The Puzzle Of Enforcing Class Action Bars Post-Shady Grove

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Despite the significant passage of time since the U.S. Supreme Court's ruling in Shady Grove Orthopedic Associates v. Allstate Insurance[1], courts continue to wrestle with whether state statutory class action bars are enforceable in federal court. Eight years ago the U.S. Supreme Court ruled that a New York class action seeking statutory penalties could proceed in federal court despite New York's prohibition on class actions seeking statutory penalties. In Shady Grove, the court compared N.Y. Civil Practice Law Ann. § 901(b), which bars class actions seeking statutory penalties, with Federal Rule of Civil Procedure 23, which permits class actions in federal court. Writing for the majority, Justice Antonin Scalia acknowledged that Rule 23 and § 901(b) directly conflict, and subsequently ruled that Rule 23 preempted application of New York's state bar on certain class actions.

In light of this decision, plaintiffs lawyers now could circumvent state law bars against class actions by bringing the state law claim in federal court. However, since Shady Grove was decided, the lower courts have been inconsistent in its application. This inconsistency likely results from the fractured disposition of the case. Justice Scalia only garnered a majority for the decision that Rule 23 supersedes § 901(b). No majority opinion exists as to the extent to which state law class action bars can be preempted by Rule 23. A plurality recognized that under the Rules Enabling Act, any valid federal procedural rule should always control over conflicting state law. In his concurrence, Justice John Paul Stevens, the fifth vote in the majority, disagreed, believing that a federal procedural rule may not be applied when it directly displaces a substantive state right.

Thus, courts have been divided on (1) whether to apply the plurality's rule or Justice Stevens' rule, and (2) if applying Justice Stevens' rule, whether to categorize a class action bar as substantive or procedural. Although the vast majority of courts seem to agree that Justice Stevens' concurrence provides the precedential rule, as it could be viewed as a narrower subset of the majority opinion, even the courts that look to Justice Scalia's plurality opinion employ a similar procedural versus substantive test. The primary difference is that while Justice Scalia would only look at the nature of Rule 23 to determine its application, Justice Stevens would instead focus on the nature of the state class action bar at issue.

Only two federal appellate courts have addressed Shady Grove's application to class action bars, to differing results. In Lisk v. Lumber One Wood Preserving, the Eleventh Circuit confronted an Alabama bar on class actions brought under its Deceptive Trade Practice Act, or ADTPA.[2] Although the court recognized that including the class action

bar within the ADTPA could arguably make it part of the substantive rights granted in the ADTPA, the court read Shady Grove as expressly holding that Rule 23 preempts any state law barring class actions seeking statutory penalties. In contrast, the Sixth Circuit, in a more perfunctory analysis, "assum[ed] without deciding" that Kentucky's bar on class actions for claims brought under the Kentucky Wage and Hour Act constituted a substantive rule.[3]

District courts have largely taken a different approach than those two circuit court cases, engaging in their own more rigorous analysis of whether Rule 23 infringes a substantive state right. Instead of assuming, as Lisk did, that Rule 23 never modifies a state substantive right, the district courts have focused their attention on determining whether a class action bar is substantive or procedural. Some courts found that a class action bar is substantive when it is contained in the same provision as the granting of a substantive right.[4] Other courts applied a stricter standard, finding a class action bar to be merely procedural when an individual claim could still be pursued under that statute.[5]

These varying approaches have led to directly contradicting results. For example, under the Illinois Antitrust Act, only the state attorney general may bring an antitrust class action suit on behalf of indirect purchasers.[6] One judge in the Northern District of Illinois found that this class action bar was inextricably "intertwined" with the Illinois Antitrust Act and thus must be enforced over Rule 23.[7] However, another judge in the same district came to the opposite conclusion a year later.[8] There, the court permitted indirect purchasers to bring a class action under the Antitrust Act because "[t]he availability of the class action procedure does not change the substantive rights or remedies available to them."

Just within the past two years, courts are still expressing their discomfort with the lack of definitiveness on how to properly apply Shady Grove. One court stated that it "does not agree with the implications of Shady Grove."[9] Another court hoped "we will have clearer guidance about the applicability of Shady Grove."[10] A third court was forced to acknowledge "that cases have ruled on both sides of this issue" and "there is no definitive guidance on this issue."[11]

This inconsistency in the district courts, combined with the paucity of appellate precedent, creates continued uncertainty on whether class action bars will be upheld in federal court. An unintended consequence of this increasing variance among courts is increased forum shopping. Not only will plaintiffs now go to federal court to circumvent state class action bars, they will choose forums where courts are more likely to find the class action bar as a procedural, rather than a substantive, rule. This may run against the purpose of uniformity inherent in federal rules, but until the federal appellate courts address this divide, enforcement of state class action bars will remain unsettled.

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[1] Shady Grove Orthopedic Associates PA v. Allstate Insurance Co., 559 U.S. 393 (2010).

[2] See Lisk v. Lumber One Wood Preserving LLC, 792 F.3d 1331 (11th Cir. 2015).

[3] See Whitlock v. FSL Management LLC, 843 F.3d 1084 (6th Cir. 2016).

[4] See, e.g., In re Myford Touch Consumer Litigation, No. 13-cv-03072-EMC, 2016 WL 7734558 (N.D. Cal. Sept. 14, 2016); Stalvey v. American Bank Holdings Inc., No. 4:13-cv-714, 2013 WL 6019320 (D.S.C. Nov. 13, 2013).

[5] See, e.g., Andren v. Alere Inc., No. 16cv1255-GPC, 2017 WL 6509550 (S.D. Cal. Dec. 20, 2017); In re Aggrenox Antitrust Litigation, No. 3:14-md-2516, 2016 WL 4204478 (D. Conn. Aug. 9, 2016); Wittman v. CB1 Inc., No. CV-15-105-BLG-SPW-CSO, 2016 WL 1411348 (D. Mont. April 8, 2016).

[6] See740 Ill. Comp. Stat. Ann. 10/7.

[7] See In re Opana ER Antitrust Litigation, 162 F.Supp.3d 704 (N.D. Ill. 2016).

[8] In re Broiler Chicken Antitrust Litigation, No. 16-C-8637, 2017 WL 5574376 (N.D. Ill. Nov. 20, 2017).

[9] See In re Scotts EZ Seed Litigation, No. 12-CV-4727, 2017 WL 3396433 at *6 (S.D.N.Y. Aug. 8, 2017).

[10] In re Aggrenox, 2016 WL 4204478 at *6.

[11] Friedman v. Dollar Thrifty Automotive Group Inc., No. 12-cv-02432-WYD-KMT, 2015 WL 8479746 at *5 (D. Colo. Dec. 10, 2015).