

NEW YORK STATE CLASS ACTIONS : GAME CHANGER

By Thomas A. Dickerson¹

From time to time the U.S. Supreme has rendered decisions which have had a profound impact on the viability of state court class actions, including those brought pursuant to Article 9 of the CPLR. The U.S. Supreme Court's decision issued on March 31, 2010 in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*¹ is no exception.

In fact, the U.S. Supreme Court has encouraged the expanded use of state court class action procedures, especially, for consumer class actions based on the common law and/or state statutory law as an alternative to bringing such actions in federal court [see e.g., *Snyder v. Harris*² [limiting federal diversity jurisdiction], *Zahn v. International Paper Company*³ [individual class members must meet jurisdictional amount], *Eisen v. Carlisle & Jacqueline*⁴ [plaintiff must pay costs of notice], *Phillips Petroleum Co. v. Shutts*⁵ [state courts have nationwide

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jurisdiction in opt-out class actions] and *Matsushita Electric Industrial Co. Ltd. v. Epstein*⁶ [state courts have power to approve settlement of nationwide class actions that release claims that could only have been brought in federal court]. As a consequence many states enacted progressive class action statutes in the 1970s and 1980s many of which track FRCP 23 with some exceptions⁷.

Some Reluctance

Notwithstanding the 1975 Judicial Conference proposal for a new class action statute designed to "set up a flexible, functional scheme whereby class actions could qualify without the present undesirable and socially detrimental restrictions"⁸, there has been some reluctance over the years since CPLR Article 9 was enacted in 1975 in applying it to the full range of common claims warranting class action treatment [see e.g., *Globe Surgical Supply v. GEICO Insurance Company*⁹ and *Friar v. Vanguard Holding Corporation*¹⁰].

CPLR § 901(b)

That reluctance also appears in CPLR § 901(b) which provides that "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". As noted by the Court of Appeals in *Sperry v. Crompton Corp.*¹¹ "While the Legislature considered the Judicial Conference report, various groups advocated for the addition of a provision that would prohibit class action plaintiffs from being awarded a statutorily-created penalty or minimum measure of recovery, except when authorized in the pertinent statute...It is obvious that by including the penalty exception in CPLR 901(b), the Legislature declined to make class actions available when individual plaintiffs were afforded sufficient economic encouragement to institute actions (through statutory provisions awarding something beyond or unrelated to actual damages) unless a statute expressly authorized the option of class action status".

New York State Applications

CPLR § 901(b) prohibition of class actions seeking a penalty or a minimum recovery has been applied by New York courts in antitrust actions under General Business Law § 340 [Donnelly Act][see e.g., *Sperry v. Crompton Corp.*¹², *Paltre v. Geeral Motors Corp.*¹³, *Ho v. Visa USA, Inc.*¹⁴, *Cunningham v. Bayer, AG*¹⁵, *Asher v.*

*Abbott Laboratories*¹⁶] and to claims brought under the federal Telephone Consumer Protection Act [see e.g., *Giovanniello v. Carolina Wholesale Office Machine Co., Inc.*¹⁷, *Rudgazer & Gratt v. Cape Carnaveral Tour & Travel, Inc.*¹⁸, *Leyse v. Flagship Capital Services Corp.*,¹⁹]. However, the CPLR § 901(b) prohibition has not been applied in class actions alleging a violation of General Business Law §§ 349, 350 [see e.g., *Cox v. Microsoft Corp.*,²⁰, *Ridge Meadows Homeowners's Association, Inc. v. Tara Development Co., Inc.*,²¹], Labor Law § 220 [see e.g., *Pasantez v. Boyle Environmental Services, Inc.*²², *Galdamez v. Biordi Construction Corp.*,²³] and Labor Law § 196-d [see e.g., *Krebs v. The Canyon Club*²⁴] as long as the penalty damages are waived and class members are given the opportunity to opt-out.

Federal Court Applications

In an effort to avoid the impact of CPLR § 901(b) some class actions have been brought in federal court under FRCP 23 which has no such prohibition. Perhaps, on the basis of comity and to discourage forum shopping the federal courts have routinely referred to CPLR § 901(b). For example, in *Leider v. Ralfe*^{25a} a class action setting forth "federal and state claims based on De Beers alleged price-fixing, anticompetitive conduct and other nefarious business practices" the court held that "NY C.P.L.R. §

901(b) must apply in a federal forum because it would contravene both of these mandates to allow plaintiffs to recover on a class-wide basis in federal court when they are unable to do the same in state court" and would encourage forum shopping.

Shady Grove

In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*²⁶ the petitioner filed a class action in diversity against Allstate seeking interest allegedly due and owing. The District Court held that it was deprived of jurisdiction by "N.Y. (CPLR) § 901(b) which precludes a class action to recover a 'penalty' such as statutory interest. Affirming, the Second Circuit...held that § 901(b) must be applied by federal courts sitting in diversity because it is 'substantive' within the meaning of *Erie R. Co. v. Tompkins*"²⁷.

In reversing Justice Scalia writing for the majority stated that "The question in dispute is whether Shady Grove's suit may proceed as a class action. Rule 23...creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his class as a class action...Thus, Rule 23 provides a one-size-fits-all formula for deciding the class-action question. Because § 901(b) attempts to answer the same question-i.e., it states that Shady Grove's suit 'may not be maintained as a class

action' (emphasis added) because of the relief it seeks-it cannot apply in diversity suits unless Rule 23 is ultra-vires...Rule 23 automatically applies 'in all civil actions and proceedings in the United States district courts'".

Significance Of Shady Grove

There are several possible outcomes from the *Shady Grove* decision. First, there may be an increase in the number of class actions brought in federal court by New York State residents seeking to avoid the impact of CPLR § 901(b). Second, defendants in some class actions brought under CPLR Article 9 may be less anxious to remove such cases to federal court under the Class Action Fairness Act²⁸. Third, the Legislature may revisit the need for CPLR § 901(b).

ENDNOTES

1. *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, 2010 WL 1222272 (U.S. Sup. 2010).
2. *Snyder v. Harris*, 394 U.S. 332 (1969).
3. *Zahn v. International Paper Company* 414 U.S. 156 (1973).
4. *Eisen v. Carlisle & Jacqueline* 417 U.S. 156 (1974).
5. *Phillips Petroleum Co. v. Shutts* 472 U.S. 797 (1985).
6. *Matsushita Electric Industrial Co. Ltd. v. Epstein* 516 U.S. 367 (1996).
7. See generally, Dickerson, *Class Actions: The Law of 50 States*, Law Journal Press, 2010.
8. *Sperry v. Crompton Corp.* 8 N.Y. 3d 204, 831 N.Y.S. 2d 760 (2007).
9. *Globe Surgical Supply v. GEICO Insurance Company*, 59 A.D. 3d 129, 871 N.Y.S. 2d 262 (2d Dept. 2008).
10. *Friar v. Vanguard Holding Corporation*, 78 A.D. 2d 83, 434 N.Y.S. 2d 698 (2d Dept. 1986).
11. *Sperry v. Crompton Corp.* 8 N.Y. 3d 204, 831 N.Y.S. 2d 760 (2007).
12. *Sperry v. Crompton Corp.* 8 N.Y. 3d 204, 831 N.Y.S. 2d 760 (2007).
13. *Paltre v. Geeral Motors Corp.*, 26 A.D. 3d 481, 810 N.Y.S. 2d 496 (2d Dept. 2006)
14. *Ho v. Visa USA, Inc.*, 16 A.D. 3d 256, 793 N.Y.S. 2d 8 (1st Dept. 2005).
15. *Cunningham v. Bayer, AG*, 24 A.D. 3d 216, 804 N.Y.S. 2d 924 (1st Dept. 2005).

16. *Asher v. Abbott Laboratories*, 290 A.D. 2d 208, 737 N.Y.S. 2d 4 (1st Dept. 2002).
17. *Giovanniello v. Carolina Wholesale Office Machine Co., Inc.*, 29 A.D. 2d 737, 815 N.Y.S. 2d 248 (2d Dept. 2006).
18. *Rudgazer & Gratt v. Cape Carnaveral Tour & Travel, Inc.*, 22 A.D. 3d 148, 799 N.Y.S. 2d 795 (2d Dept. 2005).
19. *Leyse v. Flagship Capital Services Corp.*, 22 A.D. 2d 426, 803 N.Y.S. 2d 52 (1st Dept. 2005).
20. *Cox v. Microsoft Corp.*, 8 A.D. 3d 39, 778 N.Y.S. 2d 147 (1st Dept. 2004).
21. *Ridge Meadows Homeowners's Association, Inc. v. Tara Development Co., Inc.*, 242 A.D. 2d 947, 665 N.Y.S. 2d 361 (4th Dept. 1997).
22. *Pasantez v. Boyle Environmental Services, Inc.*, 251 A.D. 2d 11, 673 N.Y.S. 2d 659 (1st Dept. 1998).
23. *Galdamez v. Biordi Construction Corp.*, 13 Misc. 3d 1224 (2006), *aff'd* 50 A.D. 3d 357, 855 N.Y.S. 2d 104 (2008)
24. *Krebs v. The Canyon Club*, 22 Misc. 3d 1125 (2009).
25. *Leider v. Ralfe*, 387 F. Supp. 2d 283 (S.D.N.Y. 2005).
26. *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, 2010 WL 1222272 (U.S. Sup. 2010).
27. *Id.*
28. In four mass tort class actions brought on behalf of " former tenants of a luxury apartment complex (in) Westbury " who were " instructed (by the landlord) that their leases would be terminated and they had to vacate the premises " because of water intrusion and the development of mold. The actions had been removed pursuant to the Class Action Fairness Act [see 3 Weinstein Korn & Miller, New York Civil Practice CPLR (MB) Lexis-Nexis at 901.10[3]]. The U.S. District Court in *Sorrentino v. ASN Roosevelt Center, LLC* 2008 WL 5068821 (E.D.N.Y. 2008) and *Ventimiglia v. Tishman Speyer Archstone-Smith Westbury, L.P.*, 2008 WL 5068857 (E.D.N.Y. 2008) remanded all of the class actions back to Nassau County Supreme Court.

