10-1984

Phillips Petroleum Co. v. Shutts

Lewis F. Powell Jr.

Grant

Presents important quest. of ~~the~~ maximum jurisdiction in a nationwide class action brought by royalty owners in oil & gas who has leased to Petr., & who claimed that Petr had withheld proper interest payments when royalties were not pd. when due

Preliminary Memo

October 5, 1984 Conference
List 1, Sheet 3

No. 84-233

PHILLIPS PETROLEUM CO.

v.

SHUTTS, et al. (nationwide plaintiff class)

Suit was brought by 3 royalty owners in Kansas whose interest — as well as that of other Kan. ~~ex~~ owners was minimal. Of the 11.3 million of each interest, the TTs were only entitled to $123,000. Only 2.7%

Cert to Kansas S.Ct. (Schroeder for the court)

State/Civil

Timely

1. SUMMARY: Petr challenges the certification of a of class lived in Kansas nationwide class and the application of forum law to transactions by class members in other states. Minimum contacts in Kan. appear not to meet DP requirements

2. FACTS AND DECISION BELOW: Petr, a Delaware corporation with its principal place of business in Oklahoma, produced natural gas from leases located in 12 different states. It sold the gas to pipeline companies, paying royalties to the owners of

~~Petr~~ Grant. Zahn v. International Paper Co. (U.S. 1973) held that every member of the class must satisfy the

the leases. Petr sought a price increase from the Federal Power Commission (now FERC). While its request was pending, it charged the higher price, subject to refund with interest if the increase was not approved. During this time, however, it continued to pay royalties based on the lower, previously approved price.[1] Only when the increases were finally approved did petr pay the royalty owners additional "suspense royalties" for the extra amounts it had been charging. It did not pay interest on these extra royalties.

Three royalty owners, one a resident of Kansas and two of Oklahoma, sued in Kansas state court seeking payment of interest on the suspense royalties. The named plaintiffs own oil and gas leases in Oklahoma and Texas, but not in Kansas. The TC certified a nationwide class of 33,000 plaintiffs consisting of all royalty owners who received suspense royalties once the price increase was approved. Petr unsuccessfully sought mandamus in the Kansas S.Ct., and this Court denied cert. Phillips Petroleum Co. v. Dickworth, No. 82-461.

After some putative members opted out and others could not be notified, the class was "finalized" at 28,100 members, who reside in all 50 states, D.C., the Virgin Islands, and several foreign countries. Applying Kansas law, the TC held that petr owed $11.3 million in interest (calculated at the rates petr

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[1]Petr did make royalty payments based on the higher prices to those royalty owners who put up an acceptable indemnity to repay the increased portion of the royalty, with interest, if the price increases were not approved.

would have paid to its buyers on the refunds had the increases not been approved). Of this amount, Kansas residents received only $123,000. Kansas' connection with the litigation is slight: 2.7% of the class members live in Kansas, .25% of the leases are located there, and only .003% of the award was attributable to those leases.

The Kansas S.Ct. held that the TC properly certified the class and could constitutionally adjudicate the claims of the nonresident members. Relying on an earlier decision involving the same named plaintiff ("Shutts I"),[2] the TC it held that as long as the nonresident class members are given adequate notice and opportunity to be heard and are adequately represented, it is not necessary that each have constitutionally adequate "minimum contacts" with the forum. Cases such as World-Wide Volkswagen involve jurisdiction over nonresident defendants and are not relevant. Noting that the availability of a nationwide class in the state courts was important as a matter of policy, it rejected petr's argument that the action had to be brought in several different states. This was merely an effort to "divide and conquer," would result in a waste of judicial resources, and might foreclose any recovery at all.

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[2] In almot identical circumstances, the court in Shutts v. Phillips Petroleum Co., 222 Kan. 527 (1977), cert. denied, 434 U.S. 1068 (1978), awarded interest on additional royalties paid following approval of a rate increase applicable to a different area than is involved here. There too the court approved a nationwide class. It noted, among other factors, that the largest portion of the rate-making area involved was located in Kansas.

The court also held that the TC properly applied Kansas law to the entire class. Where a state court has jurisdiction over a nationwide class, the law of the forum should be applied unless compelling reasons exist for applying a different law. Finally, the Court upheld the finding of liability, and required payment of post-judgment interest at the Kansas statutory rate of 15%.

3. CONTENTIONS: Petr -- 1. This case presents important and unresolved questions of state court jurisdiction over nonresident plaintiffs. The issue is the same as that on which the Court granted cert in Gillette Co. v. Miner, 456 U.S. 914, dismissed for lack of a final judgment, 459 U.S. 86 (1982). A State's jurisdictional power is limited by the constitutional requirement of minimum contacts. If the State does not have the power to compel a nonresident to submit to its jurisdiction, logically it cannot have the power to compel a nonresident to take affirmative action to avoid its jurisdiction by opting out of the class. The state courts are in disarray on this issue. This decision and that of the Illinois S.Ct. in Miner are one extreme. Other cases have allowed assertion of jurisdiction over unnamed plaintiffs when the underlying action has a nexus to the forum state. Schlosser v. Allis-Chalmers Corp., 86 Wis.2d 226 (1978); Geller v. Tabas, 462 A.2d 1078 (Del. 1983). Pennsylvania has limited a class to residents and those nonresidents who submit themselves to the court's jurisdiction. Klemow v. Time, Inc., 466 Pa. 189, cert. denied, 429 U.S. 828 (1976).

2. By applying Kansas law to the claims of all the plaintiffs, the decision below violates petr's rights under the

due process and full faith and credit clauses. The claims bore no relationship to the forum state, the nonresident class members had no affiliations with Kansas, and the application of the interested other state's laws leads to a different result. For instance, it makes no sense to apply Kansas law to leases between a Texan and a Delaware corporation whose principal place of business is in Oklahoma regarding to leases in Texas.

3. The court below analogized this case to "common fund" cases. But no such "fund" is involved here. Moreover, the principles of the common fund cases were misapplied, since the decisive factor in those cases was the presence of significant affiliating cirumstances between the defendant, the forum, and the litigation that are absent here.

Resp -- 1. Petr cannot assert the due process rights of nonresident members of the plaintiff class. In any event, as the court below held, procedural due process standards and adequate representation give state courts the power to bind all class members. Minimum contacts are not required as long as there is a commonality of interests among the class members. This case does bear "some similarity to Miner, but it consists of Phillips' gas royalty owners, a much more cohesive group with common treatment by Phillips and with common interests."

2. The general rule is that the law of the forum applies and is preferred in case of doubt. Especially in light of the common fund aspects of this case, it makes sense to apply a uniform measure of damages to the class as a whole.

3. As the Court stated in Shutts I, this is essentially a common fund case. Had petr put the suspense royalty into a common trust fund instead of mingling it with its other assets there would be such a fund.

Amicus (Amoco) -- The "twin plaintiff juggernauts" of a nationwide class composed of members with no connection whatsover with the forum, and pure forum shopping choice of law selection combine to make the result below devastating, unexpected, unprincipled, and unconstitutional. The nonresident class members lack sufficient contacts with Kansas to support jurisdiction, and Kansas lacks a sufficient interest in the controversy to allow it to apply its law to out-of-state leases.

4. DISCUSSION: The question of personal jurisdiction over the plaintiff does not usually arise, since the plaintiff submits himself to the jurisdiction of the court. Though poorly-defended by resp, the decision below was not at all unreasonable. This Court has never specifically stated that minimum contacts are necessary. Language quoted by petr ("all assertions of state-court jurisdiction must be evaluated according to the [minimum contacts] standards set forth in Internation Shoe and its progeny," Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (emphasis added)) was not written with this situation in mind. Just last Term, the Court pointed out that "we have not to date required plaintiff have 'minimum contacts' with the forum state," and have upheld jurisdiction where such contacts were lacking. Keeton v. Hustler Magazine, Inc., 52 USLW 4346, 4348 (1984). This is a different situation in that the plaintiffs have not all

personally invoked the jurisdiction of the court. Nonetheless, the due process concerns with the burdens on a nonresident defendant and the consequences of an adverse judgment are not present with regard to an adequately represented nonresident class member.

In short, certification of this class was reasonable. However, this is an important question that has divided the state courts and produced some acadmeic commentary. The issue is important because since class members cannot aggregate claims to satisfy the amount in controversy requirement for federal diversity jurisdiction, the state courts are the essential fora for small claim class actions. The grant in Miner creates a presumption that this petn is certworthy.

Resp is incorrect in arguing that petr cannot challenge jurisdiction over the plaintiffs. It has a "direct and substantial personal interest in the" question of jurisdiction. Cf. Hanson v. Denckla, 357 U.S. 235, 244-245 (1958) (allowing one defendant to argue that the state court lacked jurisdiction over another, whose presence was a prerequisite to jurisdiction).

The choice of law question, which will always be lurking in the background in this sort of case, makes the decision below more questionable than it would otherwise be. Petr and amicus assert that the result would have been different in other states. The difference seems to be primarily in interest rates.[3] On the

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[3]Also, it has been held that under Texas law petr's offer to pay increased royalties under indemnity, see n. 1, supra,

Footnote continued on next page.

one hand, this diminishes the importance of the choice of law question. On the other, the fact that different state laws could have been easily accomodated in this regard suggests that they should have been.

The general approach taken by the court below can be challenged on the ground that it fails to protect the reasonable expectations of nonresidents. Indeed, if different law applies to transactions conducted in different states, it might be that the class members may lack the necessary commonality to support class certification in the first place. In any event, because the aggregation of contacts between the state and the parties is so slight, application of Kansas law is questionable under Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981). Even if the ruling below was correct on this score, the case provides an opportunity to flesh out some of the uncertainties left by Allstate.

5. RECOMMENDATION: I recommend a grant.

There is a response and an amicus brief in support of petr.

September 18, 1984 Herz Opinion in petn

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terminates its liability for interest as of the date of the offer. Phillips Petroleum Co. v. Riverview Gas Compression Co., 409 F. Supp. 486 (N.D. Tex. 1976). In Shutts I the Kansas court held that such an offer did not terminate liability. In this case, royalty owners who entered into indemnity agreements recovered for the period before the agreement was made, though not thereafter.

October 5, 1984

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 84-233

Submitted ....., 19... *Announced* ....., 19...

I want check in "clear" 50 c

PHILLIPS PETROLEUM CO.

I have checked & see no Recusal problem. no doer Lee. 10/8/84.

SHUTTS

Also motion of The Legal Foundation for leave to file brief amicus curiae.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.		✓											
White, J.													
Marshall, J.		✓		join 3									
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.			✓										
O'Connor, J.					Dist Ct clear in hugh								

March 29, 1985

84-233 Phillips Petroleum v. Shutts

Dear Bill:

Please show at the end of the next draft of your opinion that I took no part in the consideration or decision of the above case.

Sincerely,

Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 29, 1985

Re: 84-233 - Phillips Petroleum Co.
v. Shutts

Dear Bill:

You have written an interesting and persuasive opinion. I expect to join Parts I and II, but I still plan to dissent from Part III. I attach greater significance to the choice of law analysis in Shutts I than you do and I believe the unique character of the interest question in both Shutts I and Shutts II gives the forum court a broader latitude in fashioning the appropriate remedy than would be true in a case like Allstate which involved a clear-cut issue on which the two States had taken opposite, well-defined positions.

With respect to Part II of your opinion, I have two suggestions for your consideration. The last sentence of the second paragraph on page 9 correctly identifies the due process clause as the source of the personal jurisdiction requirement, but then concludes with the phrase "rather than a restriction on state sovereignty in our federal system." I think that phrase is a trifle misleading because the footnote in Insurance Corp. of Ireland, 456 U.S., at 702-703, recognized that the jurisdictional requirement is a restriction on state sovereignty and merely indicated that its source is not properly described as "federalism."

On page 12 you make the important point that absent plaintiffs are not subject to the burdens that litigation imposes upon defendants. You avoid any mention of possible discovery against absent plaintiffs. Of course, there was no such discovery in this case and it is not typical to seek discovery from absent class members, but I believe it does

occur in some cases and that occasionally there are disputes about whether sanctions can be imposed. Query: Would that burden affect your analysis, and if so, should it be mentioned? Perhaps the wisest course is to save the entire problem for another day and not to mention it at all in this case, but I just thought I would make sure you had not overlooked it.

Respectfully,

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 1, 1985

Re: No. 84-23 Phillips Petroleum Co. v. Shutts

Dear John,

I think both of your suggestions with respect to part II of my circulating draft have merit, and I will make the following changes.

I will revise the last sentence in the second full paragraph on page 9 to read as follows:

> "In Insurance Corp. of Ireland v. Compagnie Des Bauxites, 456 U.S. 694, 702-703 and n. 10 (1982) we explained that the requirement that a court have personal jurisdiction comes from the Due Process Clause's protection of the defendant's personal liberty interest, and said that the requirement "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty (footnote omitted.)"

I must confess that this distinction seems a bit metaphysical, but we said it in Insurance Corp. and all I want is to accurately reflect the "teaching" of Byron's opinion in that case. On page 12, in footnote 1, I will add to the parade of horribles that absent class members might sometime be subject to the word "discovery," but the issue may be left to a case presenting it in a concrete manner.

With these impedimenta cleared away, I hope you will now join parts I and II.

Sincerely,

WHR

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 1, 1985

No. 84-233

Phillips Petroleum Company
v. Shutts, et al.

Dear Bill,

I agree.

Sincerely,

Bill

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 2, 1985

84-233 - Phillips Petroleum Co. v. Shutts

Dear Bill,

Join me, please.

Sincerely yours,

Byron

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 3, 1985

Re: 84-233 - Phillips Petroleum Co.,
v. Shutts

Dear Bill:

Thank you for making the changes on page 9 and 12. I will join Parts I and II. I should also advise you that I am working on my dissent from Part III and am more convinced than ever that the Court is taking an incorrect step in the choice of law area.

Respectfully,

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 10, 1985

No. 84-233 Phillips Petroleum Co. v. Shutts

Dear Bill,

Your superior powers of persuasion prevail. I see no value to expression of a contrary view. Please join me.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 10, 1985

Re: No. 84-233, Phillips Petroleum v. Shutts

Dear Bill:

Please join me.

Sincerely,

H.A.B.

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 6, 1985

Re: 84-233 - Phillips Petroleum v. Shutts

Dear Bill:

I join.

Regards,

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 19, 1985

Re: No. 84-233-Phillips Petroleum Co. v. Shutts

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Rehnquist

cc: The Conference

84-233 Phillips Petroleum v. Shutt (Lee)

LFP Out- letter 3/29/85
WHR for the Court 3/4/85
1st draft 3/29/85
2nd draft 4/2/85
3rd draft 4/3/85
4th draft 6/19/85
Joined by BRW 4/2/85
HAB 4/10/85
SOC 4/10/85
CJ 5/6/85
TM 6/19/85
JPS concurring in part and dissenting in part
1st draft 6/24/85

applicable jurisdictional amount. Therefore, class actions that are not based upon federal law will often need to be brought in state court because of the $10,000 jurisdictional amount in ~~class~~ diversity actions. This is an important issue that promises to recur.

Lee