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ARTICLES

Under the *Shady Grove* of an Alabama Pine

By Matthew M.K. Stein

Five years ago, the U.S. Supreme Court was asked a narrow question: Can a federal court exercise so-called Class Action Fairness Act (CAFA) jurisdiction—the form of jurisdiction in 28 U.S.C. § 1332(d)—over a putative class action that, if brought instead in the state court, contains claims that could not be brought on a class action basis? The Court's answer, because of federalism and the Rules Enabling Act, was yes. A claim that could not be brought on a class action basis in state court, because state law prohibits those claims from being brought on that basis, could be brought on a class action basis in federal court because Rule 23, the class action rule, is a procedural rule and, as a procedural rule, is valid in all federal courts. (Briefly stated, under the *Erie* doctrine, federal courts may apply federal procedural law but *must* apply state substantive law.)

This all happened in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), a split decision by the Court. Justice Scalia wrote the Court's plurality opinion, securing between three and five votes, depending on the section. Justice Ginsburg wrote a dissenting opinion, securing four votes. And Justice Stevens concurred in the judgment and in part with Justice Scalia's plurality opinion. As with any 4–1–4 split by the Court, the immediate holding is clear but the *ratio decidendi* is not—as your author's constitutional law professor said about a different decision, it depends on whether you start counting votes at the front (the plurality) or from the back (the dissent).

Shady Grove involved a dispute over New York's general class action statute, section 901 of New York's Civil Practice Law and Rules. That section prohibits New York courts from certifying class actions over actions to recover a penalty or minimum measure of recovery created by statute, unless the statute creating that penalty or minimum recovery specifically authorizes a class action. For most lawyers, the Court's essential conclusion is that if a state had a statute or rule like New York's, which deals in generalities unmoored from a particular statute, the state statute or rule is superseded in federal court by Rule 23 of the Federal Rules of Civil Procedure. Justice Stevens suggested as much in his concurrence: "[W]e should respect the plain textual reading of § 901(b), a rule in New York's procedural code about when to certify class actions brought under any source of law, and respect Congress' decision that Rule 23 governs class certification in federal courts." 559 U.S. at 437 (Stevens, J., concurring). And Justice Scalia did the same in a portion of his plurality opinion commanding four votes: "Nothing in the text of § 901(b) (which is to be found in New York's procedural code) confines it to claims under New York law; and of course New York has no power to alter substantive rights and duties created by

other sovereigns." (The justices' opinions run 64 pages, even if it might be suggested that this is a simple application of federalism.)

Now, five years later, the issue is back—this time, under the shade of an Alabama pine.

Like other states, Alabama has a "little Federal Trade Commission (FTC) act," the Alabama Deceptive Trade Practices Act (ADTPA), which prohibits deceptive trade practices and, like most state "little FTC" acts, provides a private right of action for its violation. But that private right of action is an *individual* action: The ADTPA expressly prohibits individuals from bringing claims on a class action basis, reserving those representative claims to the Alabama Attorney General and district attorneys. *See* Ala. Code § 8-19-10(f). Put differently, the private remedy the ADTPA creates is an individual remedy, with an individual rule of decision. Before *Shady Grove*, no one would have seriously thought an ADTPA claim could be brought in federal court as a class action. Even after *Shady Grove*, few would have believed that an ADTPA claim could be brought in federal court on a class action basis. Full stop; end of article.

Yet, you're reading this article. At least one person did believe a federal court could entertain an ADTPA class action, and that person filed suit in the Northern District of Alabama. The district court dismissed the case, and the person appealed to the Eleventh Circuit. *See Lisk v. Lumber One Wood Preserving, LLC*, No. 14-11714 (11th Cir. July 10, 2015).

According to the Eleventh Circuit, *Shady Grove* applied to the case before it (true), and applying *Shady Grove* to the facts meant that in federal courts, private plaintiffs could bring ADTPA class actions. The Eleventh Circuit's reasoning is tied to the portion of Justice Scalia's opinion that commanded five votes: that Rule 23 is a procedural rule and that the facts of *Shady Grove* and *Lisk* were similar enough that the result must be the same. To the Eleventh Circuit, Rule 23 doesn't modify a substantive right because ADTPA claims can be brought as a class action—the only question is by whom. Yet, the fact remains that Alabama made a policy choice that only its governmental officials can bring ADTPA class actions, which is a substantive right. Should CAFA and Rule 23 combine to permit a federal court to override that policy determination?

The Eleventh Circuit's analysis may be too simple. Justice Stevens departs from Justice Scalia's plurality as to what test is applied to determine whether applying a federal rule alters a substantive right. To him, the federal rule must give way to a state rule "that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Shady Grove*, 559 U.S. at 424 (Stevens, J., concurring). On this, Justice Stevens and the four dissenting justices appear to agree. *See id.* at 442 n.2 (Ginsburg, J., dissenting).

That's five votes between Justice Stevens and the four dissenting justices, counting from the dissent forward, for the proposition that Rule 23 must step aside for a *substantive* statute. The dissenting justices' view is that New York's broader and more procedural-appearing section 901(b) is substantive, because it limits the available remedy (*id.* at 447); the same is true with the ADTPA's specific prohibition on private class actions over the ADTPA's violation. Part of

Justice Stevens's disagreement with the dissenting justices is that section 901(b) applies to any claim in New York state court, regardless of governing law, making it "hard to see how § 901(b) could be understood as a rule that, though procedural in form, serves the function of defining New York's rights or remedies." 559 U.S. at 432 (Stevens, J., concurring). In contrast, the ADTPA's limitation on class actions applies *only* to ADTTA class actions. In Justice Stevens's view—and recalling that his vote was the deciding vote either way in *Shady Grove*—Alabama's policy determinations over who can bring ADTPA class actions should take priority over Rule 23. That is, after all, "so intertwined with a state right" that it is in the same statute and limited to that statute.

As an alternative to struggling with this issue, courts and litigants should take a step back and consider how this issue lies in the broader framework of the case. Neither *Shady Grove* nor *Lisk* actually involved determining whether Rule 23 is satisfied: They deal solely with whether CAFA jurisdiction exists—and, fairly, the answer to that is yes, as both cases were "filed under Rule 23 of the Federal Rules of Civil Procedure." Instead of struggling with the interplay between, on the one hand, Rule 23 and the federal courts' desire for uniform procedural rules and, on the other hand, New York's prohibition on class actions for statutory penalties or Alabama's prohibition of private ADTPA class actions, federal courts could take a different view.

The cases could proceed in federal courts, as the plain language of 28 U.S.C. § 1332(d)(2) would require. When it comes to determining whether a class should be certified, the federal court applies Rule 23 *and* the state's substantive policies on categorical bars to class certification (in New York, statutory penalties; in Alabama, private ADTPA claims), but *not* the state's procedural class-certification rules. This is akin to how the common law approaches limitations periods: *lex fori* for the statute of limitations (considered to be procedural) and *lex loci* for the statute of repose (considered to be substantive). *See, e.g.*, *Freeman v. Williamson*, 890 N.E.2d 1127, 1133 (Ill. App. Ct. 2008). Justice Stevens implicitly acknowledges this point in his *Shady Grove* concurrence when he raises the substantive impact of the "in some sense procedural" statutes of limitations as a criticism of Justice Scalia's plurality opinion. 559 U.S. at 425 n.9. The response may be that CAFA is for class actions, and if it is clear that a case cannot proceed as a class action, judicial economy counsels against letting the case proceed in federal court only to be dismissed when class certified is ultimately denied, as it must be under this proposal. That ignores the emerging consensus that denial of class certifications does *not* destroy class certification and that Congress in its wisdom chose to expand federal jurisdiction to include cases "filed under" Rule 23 or a similar state statute or rule. *See* Matthew M.K. Stein & Aaron T. Morris, "CAFA Jurisdiction after Class-Certification Denial," *Class Actions & Derivative Suits*, Vol. 23, No. 3 (Spring 2013). Had Congress wanted to limit CAFA jurisdiction to cases likely to be certified or actually certified, it could have done so.

Ultimately, one thing is clear: State laws that limit class actions in certain contexts are at risk of falling under the shade of Rule 23's axe.

Matthew Stein is an associate in the Boston, Massachusetts, office of Skadden, Arps, Slate, Meagher & Flom LLP.