

Shady Grove and CAFA: Opening the Federal Door for Class Actions Barred By States

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by Shaun C. Blake

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Shaun C. Blake analyzes two recent Supreme Court decisions that may have a substantial impact on class action litigation. His article, "Shady Grove and CAFA: Opening the Federal Door for Class Actions Barred By States," discusses the various opinions submitted by the Court in Shady Grove. Then, looking at the Court's subsequent decision in Holster, he considers whether CAFA and Shady Grove will result in a new wave of consumer-driven class action litigation.

Class action litigation, a lawsuit brought by one or a few representatives on behalf of a large group of similarly-situated people harmed by the same person or entity, can be devastating for businesses. Just the expense of defending a class action can be overwhelming, and settlements often require payments to persons who would have otherwise never filed an independent lawsuit. In recent years, tort reform advocates have succeeded in expanding federal jurisdiction over class action lawsuits in order to decrease forum shopping by plaintiffs seeking to sue in favorable state courts. Under the Class Action Fairness Act of 2005,¹ "complete diversity" is no longer required before a federal court can hear a class action law suit. Rather, once the jurisdictional dollar limit is met, a federal court can sit in diversity and hear a class action so long as the class has at least 100 members and minimal diversity is satisfied by the class.²

Under *Shady Grove Orthopedics Assoc's, P.A. v. Allstate Ins. Co.*, decided March 31, 2010, businesses and tort reform advocates may discover that CAFA is a two-sided sword. *Shady Grove* may have significant impact across the country on businesses and industries by making class actions available to plaintiffs in federal court that cannot be brought in state court under existing state laws. Many states have passed laws that provide relief to persons seeking an individual recovery while including express limitations on the ability of similarly-situated persons to combine and pursue claims against a common defendant through class action litigation.³ *Shady Grove* may change the landscape for businesses previously protected by explicit, state prohibition on class actions to recover statutory relief.

1. Overview of the *Shady Grove* Decision

In *Shady Grove*, the Petitioner filed a federal class action under CAFA to recover from Allstate interest on an insurance claim allowed under a New York law. The district court concluded that it lacked jurisdiction because N.Y. Civ. Prac. Law Ann. §901(b). §901(b) explicitly bars claimants from pursuing a class action to recover statutory interest. The United States Court of Appeals for the Second Circuit affirmed the district court's decision, finding no conflict between §901(b) and Fed. R. Civ. P. Rule 23 because they address different issues; therefore, the Second Circuit held Rule 23 was

not in conflict with the state bar on class action. In *Shady Grove*, the Supreme Court reversed by plurality decision, holding that Rule 23 and §901(b) were in conflict and that Rule 23 allowed the Petitioner to pursue a federal class action despite New York's express prohibition.

Rule 23 defines when a federal class action “may be maintained.” The Court found that Rule 23 “unambiguously authorizes *any* plaintiff, in any federal proceeding, to maintain a class action for the Rule’s prerequisites are met.”⁴ Since §901(b) provides that certain claims “may not be maintained as a class action,” five members of the Court found that Rule 23 and §901(b) inherently conflicted with one another. As a result, Rule 23 preempts §901(b), and §901(b) no longer applies to state-law claims in federal courts.

The Dissent, penned by Justice Ginsberg and joined by three members of the Court, argued that §901(b) only effects the remedy (i.e. the size of a monetary award a class plaintiff may pursue) and that Rule 23 only governs the “procedural aspects of class litigation.” As a result, the Dissent urged the Court to find that §901(b) and Rule 23 could co-exist in peace.⁶ The Court rejected the Dissents’ characterization, finding that §901(b) goes further than simply defining the remedy available in an existing class action. The Court concluded that, by its clear terms, §901(b) precludes a class action. This conclusion required the Court to determine whether the application of Rule 23 would violate the Rules Enabling Act. Although the Plurality and Justice Stevens differed on how to approach the Rules Enabling Act analysis, they agreed that applying Rule 23 would not run afoul of the Rules Enabling Act. Therefore, five members of the Court found that the class action prohibition in §901(b) was preempted by Rule 23 in federal cases.

2. Rules Enabling Act Analysis in *Shady Grove*

The Rules Enabling Act limits the Federal Rules of Civil Procedure by stating that “such rules shall not abridge, enlarge or modify any substantive right.”⁷ In *ShadyGrove*, the Plurality and Justice Stevens disagreed on how to determine whether Rule 23 violates the Rules Enabling Act. The Plurality held that the Court must look to the federal rule and determine whether it regulates procedure (i.e. the manner and the means by which litigants rights are enforced) or substance (i.e. the rules of decision by which the court will adjudicate those rights).⁸ Essentially, the Plurality adopted a bright line rule by focusing on the federal rule rather than the specific state provision. The Plurality concluded that Rule 23 neither alters each plaintiff’s separate entitlement to relief nor abridges any defendant’s rights; Rule 23 simply allows multiple claims to be litigated together. Therefore, the Plurality concluded that Rule 23 does not run afoul of the Rules Enabling Act.⁹

Justice Stevens, in his concurrence, argues that the Court instead must look to the state law to see whether it is merely procedural or if it either provides a substantive right or is “so intertwined with a state right or remedy that it functions to define the scope of the state-created right.”¹⁰ Justice Stevens opens his analysis by noting that “finding an Enabling Act problem is a high one,” and he says there must be “little doubt” that a state-created substantive right is actually impaired by the federal rule before an Enabling Act

problem will be found.¹¹ Justice Stevens then analyzes the text of the New York law and its legislative history, and he concludes that §901(b) does not define New York's rights and remedies.¹² Rather, Justice Stevens finds that §901(b) "reveals a classically procedural calibration of making it easier to litigate claims in New York courts ... only when it is necessary to do so, and not making it *too* easy when the class tool is not required."¹³

The Plurality and Justice Stevens' opinions reached the same conclusion - applying Rule 23 to invalidate New York's express intent to bar class actions for recovery of statutory interest does not violate the Rules Enabling Act. If section II.B. of the Plurality opinion is deemed controlling by future courts, then it is likely that future courts, when faced with diversity class actions filed despite state prohibitions of the same, will no longer need to perform a Rules Enabling Act analysis. The Plurality's establishes that analysis in favor of class certification. Under the Plurality opinion, future litigants seeking to overcome a state's preclusion of a class action otherwise allowable under Rule 23 need only establish that Rule 23 is sufficiently broad to prevent the conflicting state law from operating along with Rule 23.

Justice Stevens, however, reached the conclusion by adopting what is arguably a narrower, case-specific analysis. If later courts decide that Justice Steven's opinion reflects a narrower view than the Plurality's opinion, than Justice Steven's opinion should be considered the controlling authority for courts applying *Shady Grove* to engage in the Rules Enabling Act analysis in the future.¹⁴

3. The Impact of *Shady Grove*

Many of the potentially affected laws cited by Allstate in *Shady Grove* were consumer protection laws, which often contain prohibition on class actions. The impact of *Shady Grove* on consumer-driven litigation is already becoming apparent. Justices Scalia and Ginsberg waited less than three weeks to square off again on the subject of *Shady Grove*.

Holster began as a class action suit in federal court seeking actual and statutory damages for alleged violations of the Telephone Consumer Protection Act of 1991.¹⁵ The District Court dismissed the suit, holding that the rule of *Erie*¹⁶ applies to federal suits under the TCPA and that §901(b) -- which bars class actions in suits seeking statutory damages -- is "substantive" under *Erie*.¹⁷ Rule 23 had no bearing, it added, because "§901(b) is a matter not covered by [Rule] 23."¹⁸ The Second Circuit summarily affirmed on the basis of its decision (issued the same day by the same panel) in *Bonime v. Avaya, Inc.*¹⁹

The TCPA includes 47 U.S.C. § 227(b)(3), which allows a private right of action "if otherwise permitted by the laws or the rules of the State...." Justice Scalia refused to read §227(b)(3) so as to require "federal courts hearing claims under the [TCPA] to apply *all* state procedural rules that would effectively bar a suit."²⁰ Rather, Justice Scalia reads §227(b)(3) to allow a State to close its doors to claims under the Act and thus bar claims in federal courts in that State; when such claims are allowed by the state, however,

Justice Scalia stresses that the federal forum may apply its own procedures in processing them. By so construing §227(b)(3), Justice Scalia states that Rule 23 allows the class action to pursue despite §901(b) precisely because of *Shady Grove*.²¹

Holster may be an indication of what businesses can expect from federal courts in light of *Shady Grove*. The limitations on class actions states have adopted to prevent businesses from being subject to class litigation for the recovery of statutory penalties may no longer shield businesses from class actions that meet the CAFA requirements. As Justice Ginsberg notes in *Shady Grove*, this is certainly an ironic result. CAFA, viewed by many as a triumph of tort reform, may have opened the door for a myriad of consumer-driven class lawsuits that otherwise could not be litigated as class actions in state courts.

Pub.L. No. 109-2, 119 Stat. 4.
Shady Grove Orthopedic Assoc's, P.A. v. Allstate Ins. Co., 559 U.S. ____, No. 08-1008, slip op. at 24 (March 31, 2010) (Ginsberg, J. dissenting)
Id., slip op. at 16 FN 11 (Ginsberg, J. dissenting) (pointing out that at least 96 state statutes across the country containing class action limitations that may now be litigated in a federal forum under the plurality ability)
See Holster v. Gatco, Inc., 559 U.S. ____, No. 08-1307 (April 19, 2010) (Scalia, J. concurring)
Shady Grove, slip op. at 11. (plurality opinion).
Id. at 6-7.
28 U.S.C. § 2072(b)
Id. at 13, 16.
Id. at 14 (plurality opinion)
Id. at 8 (Stevens, J. concurring in part and concurring in the judgment).
Shady Grove Orthopedic Assoc's, P.A., 559 U.S. ____, No. 08-1008, slip op. at 17 (Stevens, J. concurring)
Id. at 18-22.
Id. at 20.
See Marks v. U.S., 430 U.S. 188, 193 (1977) (when the Court issues rules with a majority opinion, the opinion joining in the result that does so on the narrowest grounds is controlling)
47 U.S.C. § 227
Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)
See 485 F.Supp.2d 179, 184-186 (E.D.N.Y.2007)
id., at 185, n. 3.
547 F.3d 497 (2nd Cir. 2008)
Holster, 559 U.S. ____, No. 08-1307, slip op. at 2 (Scalia, J. concurring)
Id. at 2-3.