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**SHOP 'TIL YOU DROP: FORUMS AND
FEDERALISM IN NEW YORK'S CLASS
ACTION PROCEDURE**

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Abstract: In the wake of the Supreme Court's decision in *Shady Grove Orthopedics Associates v. Allstate Ins. Co.*, some have proposed that New York repeal § 901(b) of its class action certification statute in order to establish uniformity with the Federal Rules of Civil Procedure's analogue, Rule 23. This article argues against repeal of § 901(b) in order to further New York's sovereign calculus of determining what is best for the state. The New York legislature made a considered determination to bar certification where statutory penalties were available—acquiescing to the ukase of the Judicial Conference of the United States undermines this determination.

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INTRODUCTION

In 1975, New York liberalized its class action law by passing Article 9 of the Civil Practice Law and Rules [CPLR].¹ While Article 9 expanded plaintiffs’ class action rights in many ways, the expansion was not absolute—under § 901(b) of the CPLR, class certification remained unavailable where penalties provided by statute were already available.²

In 2010, the Supreme Court in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, held that in federal courts, Rule 23 of the Federal Rules of Civil Procedure would apply rather than § 901(b).³ Although in many ways Rule 23 is less flexible than New York’s class action law,⁴ there is no analogous bar on certification where statutory penalties are provided.⁵

In the wake of *Shady Grove*, the New York Legislature is confronted with a choice. If it repeals § 901(b), the state will be uniform with the Federal Rules of Civil Procedure, applying a similar rule for state and federal courts. If it keeps § 901(b), it will potentially perpetuate inequities, but preserve its original legislative bargain from the decisions of the Judicial Conference of the United States, the body that promulgates the Federal Rules. Any solution for the New York Legisla-

* I would like to thank Professor Oscar Chase, both for encouraging me on this research and teaching me civil procedure.

¹ N.Y. C.P.L.R. Art. 9 (McKINNEY 2014) [hereinafter C.P.L.R.].

² C.P.L.R. 901(b).

³ 559 U.S. 393 (2010).

⁴ V. Alexander, *Practice Commentary 901:2*, MCKINNEY’S CONSOLIDATED LAWS OF NEW YORK ANN., BOOK 7B, N.Y. C.P.L.R. (2006) (“The drafters of CPLR Article 9 took the position that Rule 23(b)’s classification scheme was unnecessarily complex and redundant.”).

⁵ FED. R. CIV. P. 23.

ture is second best. In 1975, they made a determination to limit certification in one respect, a determination that was sharply curtailed by *Shady Grove*. The New York legislature must now choose between a uniform suboptimal policy and an optimal policy with no uniformity. The uniformity referred to is the uniformity between state and federal procedure. The optimality referred to is the determination by the New York Legislature that the § 901(b) bar is the best policy.

In contrast with Professor Oscar Chase and others,⁶ this article argues that the optimal policy with no uniformity is preferable, even if it means that New Yorkers who do not meet the requirements of federal jurisdiction will be precluded from bringing certain claims in federal court. The article begins with a brief history of *Shady Grove* and the passage of § 901(b) and then presents counterarguments to repealing § 901(b). The article concludes with arguments in favor of retaining § 901(b).

HISTORY OF § 901(B) AND *SHADY GROVE*

The text of § 901(b) indicates that the section was designed to limit class actions by barring class certification when statutory penalties are available.⁷ Unless the statute granting penalties specifically authorizes 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.”⁸ This bar was not mere verbiage and serves to change the outcome of litigation. As an example of this language being outcome determinative, consider that the effect of the Court’s decision in *Shady Grove* to apply Rule 23 instead of the New York rule multiplied potential damages from the statutory limit of \$500 to \$5,000,000.⁹

In *Sperry v. Crompton Corp.*, the New York Court of Appeals framed the addition of § 901(b) to the legislative scheme as a compromise supported by various groups, including the Empire State Chamber of Commerce, that saw the original version of the bill as too permissive of certification.¹⁰ Commentaries to the CPLR note that the section was added to avoid inflicting “annihilating punishment” on defendants.¹¹ To counteract the overwhelmingly permissive changes, business groups wanted to impose at least some limitation by including § 901(b).¹²

⁶ Oscar G. Chase, *Living in the Shadow: Class Actions in New York After Shady Grove*, 2014 N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM 114 (2014); Thomas A. Dickerson et al., *New York State Class Actions: Making It Work-Fulfilling the Promise: Some Recent Positive Developments and Why CPLR 901(b) Should Be Repealed*, 77 ALB. L. REV. 59, 68 (2014).

⁷ See C.P.L.R. 901(b).

⁸ *Id.*

⁹ 559 U.S. at 408.

¹⁰ 8 N.Y.3d 204, 211 (2007).

¹¹ V. Alexander, *Practice Commentary 901:11*, MCKINNEY’S CONSOLIDATED LAWS OF NEW YORK ANN., BOOK 7B, N.Y. C.P.L.R. (2006).

¹² See *Sperry*, 559 U.S. at 211.

Shady Grove did nothing to change this underlying compromise, nor does Professor Chase contend it did.¹³ The effect of *Shady Grove* was to eliminate New York's class certification uniformity. If a claim were brought in federal court today, the existence of statutory penalties would not bar certification, whereas the same claim for certification in state court would be barred. The arguments for repeal speak only to this lack of uniformity.

INEQUITIES

Professor Chase has two major contentions, each of which will be addressed. The first of these is that inequity results from separate federal and state rules for class certification.¹⁴ It is often difficult to limn the line between substance and procedure. Clerical decisions by a legislature to only accept complaints filed on 8.5x11" paper written in Times New Roman may end up discriminating against those who wrote on papyrus in Comic Sans, but this is an acceptable procedural discrimination. Other discriminations are not so benign. Section 901(b), as Professor Chase explains, has the effect of barring some claimants and permitting others based merely on the "happenstance of the rules of federal court jurisdiction."¹⁵ Unlike the happenstance of writing in an incorrect font, this happenstance is more an accident of citizenship and is difficult to avoid. While an individual or his lawyer can always move to change jurisdictions, this demand is more onerous than the demand to change one's font with a few clicks.¹⁶

There are two fundamental flaws with this argument. The first is that it proves too much. The "happenstance" Professor Chase refers to is an endemic feature of a dual-court system that the Supreme Court has recognized as producing disparate results.¹⁷ So long as federal jurisdiction requirements differ from state jurisdiction requirements, some claimants unable to access federal courts will face inequities. The Court in *Shady Grove* recognized that this possible "divergence 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."¹⁸

¹³ See Chase, *supra* note 6.

¹⁴ Chase, *supra* note 6, at 117.

¹⁵ Chase, *supra* note 6, at 119.

¹⁶ The erroneous font is akin to Professor Chase's invocation of *Hanna v. Plummer*, 380 U.S. 460 (1965). There the issue was difference between state and federal rules for methods of process service. Although Professor Chase contends that these differences are acceptable because there is no bar to an entire class, the principle is the same in both cases. That rules for discovery or class certification may be more impactful in magnitude than rules for service or process should not mean that the courts should treat them under a different legal regime.

¹⁷ See Chase, *supra* note 6, at 119. "Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules." *Hanna*, 380 U.S. at 473.

¹⁸ See *Shady Grove v. Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010).

The second flaw is that the inequity here is not “happenstance,” but the result of a deliberate legislative expression which Justice Ginsburg called, in her dissent, a “legitimate interest.”¹⁹ The sole inequity is between those claimants who have CAFA standing and those who (a) do not have CAFA standing and also (b) are precluded from certification by § 901(b). Claimants who do not have CAFA standing and are precluded from certification do not have anywhere to bring their class action. Yet the reason New York claimants are precluded from certification is that the New York legislature has given them other avenues to pursue relief, namely statutory damages.²⁰ These damages may be less than those attainable through class action, but it is not clear why greater, or lesser, damages should be preferred from this view of equity.

To illustrate, under Professor Chase’s rationale, New York should not adopt policies that would be *more* permissive of class certification than Rule 23. Advocating for policy of leveling “up” *uniformly* also commits one to leveling “down” *uniformly* if what one is concerned about is the uniformity *vel non* of state and federal procedure. A more permissive rule would create inequities between those claimants who pursued their case in federal court and those who did not. Thus, if uniformity is the end, Professor Chase would want the same rule for New York certification, even if it meant more restrictive certification—a situation that might frustrate the aims of many New York legislators. Acquiescing to the Federal Rules militates towards states adopting the ukase of the Judicial Conference of the United States in lieu of their own internal judgments.

FORUM SHOPPING

Second, Professor Chase argues that, as a result of *Shady Grove*, more class action claims will be pursued in federal courts and that this forum shopping will put a strain on the system.²¹ It is not clear that this is the case statistically. The only study to measure the effect of *Shady Grove* on the courts did not include New York state court cases.²² The two data sets examined were for federal courts.²³ Ad-

¹⁹ *Id.* at 437 (Ginsburg, J., dissenting). Professor Chase looks to Justice Ginsburg for a possible solution when she says “The New York Legislature could have embedded the limitation in every provision creating a cause of action for which a penalty is authorized.” *Id.* A statute-by-statute reexamination would defeat the point of the original blanket compromise and also tax the Legislature’s resources. Justice Ginsburg’s point in invoking the hypothetical was to highlight the benefits of effecting individual substantive policy through blanket procedure. If the aims are the same, then magic words inserted by the Legislature should not be dispositive of preemption.

²⁰ *See, e.g.*, N.Y. Gen. Bus. Law § 340(5) (McKinney 2014) (“The state, or any political subdivision or public authority of the state, or any person who shall sustain damages by reason of any violation of this section, shall recover *three-fold the actual damages* sustained thereby, as well as costs not exceeding ten thousand dollars, and reasonable attorneys’ fees.”).

²¹ *See* Chase, *supra* note 6, at 117.

²² William H.J. Hubbard, *An Empirical Study of the Effect of Shady Grove v. Allstate on Forum Shopping in the New York Courts* (Univ. of Chi. Law Sch. Coase-Sandor Inst. for Law & Econ., Working Paper No. 428, 2013), available at http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1407&context=public_law_and_legal_theory.

ditionally, as Professor William Hubbard, who conducted the study, noted, in manually analyzed cases that specifically implicated § 901(b), there were not enough data to run analysis of statistical significance.²⁴ Additionally, Professor Chase's analysis does not account for the possibility that there was a general increase in all class action suits, federal and state, over the relevant timeframe.

Even granting that there has been an increase in forum shopping, that burden will not be borne by local federal courts but by the already-strained New York state court system whose budget in recent years has remained relatively constant, despite facing higher costs.²⁵ Professor Chase writes that a post-*Shady Grove* regime that incentivizes forum shopping has the undesirable effect of forcing federal courts to decide state law.²⁶ Federal courts deciding state law is nothing new; it would be better labeled the post-*Erie* regime, as in the absence of federal common law, federal courts are constantly applying state substantive law.²⁷

Finally, Professor Chase's argument suggests that the incentive effect of CPLR § 901(b) to file in federal court would be eliminated if repealed.²⁸ While it is true that this incentive would be eliminated, the Class Action Fairness Act [CAFA]²⁹ is generally seen as favoring corporate defendants, making them more likely to pursue claims in federal court.³⁰ In order to meet the requirements for class action certification in federal courts, *inter alia*, the amount in controversy must exceed \$5 million with minimal diversity.³¹ While eliminating the incentive to go to federal court in this one instance may affect some marginal cases, defendants might still prefer federal court for other reasons.³²

²³ *Id.* at 10–11.

²⁴ *Id.* at 14 (“The small sample size of the Compliance Subset means that this data has little statistical power”).

²⁵ *Judiciary*, NEW YORK STATE DIVISION OF THE BUDGET, <http://publications.budget.ny.gov/eBudget1415/agencyPresentations/appropData/Judiciary.html> (last visited Nov. 11, 2014) (noting that “[t]his slight increase [in budgetary funding] is requested after five years of essentially flat budgets during which the Judiciary absorbed more than \$300 million in increased costs and lost more than 1,900 employees.”).

²⁶ “[T]he judge most likely to be familiar with state law will be the one applying it.” Chase, *supra* note 6, at 117.

²⁷ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938) (in matters not governed by the Constitution or federal law, federal courts must apply state law when sitting in diversity).

²⁸ See Chase, *supra* note 6, at 119.

²⁹ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

³⁰ See Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1750 (2008).

³¹ 28 U.S.C. § 1332(d)(2) (2011).

³² See, e.g., S. REP. 109-14, 3 *reprinted in* 2005 U.S.C.C.A.N. 3, 6 (“One of the primary historical reasons for diversity jurisdiction is the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court.”) (internal quotations omitted).

JUSTICE GINSBURG QUA FEDERALIST

New York does not have the same concerns over inequity as the federal government. In fact, the New York legislature purposefully creates all sorts of inequities vis-à-vis other states, in the hopes that those inequities redound to the good of New York citizens.³³ These inequities abound in procedure as well as substantive law.³⁴ As Justice Ginsburg noted in her *Shady Grove* dissent, “Today’s judgment denies to the States the full power Congress has to keep certain monetary awards within reasonable bounds.”³⁵ While that power is no longer full, it is still extant in New York courts.

CONGRESSIONAL OPTIONALITY

In addition to these federalism concerns, an argument in favor of § 901(b) is that by keeping the statute, federal legislators now have an important tool they can use in drafting federal legislation. Congress occasionally refers to state court rules, for example in the Telephone Consumer Protection Act (TCPA).³⁶ The TCPA has language that says parties may bring an action “if otherwise permitted by the laws or rules of court of a state.”³⁷ In light of the Supreme Court decision in *Mims v. Arrow Financial Services, LLC*,³⁸ the Second Circuit ruled “Federal Rule of Civil Procedure 23, not state law, governs when a federal TCPA suit may proceed as a class action.”³⁹

Although the Supreme Court rejected the interpretation that the TCPA was intended to defer to state class certification procedures,⁴⁰ leaving § 901(b) on the books gives Congress the ability to more explicitly write legislation that references state procedures for certifying classes. This option is significant because New York is not the only state that restricts class certification in such a manner.⁴¹ Congress could choose to respect these states’ procedures.

³³ Compare New York’s Human Rights Law, N.Y. Exec. Law Art. 15 (McKinney 2014) with Alabama’s Code, Ala. Code §§ 25-1-20 to 1-29 (2014).

³⁴ For examples of the differences between the CPLR and FRCP see Vincent C. Alexander, *The CPLR at Fifty: A View from Academia*, 16 N.Y.U. J. Legis. & Pub. Pol’y 664, 665 (2013).

³⁵ *Shady Grove v. Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 451 (2010) (Ginsburg, J., dissenting).

³⁶ 47 U.S.C. § 227(b)(3).

³⁷ *Id.*

³⁸ 132 S. Ct. 740 (2012).

³⁹ *Bank v. Independence Energy Grp. LLC*, 736 F.3d 660, 661 (2d Cir. 2013).

⁴⁰ *Holster v. Gatco, Inc.*, 559 U.S. 1060 (2010).

⁴¹ See, e.g., *Chadwick 99 Assocs. v. Dir., Div. of Taxation*, 23 N.J. Tax 390, 410 (2007) (interpreting a New Jersey statute as prohibiting class actions for local tax appeals).

§ 901(B) IS ROBUST AND SETTLED EXPECTATIONS

In *Sperry v. Crompton Corp.*, the New York Court of Appeals allowed for the possibility that plaintiffs may escape § 901(b)'s bar by waiving the penalties they are entitled to.⁴² On numerous occasions, lower appellate courts have allowed plaintiffs to use this option and waive the penalties that would otherwise be a bar to certification.⁴³ This option may raise concerns over adequate representation, but it is currently a popular method used by plaintiffs.

A particularly instructive case that demonstrates New York's robust jurisprudence in this area is *County of Nassau v. Expedia*.⁴⁴ There, the action was dismissed from federal court without prejudice for lack of CAFA standing.⁴⁵ The Appellate Division's Second Department granted certification under § 901, allowing the action to proceed in state court, even though the plaintiff lacked federal standing.

New York plaintiffs, defendants, lawyers, and jurists have grown accustomed to this procedural scheme and developed a corpus of law around it. While this is not a dispositive reason to support § 901(b), absent some compelling reason to repeal, "in most matters it is more important that the applicable rule of law be settled than that it be settled right."⁴⁶

CONCLUSION

Process and substance are inextricably linked and the existence of a dual-court system that is forced to differentiate the two often leads to murky waters. While a lack of uniformity will certainly lead to disparate outcomes in some cases, repealing § 901(b) is essentially ceding authority to make those decisions to the federal judiciary. Though it may be tempting to acquiesce, assertions of state sovereignty over judicial rules strengthens our system of federalism. Where states are still allowed to make policy choices, they should.



⁴² *Sperry v. Crompton Corp.* 8 N.Y.3d 204, 215 (2007).

⁴³ *See, e.g., Downing v. First Lenox Terrace Assocs.*, 107 A.D.3d 86, 91 (N.Y. App. Div. 2013) ("plaintiffs, who have waived the penalty of treble damages, should be allowed to proceed by way of a class action to recover their actual damages plus interest"); *Picard v. Bigsbee Enters, Inc.*, 977 N.Y.S.2d 669 (N.Y. Sup. Ct. 2013).

⁴⁴ 971 N.Y.S.2d 664, 667 (Sup. Ct. 2013).

⁴⁵ *Id.* at 666.

⁴⁶ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).