court does not conclude that Kansas is an "interested" forum for choice of law purposes, it may nonetheless let the choice of Kansas law stand. The Supreme Court might do this if it is unable to conclude that, to apply its own law, the Kansas Supreme Court rejected the conflicting law of another state which did have a perceptible interest in having its law applied to the controversy. Or, *Shutts* might win the choice of law issue by default. This could happen if the Court regarded the record in this case to be insufficiently clear or complete to support adjudication of this complex constitutional question.

ARGUMENTS

For Phillips Petroleum Company (*Counsel of Record, Joseph W. Kennedy, Fourth Floor, 200 W. Douglas, Wichita, KS 67202; telephone (316) 262-2671*)

1. The assertion of jurisdiction over nonresident class members by the court below exceeds the constitutional limits on state court jurisdiction established by the controlling decisions of this Court.
2. The application of Kansas law by the court below was repugnant to the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of the Constitution.

For Shutts (*Counsel of Record, W. Luke Chapin, P. O. Box 148, Medicine Lodge, KS 67104; telephone (316) 886-5611*)

1. Phillips lacks standing to raise due process claims belonging exclusively to adverse parties who are fully capable of raising such claims themselves.
2. Applying basic principles of restitution embodied in Kansas law to all class member claims was neither arbitrary nor unfair and resulted in no relevant conflict with the law of any other state.

AMICUS ARGUMENTS

In support of Phillips Petroleum Company

Amoco Production Company argues that the decision below violates both the Full Faith and Credit and Due Process Clauses by applying Kansas law to transactions having no connection whatsoever with the Kansas forum.

The National Association of Independent Insurers contends in a separate brief that the decision of the Kansas Supreme Court threatens to disrupt regulation of the insurance business by subjecting insurers to nationwide class action litigation in the courts of one state on issues properly determined by the laws, insurance departments and courts of each state in which the disputed transactions occurred.

The Legal Foundation of America additionally argued that the decision of the court below threatens concerns of federalism underlying jurisdictional requirements.

In support of Shutts

The Consumer Coalition, an Illinois not-for-profit corporation, filed a brief which argued that applying the "minimum contacts" test to state court class actions would deprive the state courts of the continued ability to conduct national class actions without which national groups of consumers would be unable to obtain redress in disputes with multistate enterprises.

Public Citizen, a nonprofit, public interest organization, argued that the correct due process standard for this case is found in *Mathews v. Eldridge* (424 U.S. 319 (1976)), not in cases such as *International Shoe Co. v. Washington* (326 U.S. 310 (1940)), or other cases in which defendants were sued in states other than their residence.

ARGUMENTS: MARCH SESSION

Monday, March 18

1. Tennessee v. Street (83-2143)
2. City of Cleburne v. Cleburne Living Center (84-468)
3. Black v. Romano (84-465)
4. Mitsubishi Motors v. Soler Chrysler-Plymouth, Soler Chrysler-Plymouth v. Mitsubishi Motors (83-1733)

Tuesday, March 19

5. Commodity Futures v. Weintraub (84-261)
6. Ramirez v. Indiana (84-5059)
7. Liparota v. United States (84-5108)
8. Williams v. Vermont (84-592)

Wednesday, March 20

9. United States v. Bagley (84-48)
10. Oklahoma v. Castleberry (83-2126)
11. McDonald v. Smith (84-476)
12. INS v. Rios-Pineda

Monday, March 25

1. Alamo Foundation v. Donovan (83-1935)
2. Supt., Mass Corr. Inst. v. Hill (84-438)
3. Jean v. Nelson (84-5240)
4. Atascadero State Hosp. v. Scanlon (84-351)

Tuesday, March 26

5. Sch. Committee of Burlington v. Dept. of Ed., Mass. (84-433)
6. Landreth Timber Co. v. Landreth (83-1961)
7. Gould v. Rufenacht (84-165)
8. Thomas, Acting Admin., EPA v. Union Carbide (84-497)

Wednesday, March 27

9. Walters v. Radiation Survivors (84-571)
 10. Ct. Dept. of Income v. Heckler (83-2136)
 11. Aspen Skiing v. Aspen Highlands (84-510)
 12. Baldwin v. Alabama (84-5743)
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