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Removal Of Class Actions: What Danger Lurks In *Shady Grove*

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IN 2010, the Supreme Court of the United States delivered a landmark decision in *Shady Grove Orthopedic Associates v. Allstate Insurance.*[1] The case presented an extraordinarily complex combination of procedural issues, primarily concerning a crossroads between federal and state law in the context of class certification. The result was nothing short of bewildering. In a plurality opinion, a majority agreed that a New York statute prohibiting class actions in suits seeking penalties or statutory minimum damages was preempted by Rule 23 of the Federal Rules of Civil Procedure.[2] As a result, the petitioner's suit could proceed as a class action in federal court, while ironically it would not have been able to do so in state court.

In the opening opinion, Justice Scalia gave a broad, sweeping application of Rule 23, finding that it "unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rules' prerequisites are met."[3] But while Justice Stevens agreed with the result in this particular case, he disagreed with Justice Scalia's rationale, opining that if a federal procedural 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," then the federal procedural rule "cannot govern" such a case.[4]

Following *Shady Grove*, depending upon the proclivity of a district court to apply Justice Scalia's rigid, FRCP-deferential rationale, or Justice Stevens's more pragmatic theory, a motion for class certification could have strikingly different odds of success. If a district court follows Justice Scalia's approach, then the decision to remove a putative class action to federal court would result in the loss of the very grounds—a state law prohibiting class certification—that would otherwise defeat

[1] 559 U.S. 393 (2010).

[2] *Id.* at 394.

[3] *Id.* at 406.

[4] *Id.* at 423–424 (Stevens, J., concurring).

class certification in state court. However, should a district court follow Justice Stevens's approach, that same state law might apply even after removal, depending on whether it is so intertwined with the ability to proceed as a class action that it functions to define the scope of this right. Thus, before removing a putative class action, defense attorneys must be wary of the hidden dangers that lurk in the wake of *Shady Grove*.

Part I of this Article will discuss the *Shady Grove* decision in further detail, outlining the factual and procedural background, the majority's judgment, and the divergence between Justice Scalia and Justice Stevens on the issue of whether Rule 23 preempts *every* state law regarding class actions. Part II will examine the practical effect that judges employing Justice Scalia's rationale will have on the future of class actions, and will analyze recent court decisions affected by this reasoning. Part III will explore the practical effect that courts using Justice Stevens's approach will have in forthcoming class action cases, and outline a series of cases that were determined under this method.

This Article should provide defense practitioners with a sense of awareness when faced with the decision of whether to remove a class action to federal court, including the possibility that, ironically, this could result in certification of a class that otherwise might have been defeated in state court.

I. The *Shady Grove* Decision

A. Background

The underlying dispute arose when a medical facility, Shady Grove Orthopedic Associates, attempted to revive a $5 million class action suit it had filed in federal court against Allstate Insurance Co.[5] In the suit, Shady Grove contended that Allstate regularly failed to provide timely payments of claims under a New York law that required insurance companies to pay legitimate claims within thirty days of receipt.[6] Alleging that Allstate routinely refused to pay interest on overdue benefits, and invoking the Class Action Fairness Act, Shady Grove sought relief on behalf of itself and a class of all others to whom Allstate owed interest.[7] Allstate moved to dismiss, arguing that under New York law, N.Y.C.P.L.R. § 901(b) (hereinafter "§901(b)"), a suit to recover a statutory penalty cannot be maintained as a class action.[8] The district

[5] *See* Lyle Denniston, *Analysis: Sorting Out an* Erie *Sequel*, SCOTUSBLOG (Mar. 31, 2010 1:16 p.m.), www.scotusblog.com/2010/03/analysis-sorting-out-an-erie-sequel/ (last visited February 2, 2015).

[6] *See* Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The* Shady Grove *Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041, 1042 (2011). The provision that Shady Grove relied upon was N.Y. INS. LAW § 5106(a) (McKinney 2009). *See id.* A failure to comply with this law triggered a statutory penalty assessed at two percent per month of the amount owed. *Id.* Shady Grove filed a claim with Allstate, which Allstate paid, but not within the thirty-day time frame. *See Shady Grove*, 559 U.S. at 397. When Allstate refused to pay the statutory penalty, Shady Grove sued to recover the penalty in federal court through diversity jurisdiction. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 466 F. Supp.2d 467 (E.D.N.Y.

[7] *Shady Grove*, 466 F. Supp.2d at 470. *See also* Class Action Fairness Act, 28 U.S.C. § 1332(d) (2006).

[8] *See Shady Grove*, 466 F. Supp.2d at 470–472. Here, Allstate asserted that N.Y. C.P.L.R. § 901(b) (McKinney 2006) would preclude a federal court sitting in diversity from hearing the case. *Id.* The statute states, "[u]nless 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." N.Y. C.P.L.R. § 901(b).

court agreed with Allstate and granted its motion to dismiss,[9] and the Second Circuit affirmed the district court's decision.[10] Shady Grove then petitioned for, and was granted, writ of certiorari to the Supreme Court.[11]

The Court handed down a multi-part opinion with a majority of the justices agreeing with Justice Scalia's opening opinion only on the first step in determining whether to apply a state restriction on class actions in light of the provisions of Rule 23.[12] Just Scalia lost support from a majority in his interpretation of the Rules Enabling Act (hereinafter "REA"),[13] which governs situations in which federal and state procedural rules seemingly clash.[14] Justice Stevens penned a lengthy concurring opinion, in which he provided a different interpretation of the REA.[15]

B. The Majority Decision

Only a small fraction of the *Shady Grove* decision produced a binding effect on subsequent jurisprudence. In Parts I and II-A of the opinion, Justice Scalia was joined by Chief Justice Roberts, Justice Thomas, Justice Sotomayor, and Justice Stevens, resulting in a majority. This portion of the opinion concluded that New York's preclusion of class action suits for statutory damages does not bar "a federal district court sitting in diversity from entertaining a class action under Federal Rule of Civil Procedure 23."[16]

This conclusion was based on a simple line of reasoning. The Court explained that in a situation in which a federal court is asked to apply a state procedural law, it must first consider whether the federal procedural law—Rule 23 in this case—"answer[ed] the question in dispute."[17] If it did, "it govern[ed]—New York's law notwithstanding—unless it exceed[ed] statutory authorization or Congress's rulemaking power."[18] From this reference point, the majority found that Rule 23 did, in fact, answer the question in dispute—whether Shady Grove's suit may proceed as a class action—when it stated that "[a] class action may be maintained" if certain criteria are met.[19] The

[9] *Shady Grove*, 466 F. Supp.2d at 476.

[10] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 549 F.3d 137, 146 (2d Cir. 2008).

[11] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 556 U.S. 1220 (2009) (petition for writ of certiorari granted).

[12] *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 395–406 (2010) (plurality opinion). *See also* Denniston, *supra* note 5. Only Parts I and II-A of Justice Scalia's opinion reflect the views of a five-person majority. Ides, *supra* note 6, at 1043. Part I describes the case and the basic question presented, while Part II-A concludes that Rule 23 of the Federal Rules of Civil Procedure answered the "question in dispute"; in other words, whether a class action may be maintained in the case before it. *Id.* It should be noted that Justice Ginsburg led a strong dissenting opinion, in which three justices joined. *Id.* at 437–459. However, this portion of the decision is not within the scope of this Article.

[13] 28 U.S.C. § 2072(b) (2006). In *Shady Grove*, the split arose from a disagreement among the justices with respect to whether the Rules Enabling Act would authorize Rule 23's applicability.

[14] *See Shady Grove*, 559 U.S. at 406–410 (plurality opinion).

[15] *See id.* at 416–436 (Stevens, J., concurring).

[16] *Id.* at 393.

[17] *Id.* at 398 (citing Burlington Northern R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987)).

[18] *Id.* (citing *Burlington*, 480 U.S. at 5; Hanna v. Plumer, 380 U.S. 460, 463–464 (1965)).

[19] *Id.* The two conditions that must be met for Rule 23 to govern are set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), as well as one of three categories described in subdivision (b). *Id.* (citing Fed. R. Civ. P. 23).

majority further concluded that since the New York law attempted to answer the same question—prohibiting Shady Grove's suit from being "maintained as a class action" due to the relief it sought—the state law cannot apply in diversity suits unless Rule 23 is *ultra vires*.[20] In other words, because the state law was in direct conflict with the federal law, the state law gave way in favor of the federal law.

C. The Divide – Differing Interpretations of the Rules Enabling Act Create a Plurality Opinion and a Defining Concurrence

Justice Stevens withdrew his endorsement of Part II-B of Justice Scalia's opinion and instead offered his own view of the REA. As a result, courts have been left with two choices when looking to interpret a state law that appears to conflict with Rule 23—Justice Scalia's sweeping deference to Rule 23 or Justice Stevens's more nuanced view.[21]

1. Justice Scalia's Approach – The "Facial Challenge" Test

After determining that Rule 23 preempted § 901(b), Justice Scalia attempted to develop a bright-line rule for subsequent courts to apply when dealing with state laws that appear to conflict with Rule 23.[22] He first explained that the REA grants the Court the authority to promulgate and apply rules subject to its review (such as the Federal Rules of Civil Procedure, generally, and Rule 23, specifically), so long as those rules do "not abridge, enlarge or modify any substantive right."[23] Justice Scalia further noted that while a Rule may incidentally affect a party's rights, it is valid so long as it "regulated only the process for enforcing those rights," and not "the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either."[24] He clarified that most procedural rules affect a litigant's substantive rights, so the test of the REA's "abridge-enlarge-modify" limitations is what "the rule itself regulates."[25]

Using this framework, Justice Scalia concluded that when examining the validity of a FRCP under the REA, "it is not the substantive or procedural nature or purpose of the affected *state* law that matters, but the substantive or procedural nature of the *Federal Rule*."[26] Accordingly, the validity of a Federal Rule "depends entirely upon whether it regulates procedure" and, if it does, "it is authorized by [the REA] and is valid in all jurisdictions, with respect to all claims, *regardless of its incidental effect upon state-created rights*."[27] In other words,

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[20] *Id.* at 398–399. The majority determined that the Second Circuit incorrectly concluded that § 901(b) and Rule 23 did not conflict because they addressed different issues, the former dealing with eligibility for class treatment, and the latter dealing with certifiability. *Id.* at 399. Justice Scalia proclaimed that this distinction was "entirely artificial." *Id.*

[21] *See* Jack E. Pace III and Rachel J. Feldman, *From Shady to Dark: One Year Later,* Shady Grove*'s Meaning Remains Unclear,* 25 ANTITRUST 75, 76–77 (Spring 2011).

[22] *See Shady Grove, 559* U.S. at 406–410 (plurality opinion).

[23] *See Id.* at 406–407 (plurality opinion) (citing 28 U.S.C. § 2072(b)).

[24] *Id.* at 407–408. .

[25] *See* Ides, *supra* note 6, at 1044 (quoting *Shady Grove,* 559 U.S. at 407).

[26] *Shady Grove,* 559 U.S. at 410 (plurality opinion) (emphasis added).

[27] *Id.* (citing Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)) (emphasis added).

Justice Scalia determined that Rule 23 did not affect parties' rights, but only altered *how* the claims were processed, and as a result trumped the New York law.[28] Essentially, this approach considers solely the text of the state law (as opposed to its purpose, context, applicability, etc.), so that any facial conflict between a state law and Rule 23 would be resolved in favor of the Federal Rule. Put another way, a federal procedural rule that "answers the same question" as a state law will always preempt the conflicting state law. This rationale gives the absolute right of way to Rule 23 in the event that it conflicts with a state statute precluding class actions, regardless of whether the state law is considered "substantive" or "procedural." This approach garnered only a plurality, so lower courts are not bound by it.

2. Justice Stevens's Concurring Opinion – The "As Applied" Test

Although a majority of the justices agreed that the REA prevents the Court from applying a Federal Rule if it would "abridge, enlarge or modify any substantive right," Justice Stevens parted ways with the majority's interpretation of the REA's reach in favor of a more flexible approach.[29] In his concurrence, Justice Stevens disagreed with Justice Scalia's heavy deference to the Federal Rules, and the concomitant unwillingness to examine the state law in question. While he agreed that § 901(b) was purely procedural, and therefore that Rule 23 did not improperly infringe upon the parties' substantive rights, he recognized the possibility of exceptions to the Justice Scalia's REA interpretation.[30] Justice Stevens explained that in rare cases, the "line between procedural and substantive law is hazy. ... " Where 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, "federal courts must recognize and respect that choice."[31]

Justice Stevens then provided a two-step framework for federal courts to make this determination. First, the court must determine whether the scope of the Federal Rule is "sufficiently broad to control the issue before the court, thereby leaving no room for the operation of seemingly conflicting state law."[32] If not, or if both the federal law and state law can operate alongside one another, then the REA does not apply, and the court must engage in the traditional Rules of Decision Act inquiry under the *Erie* line of cases.[33] If, however, the federal rule is sufficiently broad to cover the issue, "such that there is a direct collision, the court must decide whether application of the Federal Rule represents a valid exercise

[28] *See* Ides, *supra* note 6, at 1046 (quoting *Shady Grove*, 559 U.S. at 408 (plurality opinion) (emphasis added)). Justice Scalia, as he so often does, turned to the precise text of the state law at issue, and essentially reasoned that the REA should govern state laws that facially conflict with the Federal Rule on point.

[29] *See Shady Grove*, 559 U.S. at 416–436 (Stevens, J., concurring).

[30] *See id.* at 419–421.

[31] *See id.* (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533 (1949)).

[32] *Id.* at 421 (citing Burlington Northern R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987); Walker v. Armco Steel Corp., 446 U.S. 740, 749–750 n.9 (1980)).

[33] *Shady Grove*, 559 U.S. at 421 (Stevens, J., concurring).

of the rulemaking authority ... bestowed on this Court by the Rules Enabling Act."[34] Unlike Justice Scalia's broad deference to the Federal Rules, Justice Stevens believed that Congress did not intend to afford the Federal Rules such sweeping application.[35]

Under Justice Stevens's approach, if there is no direct conflict with the state law at issue, federal courts are vested with the power either to apply the state law or to supplant the state law with judge-made rules.[36] On the other hand, if the Federal Rule does cover the issue at hand, it generally applies, pursuant to the REA. Nonetheless, the Federal Rule still may not apply, since some state procedural rules may be "so bound up with the state-created right or remedy that [they define] the scope of the substantive right or remedy."[37] This two-step approach is more favorable to defense attorneys, as it does not necessarily prevent a federal court from applying a state law that, in certain situations, prohibits class actions.

II. Following Justice Scalia's Line of Reasoning: The Hidden Dangers of Removal

One of the indirect effects of the *Shady Grove* decision is that lower courts are left with a choice of whether to apply Justice Scalia's or Justice Stevens's approach.[38] According to Justice Scalia's method, if a state law, on its face, conflicts with a Federal Rule, a federal court must apply the Federal Rule.

In the context of class actions, few courts have adopted Justice Scalia's approach allowing certain lawsuits to proceed as class actions in federal court, despite a state law clearly precluding such a course of action. This Part will analyze recent decisions falling under this line of reasoning.

Shortly after the Supreme Court issued its *Shady Grove* decision, the U.S. District Court for the Western District of Michigan was one of the first district courts to consider its effect. In *American Copper & Brass v. Lake City Industrial Products* the court was faced with a class action complaint under the Telecommunications Consumer Protection Act ("TCPA"), which provided recipients of unsolicited, commercial faxes the right to recover a $500 statutory penalty for each transmission "if otherwise permitted by the laws or rules of a court of a State."[39] The defendant moved to dismiss because Michigan Court Rule 3.501 prohibited plaintiffs from maintaining their claims as a class action if they sought a statutory penalty.[40] The court denied the defendant's motion, citing *Shady Grove*, and held that it can certify a class seeking TCPA's statutory penalty – despite a state court rule prohibiting such.[41]

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[34] *Id.* at 422 (citing *Walker*, 446 U.S. at 749–750; *Burlington*, 480 U.S. at 5) (internal quotations omitted). As previously mentioned, the REA requires that federal rules "not abridge, enlarge or modify *any* substantive right." 28 U.S.C. § 2072(b) (emphasis added).

[35] *Id.* (referencing Wyeth v. Levine, 555 U.S. 555 (2009)).

[36] *See Erie*, 304 U.S. 64; Guaranty Trust Co. v. York, 326 U.S. 99 (1945). Since there would be no FRCP on point, the REA is inapplicable. Thus, a federal judge would be authorized to act on his own discretion in determining whether to apply the state law.

[37] *See Shady Grove*, 559 U.S. at 419–420 (Stevens, J., concurring).

[38] *See infra* Part I.C.

[39] No. 1:09-CV-1162, 2010 WL 2998472 (W.D. Mich. July 28, 2010); 47 U.S.C. § 227(b)(3).

[40] *See id.* at *1–2.

[41] *Id.* at *3 (citing *Shady Grove*, 559 U.S. at 406–410 (plurality opinion)). However, the court never considered whether the TCPA's "if otherwise permitted" language incorporated the state court's rule. *See* Craig T. Cagney, Note, *O Sonia, Where Art Thou?: Why Justice Sotomayor's Silent "Opinion" Should Serve as* Shady Grove*'s Holding*, 80 FORDHAM L. REV. 189, 218 n.315 (2011).

Another Michigan district court – this time, the Eastern District – applied *Shady Grove* just one month later. In In re *OnStar Contract Litig.*, buyers and lessees of automobiles equipped with OnStar telematics equipment filed class action complaints against four automobile manufacturers and OnStar Corporation, asserting consumer protection act and warranty claims.[42] The defendants moved to dismiss the non-resident plaintiffs on the grounds that the Michigan Consumer Protection Act ("MCPA") prevented non-residents from maintaining a class action.[43] Citing *Shady Grove*, the court concluded that the MCPA's limitation on class actions conflicted with Rule 23; thus, it did not prevent non-residents from maintaining class action claims under the MCPA.[44]

Other courts have applied Justice Scalia's approach in similar contexts. In *Coastal Conservation Ass'n v. Locke*, the Middle District of Florida held that the test of whether a rule is procedural or substantive is whether the rule will "really regulat[e] procedure."[45] Additionally, in In re *Katrina Canal Breaches Litig.*, the Fifth Circuit Court of Appeals held that "reliance on state court decisions in support of certification is unavailing" because "[f]ederal class action certification is controlled by federal procedural rules, notwithstanding state law."[46] In *3M Co. v. Boulter*, the D.C. Circuit expressly rejected Justice Stevens's approach when dealing with a situation involving conflicting state and federal laws.[47]

Taking these decisions into consideration, defense practitioners must be conscientious of the forum where the petition is filed. While the above cases were all filed in federal district court, a tactical decision to remove a class action filed in state court to a federal court could have undesirable consequences. If Justice Scalia's approach is followed, a class may be certified in federal court event though class certification would not have been permissible had the case remained in state court.

III. Following Justice Stevens' Concurrence: The Perils of Removal are not so Gloomy

In contrast to the cases noted in Part II applying Justice Scalia's "facial challenge" approach, this Part will discuss a series of recent decisions that have used Justice Stevens's "as-applied" framework when faced with a clash between federal and

[42] No. 2:07-MDL-01867, 2010 WL 3516691, at *1 (E.D. Mich. Aug. 25, 2010). The actions were consolidated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation, and the complaints were then combined in a Second Master Amended Complaint that sought certification of nationwide classes. *Id.*

[43] *See id.*

[44] *Id.* at *4.

[45] Nos. 2:09-cv-641-FtM-29SPC, 2:10-cv-FtM-29SPC, 2010 WL 1407680, at *2 (M.D. Fla. Apr. 6, 2010).

[46] 401 Fed. App'x 884, 887 (5th Cir. 2010).

[47] 842 F. Supp.2d 85, 94–96 nn. 7–8 (D.C. Cir. 2012). In this case, however, the defendant's motion to dismiss was brought on the grounds that the D.C. Anti-SLAPP statute mandated that a court resolve a "special motion to dismiss" in a different manner than it would otherwise resolve a preliminary motion attacking the merits of a case under Rules 12 or 56. *Id.* at 93. The D.C. Circuit did not buy this argument, finding that the precise text of the D.C. statute conflicted with Rules 12 and 56. *Id.* at 94–100 (citing *Shady Grove*, 559 U.S. 393). In rejecting the defendant's motion to dismiss, the court determined that Justice Stevens's concurrence in *Shady Grove* should not be dispositive. *Id.* at 94–95 nn. 7–8. The Northern District of Illinois employed this same approach in Intercon Solutions, Inc. v. Basel Action Network when it denied the defendant's motion to dismiss under a similar Anti-SLAPP statute. 969 F. Supp.2d 1026, 1041–1048 (N.D. Ill. 2013).

state procedural law. Not surprisingly, these cases have been exceedingly more favorable to defendants in class actions.

Fortunately for defendants, a majority of the courts applying *Shady Grove* seem to follow Justice Stevens's rationale.[48] This is principally due to those courts' reliance on the Supreme Court's directive for interpreting fragmented Court decisions.[49] In *Marks v. United States*, the Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as the position taken by those Members who *concurred in the judgments on the narrowest grounds.*'"[50] The "narrowest grounds" is understood as the "less far-reaching common ground."[51]

In *McKinney v. Bayer Corp.*, the Northern District of Ohio used the *Marks* "narrowest grounds" rationale in concluding that Justice Stevens's concurrence was the appropriate framework for determining whether an Ohio statute prohibiting class actions under specific conditions was preempted by Rule 23.[52] The court held that "[b]ecause Justice Stevens's concurring opinion would permit *some* state law provisions addressing class actions – whereas [Justice Scalia's opinion] would *broadly prohibit any* state law that conflicted with Rule 23 – Justice Stevens's opinion is the narrowest and, thus, controlling opinion."[53] Thus, the court granted the defendants' motion to dismiss.[54]

Courts that have adopted Justice Stevens's approach to interpreting the REA have found that state laws which limit a plaintiff's ability to bring a class action are

[48] *See, e.g., In re* Target Corp. Data Sec. Breach Litig., MDL No. 14-2522 (PAM/JJK), 2014 WL 7192478, at *8–9 (D. Minn. Dec. 18, 2014) (agreeing with the line of cases adopting Justice Stevens's approach); Davenport v. Charter Commc'ns, LLC, Case No. 4:12CV0007 AGF, 2014 WL 3818377 (E.D. Mo. Aug. 4, 2014) (finding Justice Stevens's approach applied because it was the narrowest of the Justices'); Leonard v. Abbott Labs., Inc., No. 10-cv-4676 (ADS)(WDW), 2012 WL 764199, at *12 (E.D.N.Y. Mar. 5, 2012); *In re* Wellbutrin XL Antitrust Litig., 756 F. Supp.2d 670, 675 (E.D. Pa. 2010); *see* James River Ins. Co. v. Rapid Funding, LLC, 658 F.3d 1207, 1217 (10th Cir. 2011) ("Justice Stevens concurred, and the Tenth Circuit has understood his concurrence to be the controlling opinion in *Shady Grove.*") (citing Garman v. Campbell Cnty. Sch. Dist. No. 1, 630 F.3d 977, 983 n.6 (10th Cir. 2010)); Godin v. Schencks, 629 F.3d 79, 84 (1st Cir. 2010) (relying on Justice Stevens's concurrence in holding that "[b]ecause Section 556 is 'so intertwined with a state right or remedy that it functions to define the scope of the state-created right,' it cannot be displaced by Rule 12(b)(6) or Rule 56."); *In re* Digital Music Antitrust Litig., 812 F. Supp.2d 390, 415–416 (S.D.N.Y. 2011); *In re* Packaged Ice Antitrust Litig., 779 F. Supp.2d 642, 660 (E.D. Mich. 2011) ("Courts interpreting the *Shady Grove* decision … have concluded that Justice Stevens's concurrence is the controlling opinion by which interpreting courts are bound."); Bearden v. Honeywell Int'l, Inc., No. 09-CV-1035, 2010 WL 3239285, at *10 (M.D. Tenn. Aug. 16, 2010) ("Justice Stevens's concurrence is the controlling opinion"); Kline v. Mortg. Elec. Sec. Sys., No. 08-CV-408, 2010 WL 6298271, at *3 (S.D. Ohio 2010) (noting that the district courts in Ohio faced with this precise issue "have concluded unanimously ' that Justice Stevens's concurrence … is the controlling opinion by which [they are] bound.'") (quoting McKinney v. Bayer Corp., 744 F. Supp.2d 733 (N.D. Ohio 2010)); *In re* Whirlpool Corp. FrontLoading Washer Prod. Liab. Litig., No. 08-WP-65000, 2010 WL 2756947, at *2 (N.D. Ohio July 12, 2010).

[49] *See* Marks v. United States, 430 U.S. 188 (1977).

[50] 430 U.S. at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)) (emphasis added).

[51] United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007) (quoting Johnson v. Bd. of Regents, 263 F.3d 1234, 1247 (11th Cir. 2001)).

[52] *See McKinney*, 744 F. Supp. 2d 733.

[53] *Id.* at 747 (emphasis added).

[54] *Id.* at 749.

not preempted by Rule 23 if 1) the limiting provision is found within the text of a state statute that confers a substantive right and 2) applies only to cases brought under the statute. Where this is true, the state procedural laws were so intertwined with state-created substantive remedies that applying Rule 23 would abridge, enlarge, or modify a substantive state-created right in violation of the REA.[55] In other words, if the state restriction on class actions was contained in a statute that applied to a specific state-created right, Rule 23 would not preempt the state law.

For example, in *Lisk v. Lumber One Wood Preserving, LLC*, the plaintiffs brought a class action for alleged breach of express warranty and violation of the Alabama Deceptive Trade Practices Act ("ADTPA").[56] Following Justice Stevens's method, the court concluded that the ADTPA's bar on private class actions defined the scope of a state-created right or remedy, since it was contained in the same section of the Alabama Code that *created* a private right of action for a violation of the ADTPA.[57] Therefore, applying Rule 23 would have modified that remedy in violation of the REA.[58]

Similarly, in In re *Nexium (Esomeprazole) Antitrust Litig.*, the Massachusetts District Court found that a provision of the Illinois Antitrust Act ("IAA"), which required indirect purchaser suits to be brought by the Illinois Attorney General, and a provision of the Utah Antitrust Act ("UAA"), which required residency to sue under the UAA, were not preempted by Rule 23.[59] The court found that because each of the state restrictions was contained in the applicable state's antitrust statute, both defined the scope of the plaintiffs' substantive right to bring antitrust claims.[60] Therefore, the court applied the state laws and dismissed the claims.[61]

A number of other federal district courts have used this same method for applying a state law restricting class actions. These courts have looked to whether the state law in question applied to all claims, or whether its reach was limited to certain claims, as an indication of whether it substantially impacted state substantive rights.[62] The primary determining factor has been whether the limitation was encompassed within a set of statutes that afford a

[55] *See, e.g.*, Lisk v. Lumber One Wood Preserving, LLC, 993 F. Supp.2d 1376, 1383–1384 (N.D. Ala. 2014); *In re* Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp.2d 367, 408–409, 410 (D. Mass. 2013).

[56] *Lisk*, 993 F. Supp. 2d at 1377; ALA. CODE §§ 8-19-1 to 8-19-15 (2013).

[57] *See id.* at *7; ALA. CODE § 8-19-10(f) ("[a] consumer or other person bringing an action *under this chapter* may not bring an action on behalf of a class") (emphasis added).

[58] *Id.*

[59] *See* 968 F.Supp.2d 367, 408–409, 410 (D. Mass 2013); 740 ILL. COMP. STAT. §§ 10/1 to 10/12 (West 2012); UTAH CODE §§ 76-10-3101 to 76-10-3118 (West 2012).

[60] *Esomeprazole*, 968 F. Supp.2d at 408–410.

[61] *Id.*

[62] *See, e.g., In re Digital Music Antitrust Litig.*, 812 F. Supp.2d at 416 (applying Illinois class-action limitation, noting that it "[was] not contained in a generally applicable procedural rule but, rather, in the same paragraph of the same statute that create[d] the underlying substantive right."); *In re* Wellbutrin XL Antitrust Litig., 756 F. Supp.2d 670, 677 (E.D. Pa. 2010) (relying in part on the fact that the state statutory restriction on indirect purchaser actions was "incorporated in the same statutory provision as the underlying right, not a separate procedural rule").

substantive right to a plaintiff.[63] This approach focuses on the state legislature's intent behind the restriction.[64] State legislatures are in the unique position of gauging both the negative effect of unfair business practices on consumers as well as the pernicious effect that class actions can have on businesses. Logically, it makes sense that a state be able to eliminate both evils, so long as the limitations are not too broad.

Therefore, if a defense practitioner is certain that Justice Stevens's approach will apply, she might be able to comfortably remove a class action where there is a state restriction on class actions. Still, the practitioner must first look to assess whether the restriction stems from a state statute creating a substantive right (thus, allowing for application of state law in federal court) or if is purely procedural (thus, preempted by Rule 23). This requires careful attention to detail and a thorough analysis of both the state restriction at issue and the judicial philosophy of the federal jurisdiction in which the case sits.

IV. Conclusion

The Supreme Court's decision in *Shady Grove* has created confusion in the class action realm. Although a majority agreed that the first step in determining whether to apply a state bar on class actions is to gauge whether there is a Federal Rule on point, no majority could agree as to the proper interpretation of whether the REA would authorize Rule 23's applicability.[65] Consequently, courts faced with these situations must choose whether to apply Justice Scalia's "facial challenge" approach or Justice Stevens's "as applied" approach. This is a complicated question, implicating not only how to apply the REA, but also how to interpret a fragmented, plurality opinion.

Fortunately, the take-away for the practitioner is simpler: If you are defending a class action originally filed in federal court and there is a bar to class certification under state law that you wish to invoke, be prepared to argue (if available in your jurisdiction) for Justice Stevens's approach, and to show why, under this test, the state bar on class actions should be applied. If you are defending a class action filed in state

[63] *See, e.g., In re* Frito-Lay N. Am., Inc. All Natural Litig., No. 12-MD-2413 (RRM)(RLM), 2013 WL 4647512, at *18 (E.D.N.Y. Aug. 29, 2013) (The court held that a provision of New York's General Business Law ("GBL") that limited its application to conduct occurring within New York was not preempted by Rule 23. This was because the underlying conduct that gave way to the prohibition was substantive; thus, application of Rule 23 would violate the REA.); Phillips v. Philip Morris Cos., Inc., 290 F.R.D. 476, 481 (N.D. Ohio 2013) (The court found that a provision in the Ohio Consumer Sales Practice Act ("OCSPA") that prohibited class actions unless defendants were on constructive notice that their alleged behavior was deceptive was not preempted by Rule 23. In distinguishing the statute at issue in *Shady Grove*, the court concluded that § 901(b) limited the availability of *all* class actions, in which the plaintiff sought statutory damages, whereas the OCSPA provision only restricted such suits arising out of OCSPA.); Williams v. Chesapeake La., Inc. Civil Action No. 10-1906, 2013 WL 951251, at *5 (W.D. La. Mar. 11, 2013) (The court found a notice provision of Louisiana's Mineral Code Articles, which barred class actions for the underpayment of royalties was not preempted by Rule 23, since the restriction was encompassed within the Mineral Code.).

[64] *See Lisk*, 993 F. Supp.2d at 1385 ("Justice Stevens seems to indicate that were it clearer the New York legislature enacted the law at issue in *Shady Grove* to limit the state's damages remedy, i.e. a substantive right, applying Rule 23 *would* violate the Rules Enabling Act.").

[65] *See* Cagney, *supra* note 41, at 208.

court and you are contemplating removal, first check whether there may be a state law that bars class certification. For example, if the suit is one under a state Unfair Trade Practices Act, state law may allow only the state Attorney General, and not private plaintiffs, to pursue a class action. If there is such a bar, think twice before removing the case to federal court. Depending on whether the federal court applies Justice Scalia's or Justice Stevens's approach, and, if the latter, whether the test is satisfied, the bar may be preempted in federal court. This could mean you might have been able to defeat class certification in state court, but ironically be deprived of that defense in federal court. Beware of what danger lurks in *Shady Grove.*