No. 08-

IN THE

Supreme Court of the United States

SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A.,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a state legislature properly prohibit the federal courts from using the class action device for state law claims?

2. Can state legislatures dictate procedure in the federal courts?

3. Could state-law class actions eventually disappear altogether, as more state legislatures declare them off limits to the federal courts?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner Shady Grove Orthopedic Associates, P.A. has no corporate parent, and there is no publicly held company owning ten percent or more of its stock.

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Petitioner Shady Grove Orthopedic Associates, P.A. ("Shady Grove") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The district court's December 15, 2006 memorandum opinion is published at 466 F. Supp.2d 467, and reproduced in the accompanying appendix at pages 19a-36a. The Second Circuit's November 19, 2008 opinion is published at 549 F.3d 137, and appears at pages 1a-18a of the appendix.

STATEMENT OF JURISDICTION

The opinion and judgment for which review is sought were issued by the Second Circuit on November 19, 2008. This petition is thus timely, having been filed within 90 days of the judgment below. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

In this proposed class action, Shady Grove's central allegation is that Allstate routinely violates section 5106(a) of the New York Insurance Law in its handling of no-fault automobile insurance claims; and that as a result, Allstate owes statutory interest to every member of the proposed class. Section 5106(a) provides:

> Fair claims settlement. (a) Payments of first party benefits and additional first party benefits shall be made as the loss is incurred.

> Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained. If proof is not supplied as to the entire claim, the amount which is supported by proof is overdue if not paid within thirty days after such proof is supplied. All overdue payments shall bear interest at the rate of two percent per month. If a valid claim or portion was overdue, the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to limitations promulgated by the superintendent in regulations.

N.Y. Ins. Law § 5106(a).

The district court and Second Circuit both held that no class action could be maintained in the federal courts due to the prohibition on class actions in section 901(b) of New York's Civil Practice Law and Rules. Section 901(b) provides:

> 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.

N.Y. CPLR § 901(b).

STATEMENT OF THE CASE

This proposed class action seeks compensatory damages and declaratory and other relief for Allstate's violations of N.Y. Ins. Law § 5106(a) and related breaches of contract. It was commenced by the filing of a class action complaint on behalf of the two original plaintiffs, Shady Grove and Sonia E. Galvez, in the U.S. District Court for the Eastern District of New York on April 20, 2006. Jurisdiction in the district court was based on the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2)(A).

A. The Thirty-Day Standard and Interest Penalty

Under New York Vehicle & Traffic Law § 319(1) (part of New York's Motor Vehicle Financial Security Act), persons who own any motor vehicle registered in New York or operate or permit to be operated a motor vehicle in New York must maintain specified forms of liability insurance. New York Insurance Law § 5103(a) provides that liability insurance issued in satisfaction of section 319's requirements must also provide for the payment of first-party benefits to specified categories of persons, and for loss arising out of the use or operation of the insured vehicle. These first-party benefits (sometimes referred to as "no-fault," "personal injury protection" or "PIP" benefits) include, by virtue of the definitions set forth in New York Insurance Law § 5102, payments to reimburse persons for medical and other expenses up to $50,000 per person.

Under New York Insurance Law § 5106(a), payment of first-party no-fault benefits pursuant to section 5103

must be made as the loss is incurred. Section 5106(a) further provides that such benefits are overdue if not paid within 30 days after the claimant supplies proof of the fact and amount of the loss. It provides, too, that overdue benefits bear interest at the rate of 2% per month.

Regulations promulgated by New York's Insurance Department likewise govern the processing of claims for first-party no-fault benefits. Under 11 NYCRR 65-3.5(a), an insurer may request verification of the claim for no-fault benefits within 10 business days of its receipt of the claimant's application for such benefits. If an insurer makes a timely request for verification under 11 NYCRR 65-3.5(a), the time within which the insurer must pay the claim for no-fault benefits is tolled pending the insurer's receipt of the requested verification. *King's Medical Supply Inc. v. Country-Wide Ins. Co.*, 783 N.Y.S.2d 448, 450 (N.Y. Civ. Ct. 2004). If the requested verification is not supplied to the insurer within 30 days of the original request, then 11 NYCRR 65-3.6(b) requires the insurer to communicate a follow-up request for verification within 10 days thereafter. The regulations further provide, under 11 NYCRR 65-3.5(b), that an insurer may request additional verification within fifteen business days of its receipt of one or more completed verification forms.

Under 11 NYCRR 65-3.8(a)(1), no-fault benefits are overdue if not paid within thirty days after the insurer receives verification of all relevant information requested pursuant to 11 NYCRR 65-3.5 (in cases where such a request is made). As noted above, overdue benefits are subject to the interest penalty specified in section 5106(a) and 11 NYCRR 65-3.9(a).

The effect of this regulatory scheme (established under New York Insurance Law §§ 5102, 5103 and 5106, in combination with the provisions of 11 NYCRR 65-3) is to require insurers to pay covered no-fault benefits within thirty days of the claimant's submission of proof of the fact and amount of loss, or (in cases where the insurer makes a timely request for verification) within thirty days of the insurer's receipt of all requested verification. This same regulatory scheme makes no-fault insurers liable for payment of an interest penalty on overdue benefits, calculated at the rate of 2% per month.

B. Proceedings in the District Court

On July 12, 2006 Allstate moved to dismiss the complaint in the district court. Allstate argued, among other points, that 1) the prohibition on class actions under section 901(b) of New York's Civil Practice Law and Rules ("CPLR") supersedes Federal Rule of Civil Procedure 23, so that this action cannot properly proceed as a class action in federal court; and 2) Shady Grove alone, and not Ms. Galvez, is the real party in interest.

On December 15, 2006, the district court granted Allstate's motion. In so doing, the district court found that Shady Grove's patient, Ms. Galvez, was not a real party in interest, so that Shady Grove alone was the proper plaintiff. *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 466 F. Supp.2d 467, 473-74 (E.D.N.Y. 2006), *aff'd*, 549 F.3d 137 (2d Cir. 2008) ("*Shady Grove* I"). That holding is not the subject of this petition, and Ms. Galvez is no longer a party to these proceedings.

But the district court's other main holding led to Shady Grove's appeal. Specifically, the district court held that the prohibition on class actions under N.Y. CPLR § 901(b) renders the class action device unavailable in federal court for Shady Grove's state law claims. *Shady Grove* I, 466 F. Supp.2d at 471-73. Based on this latter holding, the district court dismissed the case in its entirety.

C. Proceedings in the Second Circuit

On appeal to the Second Circuit, the district court's judgment was affirmed. The Second Circuit found that through CPLR § 901(b) the New York legislature had effectively prohibited the federal courts from employing the (purely procedural) class action device for a broad range of state law claims. *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 142-46 (2d Cir. 2008) ("*Shady Grove* II"). This petition followed.

REASONS FOR GRANTING THE PETITION

By permitting New York's legislature to dictate procedure in the federal courts, the Second Circuit has effectively ceded federal authority to the states. This raises compelling federal questions: *Can state legislatures prohibit the federal courts from using the class action device for state law claims? Could state-law class actions eventually disappear altogether, as more and more state legislatures declare them off limits to the federal courts?*

These questions should be settled, and can only be finally settled, in this Court. Moreover, the Second

Circuit's approach to federalism — allowing as it does a state legislature to prohibit a federal court's use of a federal procedural device — conflicts with this Court's longstanding conception of the (respective) sovereignties of state and federal government.

The class action device is, after all, purely procedural. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 331 (1980) (referring to "the procedural device of a Rule 23 class action"); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (referring to "the procedural device of Rule 23"). As a matter of basic federalism, no state legislature can dictate the use or nonuse of the class action device in any federal court.

Yet to say that the class action device is procedural is not to say that it is ***merely*** procedural, because class actions continue to serve important interests. But other procedural devices are important, too; and some are so deeply ingrained in federal practice, and so heavily relied upon by the machinery of justice, as to constitute procedural due process itself. The question should thus be asked: if state legislatures can proscribe the use of class actions for particular claims in federal court, why can they not also proscribe other procedural devices? Why not have California's lawmakers legislate a ban on deposition practice in contract cases for all district courts sitting in California? Why not allow the Illinois legislature to prohibit the use of document requests for tort claims filed in district courts there?

The answer, in a word, is federalism:

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.

Saenz v. Roe, 526 U.S. 489, 504 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). But the Second Circuit's decision threatens a dramatic incursion on federal sovereignty: if state legislatures can prohibit both state ***and*** federal courts from entertaining class actions on state law claims, the class action device could all but disappear from America's civil litigation landscape. Indeed, if every state followed New York's lead for every state law claim, class actions would henceforth be limited to federal claims only — a result that on its face is wildly inconsistent with Congress's intent in making class actions available in diversity cases.

The Second Circuit focused its analysis on whether section 901(b) is in "conflict" with Federal Rule of Civil Procedure 23. *Shady Grove* II, 549 F.3d at 142-45. But conflict or no, the fact remains that state legislatures cannot properly dictate procedure in the federal courts. This means that a decree from a state legislature requiring federal judges to wear powdered wigs must fail as a matter of federalism, regardless of whether the Federal Rules contain any "non-powdered-wig" provision.

Can New York's legislature take steps to limit the use of class actions in the New York courts? Presumably it can; but it has no such power in the federal courts, where procedure is fixed by the federal sovereign. Because the Second Circuit's decision shifts this federal power to the states, and because that shift raises fundamental issues of federalism, the writ should be granted.

CONCLUSION

For the reasons stated above, Shady Grove respectfully requests that writ of certiorari be allowed.

Respectfully submitted,

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