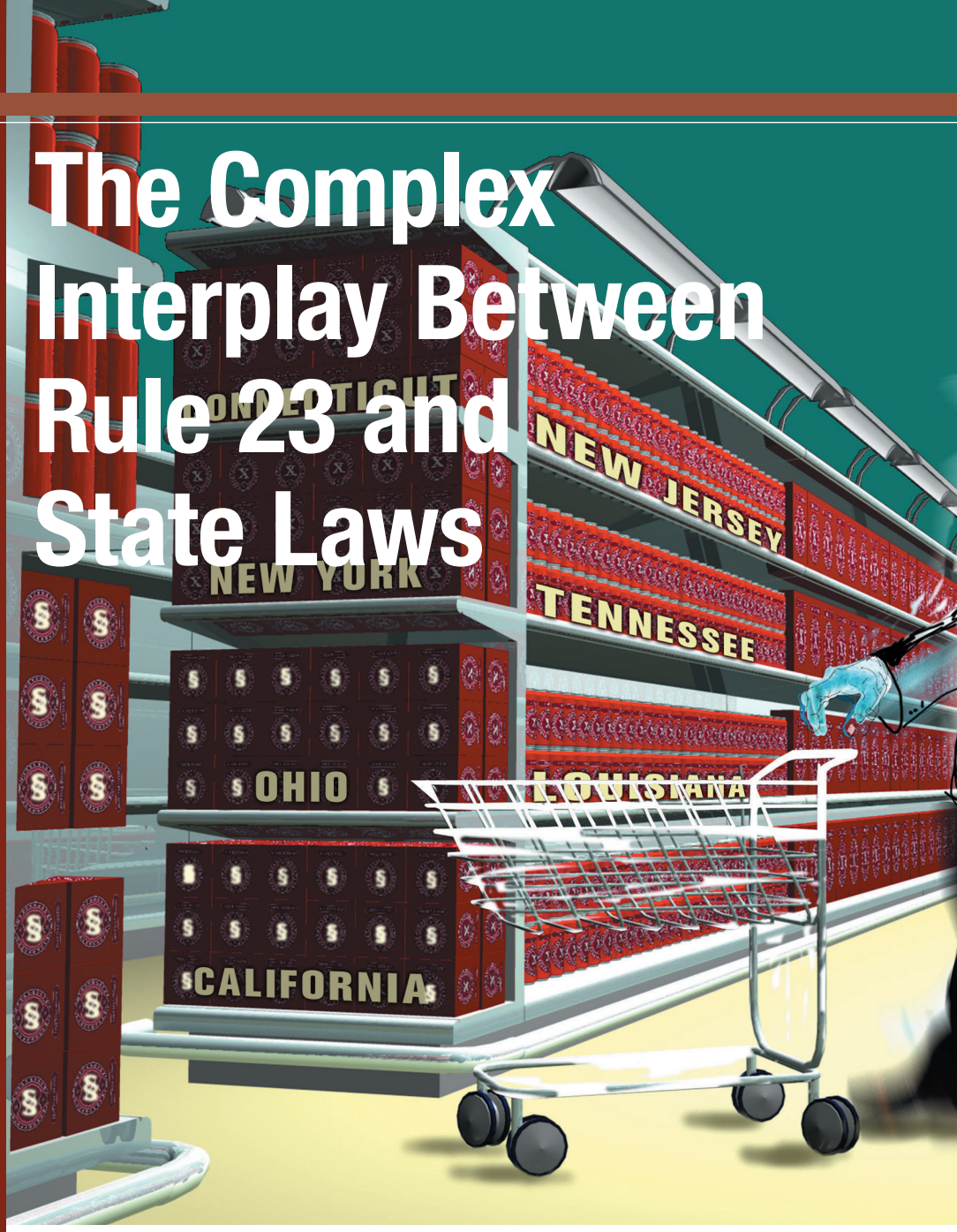
Class Actions in Diversity Actions

The Complex Interplay Between Rule 23 and State Laws

By Michael R. McDonald and Damian V. Santomauro

State statutes will be carefully analyzed as plaintiffs eagerly test the breadth of *Shady Grove* and its potential to allow otherwise barred class action complaints.



In the recent plurality opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, the United States Supreme Court held that a New York state statute barring class actions seeking to recover statutory penalties did not apply to state law claims in federal court because the New York law's validity was preempted by Federal Rule of Civil Procedure 23. 130 S. Ct. 1431 (2010). As a result, certain state law class actions may become viable in federal court diversity cases even though state law would otherwise prohibit those actions in state court.

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Shady Grove is noteworthy for the unusual constellation of justices joining the three opinions issued by the Court. Justice Scalia authored the main opinion and was joined by Chief Justice Roberts and Justices Thomas and Sotomayor. Justice Stevens issued a concurring opinion joining the result, while Justice Ginsburg authored a dissenting opinion, joined by Justices Kennedy, Breyer, and Alito. More importantly, though, *Shady Grove* has uncertain but potentially far-reaching implications. Although five justices agreed with the result in *Shady Grove*, the Court's opinion is a plurality because no single rationale or opinion garnered five votes. Indeed, the three separate *Shady Grove* opinions reflect three disparate approaches—none of which a majority of justices appear to have agreed with—to resolving disputes that can develop in federal court diversity actions involving application of federal rules and procedures to state law claims. Thus, issues involving the interplay between the Federal Rules of Civil Procedure and state statutes and rules remain far from settled. This uncertainty will likely lead to significantly increased litigation in the federal court system involving application of Federal Rule of Civil Procedure 23 to state statutes and rules about class actions.

The Supreme Court's *Shady Grove* Decision

In *Shady Grove* a medical practice, Shady Grove Orthopedic Associates, provided care to an automobile accident victim, Sonia E. Galvez, who later assigned to Shady Grove her rights to insurance benefits under an insurance policy with Allstate. Shady Gove submitted a claim to Allstate. Allstate paid the claim, but only after the 30 days required by N.Y. Ins. Law Ann. §5106(a). Afterward, Shady Grove filed an action seeking to recover approximately $500 in statutory interest that had accrued on the overdue benefits. Shady Grove's complaint, filed in the Eastern District of New York, and based on diversity jurisdiction under the Class Action Fairness Act, 28 U.S.C. §1332(d) (CAFA), sought relief on its own behalf and on behalf of a putative class of all other policyholders to which Allstate owed statutory interest. The district court dismissed the complaint for lack of subject matter jurisdiction, holding that the New York statute, which bars class action claims seeking, as Shady Grove did, to recover a statutory penalty, applied in diversity suits in federal court. N.Y. C.P.L.R. §901(b) ("Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."). The Second Circuit affirmed, finding that because N.Y. C.P.L.R. §901(b) and Fed. R. Civ. P. 23 addressed separate issues and, therefore, did not conflict, N.Y. C.P.L.R. §901(b) applied in a diversity case.

The *Shady Grove* Court was confronted with the tension inherent in earlier jurisprudence about which law would apply in an action pending in federal court on the basis of diversity jurisdiction. At the heart of this tension is forum shopping—a situation in which a party selects a particular forum to obtain a litigation advantage that would not otherwise exist. On the one hand, the Court's line of cases following *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), have indicated that state substantive law and federal procedural rules apply in diversity actions in federal court and that courts determine whether a rule affects the availability of a substantive right to ascertain whether it is substantive or procedural rule under the oft-referenced "outcome-determinative" test. *See*, *e.g.*, *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996) (holding that "New York's law controlling compensation awards for excessiveness or inadequacy can be given effect, without detriment to the Seventh Amendment"). On the other hand, the Court's jurisprudence following *Sibbach v. Wilson & Co.*, 312 U.S. 1, 61 S. Ct. 422, 85 L. Ed. 479 (1941), suggests that *Erie* is not implicated when a Federal Rule of Civil Procedure covers an issue. That is, a court should only conduct the *Erie* analysis if a Federal Rule of Civil Procedure does not apply or is otherwise invalid. *See*, *e.g.*, *Hanna v. Plumer*, 380 U.S. 460 (1965) (holding that "the adoption of Rule 4 (d)(1), designed to control service of process in diversity actions, neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule [rather than the law of Massachusetts, which would have compelled a different result] is therefore the standard against which the District Court should have measured the adequacy of the service"). The three disparate opinions in *Shady Grove* reflect different approaches to resolving the tension discussed above.

Justice Scalia's Plurality Opinion

Writing for the plurality, Justice Scalia articulated a bright-line rule to resolve the issue in this case. The Court would first determine whether the federal rule of procedure "answers the question in dispute." 130 S. Ct. at 1437. That is, does the state law conflict with the federal rule of procedure? If it does, then the Court must apply the federal rule of procedure "unless it exceeds statu-

tory authorization or Congress's rulemaking power." *Id.* In other words, under the plurality view, if a Federal Rule of Civil Procedure "really regulates procedure," courts must apply it in a diversity case unless it violates the Rules Enabling Act, 28 U.S.C. §2072(b). *Id.* at 1445. In reality, the answer to the first question will likely be dispositive under this approach because, as Justice Scalia observed, "we have rejected every statutory challenge to a Federal Rule that has come before us." *Id.* at 1442. Applying this test, the plurality determined that both Fed. R. Civ. P. 23 and N.Y. C.P.L.R. §901(b) addressed the same issue—whether a party may "maintain" a class action. *Id.* at 1439. As such, the analysis for the plurality was straightforward. Having concluded that N.Y. C.P.L.R. §901(b) conflicted with Fed. R. Civ. P. 23, and finding that the federal rule fell within the Rules Enabling Act's authorization, the plurality determined that the Second Circuit erred in applying N.Y. C.P.L.R. §901(b) to Shady Grove's diversity action. For the plurality, it was irrelevant whether a *state law*—in *Shady Grove*, N.Y. C.P.L.R. §901(b)—was substantive or procedural. As long as the Federal Rule of Civil Procedure "really regulates procedure," it would take precedence over a state law in a conflict between the two.

> ***Shady Grove…*** has turned Congress's intent in enacting CAFA on its head.

Justice Ginsberg's Dissent

Justice Ginsburg, writing for the dissent, expressed concern that the Court's decision "approves Shady Grove's attempt to transform a $500 case into a $5,000,000 award, although the State creating the right has proscribed this alchemy." 130 S. Ct. at 1460 (Ginsburg, J. dissenting). Cautioning that courts should interpret the Federal Rules of Civil Procedure "with sensitivity to important state interests," the dissent urged that "Rule 23 should be rationally read to avoid any collision" with state law. *Id.* at 1463, 1468–69 (quotation marks and citation omitted). The dissent's approach was that with an "unavoidable conflict," the relevant inquiry was "whether application of the [state] rule would have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would be likely to cause a plaintiff to choose the federal court." *Id.* at 1469 (brackets in original) (quotation marks and citation omitted). Using this approach, the dissent did not find a conflict between Fed. R. Civ. P. 23 and N.Y. C.P.L.R. §901(b), concluding that N.Y. C.P.L.R. §901(b) did not address whether Shady Grove could maintain a class action in the suit but, rather, merely affected its possible remedy. *Id.* at 1464, 1466 ("In other words, Rule 23 describes a method of enforcing a claim for relief, while CPLR §901(b) defines the dimensions of the claim itself"). Without a conflict, the Court did not need to consider whether Fed. R. Civ. P. 23 was authorized by the Rules Enabling Act.

Justice Stevens' Concurrence

Justice Stevens' concurring opinion reached the same result as the plurality, but eschewed the plurality's bright-line approach to resolving the question of whether a Federal Rule of Civil Procedure applies to an issue: he adopted a nuanced approach. 130 S. Ct. at 1454 (Stevens, J. concurring) ("Although Justice Scalia may generally prefer easily administrable, bright-line rules, his preference does not give us license to adopt a second-best interpretation of the Rules Enabling Act. Courts cannot ignore text and context in the service of simplicity."). Justice Stevens "agree[d] with Justice Ginsburg that there are some state procedural rules that federal courts must apply in diversity cases because they function as a part of the State's definition of substantive rights and remedies." *Id.* at 1448. As articulated by Justice Stevens, however, the circumstances that warranted applying bright-line rules supported by the Rules Enabling Act, as opposed to reading "text" and considering "context," are quite limited. *Id.* at 1457 ("In my view, however, the bar for finding an Enabling Act problem is a high one…. The mere possibility that a federal rule would alter a state-created right is not sufficient. There must be little doubt.").

Under Justice Stevens's approach, a "federal rule… cannot govern a particular case in which the rule would displace a state law 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." *Id.* at 1452. In contrast to the plurality, Justice Stevens' approach focused not only on whether the Federal Rule of Civil Procedure was procedural, but whether the particular state law addressed substantive rights. Applying this approach to Fed. R. Civ. P. 23 and N.Y. C.P.L.R. §901(b), Justice Stevens noted that "[b]ecause Rule 23 governs class certification, the only decision is whether certifying a class in this diversity case would 'abridge, enlarge, or modify' New York's substantive rights or remedies." *Id.* at 1459. Justice Stevens determined that a plain reading of N.Y. C.P.L.R. §901(b) indicated that it was "a rule in New York's procedural code about when to certify class actions brought under any source law," and as such, concluded that it was "a procedural rule that is not part of New York's substantive law." *Id.* at 1148. As a result, Justice Stevens agreed with the plurality's determination that Fed. R. Civ. P. 23 applied to Shady Grove's diversity action.

The Ironies of *Shady Grove*

There are a couple of significant ironies that flow from *Shady Grove*. First, the plurality not only openly recognized that the Court's decision encouraged forum shopping, but the Court also found it perfectly acceptable. 130 S. Ct. at 1148. ("[D]ivergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure. Congress itself has created the possibility that the same case may follow a different course if filed in federal instead of state court. The short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping."). Such acceptance of blatant forum shopping appears at odds with the mandate of the Court in *Erie*—and followed in the *Hanna* line of cases—that deciding whether to apply a state or federal rule or law turns on the "twin aims of… discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). Regardless of how the *Shady Grove* plu-

rality's willing acceptance of forum shopping comports with the Court's precedents, *Shady Grove* will have significant consequences, namely allowing claims, previously restricted to individual actions, to proceed as class actions. Indeed, as the dissent noted, "substantial variations between state and federal money judgments may be expected" following *Shady Grove*. 130 S. Ct. at 1471 (quotations marks and citation omitted). For example, a federal court venue will now permit Shady Grove to seek relief ten thousand times greater than the remedy available to it in state court.

The other irony of *Shady Grove* is that it dramatically undermines the principles underlying CAFA. In enacting CAFA, Congress intended to limit the overall number of class actions that state courts would certify by creating a mechanism through which class actions involving at least 100 members and seeking at least $5,000,000 could be removed to federal court. One of Congress's primary goals in enacting CAFA was to make it harder for plaintiffs' lawyers to engage in "gaming the system," which typically involved trying to avoid diversity jurisdiction and filing class actions in state courts "with reputations for readily certifying classes and approving settlement without regard to class members' interests." S. Rep. No. 109-14, Section III (Purposes), at 4, 5 (2005). Indeed, as Justice Ginsburg noted in her dissent, CAFA "sought to check… the overreadiness of some state courts to certify class actions." 130 S. Ct. at 1473. *Shady Grove*, however, has turned Congress's intent in enacting CAFA on its head and allows class action claims barred in state court to become viable solely by virtue of CAFA. Accordingly, a likely outgrowth of *Shady Grove* will be a significant rise in the number of plaintiffs who will now affirmatively plead CAFA jurisdiction to obtain entry into the federal court system to pursue class action claims that they cannot file in state courts. In other words, *Shady Grove* has created an anomalous situation in which class action plaintiffs and their lawyers can "game the system" in reverse by seeking federal diversity jurisdiction for class actions that are barred in state courts.

The Impact of *Shady Grove*

In addition to offering plaintiffs' attorneys a way to "game the system," *Shady Grove* probably has other legacies. First, it will probably lead to confusion in the lower courts in diversity cases because it did not offer a clear rule or standard backed by a majority opinion. Second, *Shady Grove* will probably have an instant, substantial effect in diversity actions in which the New York state law, N.Y. C.P.L.R. §901(b), applies. Third, it may make inapplicable some aspects of other state statutes dealing with class actions.

No Overarching Rule from *Shady Grove*

For all of its analysis of complex civil procedure issues, *Shady Grove* actually provides little guidance to lower courts and practitioners because of the varying approaches expressed in the three opinions. Indeed, the absence of a clear majority rule or standard in *Shady Grove* may result in confusion among the various circuit courts of appeals and district courts attempting to apply *Shady Grove* in diversity cases. As a result, it would not be surprising if the Court were to further refine the analysis in *Shady Grove* in the near future. Justice Stevens' retirement has added an additional wrinkle in that his replacement will likely have a significant role in determining the Court's approach to cases involving alleged clashes between the Federal Rules of Civil Procedure and state law. Accordingly, prognostications about the potential, future, substantive consequences of *Shady Grove* are little more than speculation.

If, as in the case of *Shady Grove*, "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices," the "narrowest ground" on which the judgment rests then represents the controlling rule. *Marks v. United States*, 430 U.S. 188, 193 (1977). As articulated in a subsequent decision described in more detail below, after *Shady Grove*, the "narrowest ground" on which the plurality and the concurrence agreed is this: "irrespective of *Erie*, §901(b) does not apply to state-law claims in federal court because it is validly pre-empted by Rule 23." *Holster v. Gatco*, 130 S. Ct. 1575, 1575 (2010) (Scalia, J. concurring).

N.Y. C.P.L.R. §901(b) Will Not Apply to State Law Claims in Federal Court

Though the central holding of *Shady Grove* is narrow, the decision will likely have a significant, immediate impact on diversity actions in which New York state law applies. Specifically, N.Y. C.P.L.R. §901(b) will no longer impede class actions alleging New York state law claims in diversity cases. In this respect, *Shady Grove* dramatically departs from existing decisional authority. *See, e.g., In re Auto. Refinishing Paint Antitrust Litig.*, 515 F. Supp. 2d 544, 550 (E.D. Pa. 2007); *Paul v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.)*, 496 F. Supp. 2d 404, 415, n. 7 (D. Del. 2007). Class action plaintiffs will likely rush to assert New York state law claims as class actions in federal courts that they could not pursue as class actions in New York state courts, such as violations of New York's antitrust law, N.Y. Gen. Bus. Law. §340, and New York's Consumer Protection Act, N.Y. Gen. Bus. Law. §349, both of which permit statutory penalty awards.

Justice Stevens' concurrence will likely become a critical component of the analysis in determining the extent to which the *Shady Grove* rationale will be extended.

One potential exception might involve class actions asserted under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. §227. This unique federal statute, which covers certain facsimile transmissions, telephone calls, and prerecorded telephone calls and involves statutory penalties, creates a private right of action as follows: "A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring [a private action] in an appropriate court of that State…." 47 U.S.C. §227(b)(3). Numerous decisions have found that N.Y. C.P.L.R. §901(b) barred TCPA class actions from proceeding in federal diversity cases. *See, e.g., Bonime v. Avaya, Inc.*, 547 F.3d 497 (2d Cir. 2008); *Holster v. Gatco, Inc.*, 2008 U.S. App. LEXIS 23203 (2d Cir. Oct. 31, 2008), *vacated and remanded*, 130 S. Ct. 1575 (2010).

Shady Grove's impact on these decisions is uncertain because of the TCPA's unique nature. The TCPA conditions a private action on whether the applicable state's laws or court rules permit a party to pursue that action in the courts of that state.

Nevertheless, *Shady Grove* could possibly open the floodgates to TCPA class action lawsuits by New York plaintiffs previously foreclosed from filing them. Recently, the United States Supreme Court, in a two sentence order accompanied by a concurrence from Justice Scalia and a dissent by Justices Ginsburg and Breyer, vacated and remanded the Second Circuit's decision in *Holster* for further consideration in light of *Shady Grove*. *Holster v. Gatco*, 130 S. Ct. 1575, 1575 (2010). The decision by the Second Circuit on remand will likely further define the scope of *Shady Grove* and the potential statutes that may fall within its ambit.

Other State Laws Are Potentially Inapplicable in Federal Court

In addition to N.Y. C.P.L.R. §901(b), a myriad of other state laws affecting class actions have been potentially implicated by *Shady Grove*. For example, some states have statutes creating causes of action, particularly consumer protection laws, that bar individuals from pursuing violations of the statutes as class actions. *See*, *e.g.*, O.C.G.A. §10-1-399 ("Any person who suffers injury or damages as a result of a violation of Chapter 5B of this title, as a result of consumer acts or practices in violation of this part, as a result of office supply transactions in violation of this part or whose business or property has been injured or damaged as a result of such violations may bring an action individually, but not in a representative capacity). Further, some states have statutes that expressly limit the circumstances in which plaintiffs may assert claims under the statutes as class actions. *See*, *e.g.*, Ohio Rev. Code §1345.09(B) ("Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02 or 1345.03 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code"). Similarly, some states have statutes that limit the types and amount of damages that individuals can recover in a class action. *See*, *e.g.*, N.J. Stat. Ann. §56:12-4 ("Class actions may be brought under the provisions of [the Plain Language Act], but the amount of punitive damages shall be limited to $10,000.00 against any one seller, lessor, insurer or creditor and the amount of attorney's fees may not exceed $10,000.00"). To test the limits of *Shady Grove*, plaintiffs will likely file class action claims in federal courts based on diversity and allege violations of these types of state statutes, which will, at least initially, result in an increase in diversity class actions in federal courts.

Justice Stevens' concurrence will likely become a critical component of the analysis in determining the extent to which the *Shady Grove* rationale will be extended beyond N.Y. C.P.L.R. §901(b) to other state laws and rules that address class action issues. Specifically, Justice Stevens concurred in the judgment of the Court only because he viewed N.Y. C.P.L.R. §901(b) as "a procedural rule that is not part of New York's substantive law." 130 S. Ct. at 1448 (Stevens, J. concurring). And, indeed, as Justice Ginsberg pointed out in her dissent, Justice Stevens stood on common ground with the dissent in that a majority of the Court "agrees that Federal Rules should be read with moderation in diversity suits to accommodate important state concerns." *Id.* at 1463, n.2 (Ginsburg, J. dissenting).

Nevertheless, it is unclear how courts will resolve apparent collisions between Federal Rule 23 and state rules or statutes that are "sufficiently interwoven with the scope of the substantive right or remedy" so that if they applied Federal Rule 23 it would "abridge, enlarge, or modify" the state's substantive rights and remedies. *Id.* at 1456 (Stevens, J. concurring). Justice Stevens recognized that those circumstances, although perhaps limited, may exist, suggesting that Federal Rule 23 will not preempt all state statutes that address class action.

Although too small a sample to constitute an accurate barometer on future decisions, two recent decisions from federal courts give credence to the view that Justice Stevens' concurrence may become the critical opinion in *Shady Grove*, at least when courts grapple with the interplay between Fed. R. Civ. P. 23 and state statutes and rules. First, *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, the District Court for the Northern District of Ohio expressly relied upon Justice Stevens' concurrence, which it referred to as "the crucial fifth vote in *Shady Grove*," to conclude that, in a diversity action, Federal Rule 23 did *not* preempt a provision of Ohio's statutory consumer protection scheme that prohibited plaintiffs from maintaining class actions in the absence of an Ohio attorney general rule or state court decision determining that the defendant's conduct was deceptive or unconscionable. 2010 U.S. Dist. LEXIS 69254, *6 (N.D. Ohio July 12, 2010) (addressing Ohio Rev. Code §1345.09(B)). As the court stated: "Here, O.R.C. §1345.09 purports to define Ohio's substantive rights and remedies by creating a cause of action for defrauded consumers and declaring the relief available to them. The class action restriction in O.R.C. §1345.09(B) is intimately interwoven with the substantive remedies available under the OCSPA." *Id.* at **6–8 (citing *Shady Grove*, 130 S. Ct. at 1456 (Stevens, J. concurring)).

Similarly, in *Bearden v. Honeywell Int'l Inc.* the District Court for the Middle District of Tennessee held that a plaintiff's class action claims pursuant to the Tennessee Consumer Protection Act, Tenn. Code Ann. §47-18-104, *et seq.*, were barred because the statute only authorized private actions to be brought "individually to recover actual damages." 2010 U.S. Dist. LEXIS 83996, **23–24, 30–31 (M.D. Tenn. Aug. 16, 2010) (citing Tenn. Code Ann. §47-18-109(a)(1)). In doing so, the court rejected the argument by the plaintiff that the *Shady Grove* decision compelled application of Rule 23 in lieu of the class action bar in the Tennessee statute. Instead, the court applied the approach set forth in Justice Stevens's concurrence in *Shady Grove* and ruled that because the class action limitation in the Tennessee statute was part of the statute's substantive rights and remedies, Rule 23 did not apply. *Id.* at **30–31 ("Applying Justice Stevens's approach, this court finds that the class-action limitation contained in the [Tennessee statute]

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is so intertwined with that statute's rights and remedies that it functions to define the scope of the substantive rights. Unlike in *Shady Grove*, the limitation here is contained in the substantive statute itself, not in a separate procedural rule. The very statutory provision that authorizes a private right of action for a violation of [the statute] limits such claims those brought individually.") (internal quotation marks and citation omitted).

Subsequent decisions may prove that the *In re Whirlpool* and *Bearden* decisions and their reliance on Justice Stevens's concurrence were an anomaly. But the reasoning utilized by these courts appears sound and is consistent with the Supreme Court's *Erie* jurisprudence, which has suggested that courts should perform substantive analyses of potential conflicts between the Federal Rules of Civil Procedure and state laws, rather than the bright-line test proposed by Justice Scalia's opinion in *Shady Grove*.

Can State Court Be a Favorable Forum?

As a general proposition, corporate defendants typically prefer litigating class actions in federal court, particularly in those jurisdictions where the state courts are viewed as friendly forums for class action plaintiffs and their attorneys. Thus, often the initial instinct of a defense counsel facing a proposed class action in state court is to investigate the potential for removal to federal court based on CAFA. Even if there is the potential that another state's more favorable laws would apply, defendants are generally more comfortable with the district courts conducting the choice of law analysis than the forum state's court. The *Shady Grove* decision, however, potentially alters these considerations in two significant ways.

First, plaintiffs pursing state law class actions that are barred in state courts now can turn to the federal courts to assert those claims in some instances. Certainly, plaintiffs formerly without forums to assert statutory penalty class actions when New York law applied can now turn to the federal courts without fear of N.Y. C.P.L.R. §901(b). The number of those claims filed in federal courts will undoubtedly rise significantly. While *Shady Grove* only addresses applying N.Y. C.P.L.R. §901(b) to federal court, the plaintiffs' class action bar will likely eagerly test the breadth of *Shady Grove* by filing class action complaints that would have been otherwise barred or adversely affected by other state statutes and rules about class actions. As such, in light of *Shady Grove*, defense counsel should carefully consider the applicable state statutes that form the basis of state law claims to determine whether any of the potentially applicable states' laws provide more favorable positions from which defendants can challenge the viability of class actions. If so, counsel will want to determine whether challenging a court's jurisdiction through a removal application offers an advantage. An analysis will vary from case to case, but regardless, counsel will need to balance the traditional advantages of litigating class actions in federal courts with the potential for eliminating or otherwise adversely affecting the maintenance of a class actions if potential classes re-file the case in state courts.

Second, for class action complaints filed in state courts, removal under CAFA may no longer hold the default position for defendants in analyzing the best forum. That is, if counsel discovers a potentially applicable state law that has the capacity to provide a more favorable disposition of a class action than if class issues were simply analyzed under Fed. R. Civ. P. 23 in federal court, *Shady Grove* suggests that defense counsel may want to approach removal more cautiously than in the past. Indeed, a reflex removal application could preclude the viability of certain defenses to a class action that would otherwise exist if an action remained in state court, including defenses that could bar the class action entirely.

For example, if a potential class' counsel filed a class action in Louisiana state court for violation of Louisiana's Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. §51:1401 and other common law claims, difficult choices may confront defense counsel seeking removal. On the one hand, remaining in state court would bar the class claims for violation of Louisiana's Unfair Trade Practices and Consumer Protection Law because that statute bars private right of actions from being filed in a representative capacity. *See* La. Rev. Stat. §51:1409. But the potentially class action friendly state court would consider the common law claims. On the other hand, a removal application could result in both claims proceeding as class claims if the district court rejected Justice Stevens' rationale and applied *Shady Grove* to determine that Fed. R. Civ. P. 23 preempted the class action bar in the Louisiana law. Thus, a defendant would confront litigating only the common law claims as a class action in the state court, or removing to a federal court and potentially litigating both the common law claims and the claims alleging violations of Louisiana's Unfair Trade Practices and Consumer Protection Law as class claims. Defense counsel would have to weigh the advantages of the federal forum against the risk of litigating the Louisiana Unfair Trade Practices and Consumer Protection Law claim as a class claim, which could potentially leave a defendant liable for treble damages and attorneys' fees on a classwide basis if the plaintiffs prevailed and a court certified the class. *See* La. Rev. Stat. §51:1409.

Conclusion

Beyond its narrow holding, *Shady Grove* did little to establish a mechanism for addressing the tension that can arise when the Federal Rules of Civil Procedure are applied in diversity cases involving state laws or rules that address subjects similar to those in federal procedural rules. Because the *Shady Grove* decision did not result in a majority-approved, bright-line rule for courts to follow, courts appear likely to apply *Shady Grove*'s middle ground approach advocated by Justice Stevens, which interprets a federal rule with sensitivity to important state interests. In light of the high bar placed by Justice Stevens for application of a state procedural statute or rule that is in conflict with a Federal Rule of Civil Procedure, it appears probable that, at least for now, courts will err on the side of favoring and applying the Federal Rule of Civil Procedure when there is a conflict with a state statute or rule. What will transpire when the Court—with a new justice—next weighs in on the issue is, of course, anyone's guess.

With class actions, it is clear that the *Shady Grove* decision has fundamentally altered existing jurisprudence regarding the application of N.Y. C.P.L.R. §901(b) and, going forward, the bar to statutory penalties in class actions is no longer available to defendants in federal diversity cases in which New York law applies. Whether this will be

the extent of *Shady Grove*'s impact on diversity cases involving class action claims based on state laws, or whether the decision will have broader implications remains to be seen. In the short term, however, the decision may result in an influx of consumer-oriented, class actions into federal courts based on diversity jurisdiction. Conversely, defendants will probably adopt cautious approaches to attempting to remove cases filed in state courts in which the state laws provide more protection, or more obstacles for plaintiffs to overcome, against class action claims than Federal Rule of Civil Procedure 23. The full impact of the *Shady Grove* decision, though, will remain unrealized until subsequent decisions from district courts weigh in on its application to the myriad of state court statutes and rules involving class actions.