SUPREME COURT OF THE UNITED STATES

No. 92–1988

TICOR TITLE INSURANCE COMPANY, ET AL., PETITIONERS *v.* WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 4, 1994]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, dissenting.

We granted certiorari to consider one specific question: "Whether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." Pet. for Cert. i. The Court decides not to answer this question based on its speculation about a nonconstitutional ground for decision that is neither presented on this record nor available to these parties. From that decision I respectfully dissent.

Respondents are members of a class that reached a final settlement with petitioners in an antitrust action styled MDL 633. *In re Real Estate Title and Settlement Services Antitrust Litigation*, 1986–1 Trade Cases ¶ 67,149, p. 62,921 (ED Pa. 1986), aff'd, 815 F. 2d 696 (CA3 1987), cert. denied, 485 U. S. 909 (1988). Respondents subsequently brought this action against petitioners, asserting some of the same claims. The District Court held that respondents had been adequately represented in the MDL 633 action, and granted summary judgment for petitioners because, given the identity of parties and claims, the MDL 633 settlement was res judicata. App. to Pet. for Cert. 20a-28a. The Court of Appeals for the Ninth Circuit

reversed. 982 F. 2d 386 (1992). The court agreed that respondents had been adequately represented in the MDL 633 action, *id.*, at 390–391, but held that respondents could nevertheless relitigate the same claims against petitioners: "Because [respondents] had no opportunity to opt out of the MDL 633 litigation, we hold there would be a violation of minimal due process if [respondents'] damage claims were held barred by *res judicata*." *Id.*, at 392.

The Court concludes that the correctness of the Ninth Circuit's constitutional interpretation "is of no general consequence if, . . . in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not." *Ante*, at 4. In other words, the Court declines to answer the constitutional question because the MDL 633 action might not have been properly certified—an issue that was litigated to a final determination in petitioners' favor more than five years ago, and on which we denied certiorari. The nonconstitutional ground for decision about which the Court speculates is therefore unavailable to respondents. The constitutional ground on which the Court of Appeals relied, the one we granted certiorari to review and the parties have briefed and argued, was necessary to the decision in this case. Our prudential rule of avoiding constitutional questions has no application in these circumstances, and the Court errs in relying on it.

The Court's assertion that "our resolution of the posited constitutional question may be . . . of virtually no practical consequence in fact," *ante*, at 4, is unsound. The lower courts have consistently held that the presence of monetary damage claims does not preclude class certification under Rules 23(b)(1)(A) and (b)(2). See 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure, Civil 2d §1775, pp. 463–470 (1986 and Supp. 1992). Whether or not those decisions are correct (a question we need not, and indeed should not, decide today), they at least indicate that there are a substantial number of class members in exactly the same position as respondents. Under the Ninth Circuit's rationale in this case, every one of them has the right to go into federal court and relitigate their claims against the defendants in the original action. The individuals, corporations, and governments that have successfully defended against class actions or reached

appropriate settlements, but are now subject to relitigation of the same claims with individual class members, will rightly dispute the Court's characterization of the constitutional rule in this case as inconsequential.

The Court is likewise incorrect in suggesting that a decision in this case "may be quite unnecessary in law." *Ante*, at 4. Unless and until a contrary rule is adopted, courts will continue to certify classes under Rules 23(b)(1) and (b)(2) notwithstanding the presence of damage claims; the constitutional opt-out right announced by the court below will be implicated in every such action, at least in the Ninth Circuit. Moreover, because the decision below is based on the Due Process Clause, presumably it applies to the States; although we held in *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797 (1985), that there is a constitutional right to opt out of class actions brought in state court, that holding was expressly "limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." *Id.*, at 811, n. 3. The Ninth Circuit's rule, by contrast, applies whenever "substantial damage claims" are asserted. See 982 F. 2d, at 392. The resolution of a constitutional issue with such broad-ranging consequences is both necessary and appropriate.

Finally, I do not agree with the Court's suggestion that the posture of the case could "lead us to the wrong result" with respect to the question whether the Due Process Clause requires an opt-out right in federal class actions involving claims for money damages. See *ante*, at 4–5. As the case comes to us, we must assume that the MDL 633 class was properly certified under Rule 23, notwithstanding the presence of claims for monetary relief. But this assumption, coupled with whatever presumption of constitutionality to which the Rules are entitled, will not lead us to "approve . . . action that neither we nor

Congress would independently think constitutional." *Ante*, at 5. Either an opt-out right is constitutionally required, or it isn't. We can decide this issue while reserving the question of how the Rules should be construed. While it might be convenient, and it would certainly accord with our usual practice, to decide the nonconstitutional question first, that option is not available to us in this case. The only question, then, is whether we should dismiss the writ as improvidently granted. In my view, the importance of the constitutional question, as well as the significant expenditures of resources by the litigants, amici, and this Court, outweighs the prudential concerns on which the Court relies.

When a constitutional issue is fairly joined, necessary to the decision, and important enough to warrant review, this Court should not avoid resolving it—particularly on the basis of an entirely speculative alternate ground for decision that is neither presented by the record nor available to the parties before the Court. The decision below rests exclusively on a constitutional right to opt out of class actions asserting claims for monetary relief. We granted certiorari to consider whether such a right exists. The issue has been thoroughly briefed and argued by the parties. We should decide it.