No. 08-1008

APR 14 2009

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

REPLY BRIEF

JOHN S. SPADARO
JOHN SHEEHAN SPADARO, LLC
724 Yorklyn Road
Suite 375
Hockessin, DE 19707
(302) 235-7745

Attorney for Petitioner

222247

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cited Authorities

Other Authorities

In its opposition brief, respondent Allstate Insurance Company chides petitioner for ignoring what it says is the dispositive decision of this Court, *Erie RR Co. v. Tompkins*, 304 U.S. 64 (1938), with its familiar holding that state substantive law governs diversity cases. And Allstate repeatedly characterizes the statute in question, section 901(b) of New York's Civil Practice Law and Rules, as a rule of substance rather than procedure — "a *state*-law limitation on a *state*-law cause of action." Opp. at 5 (emphasis in original).

Allstate is fundamentally wrong on both counts. It all but ignores the decision of this Court that sets forth the principles applicable here: *Hanna v. Plumer*, 380 U.S. 460 (1965), which holds that in both diversity and federal question cases in the federal courts, a validly promulgated Federal Rule of Civil Procedure "applies regardless of contrary state law." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 n.7 (1996) (citing *Hanna*, 380 U.S. at 469-74). Moreover, Allstate's insistence that section 901(b) is a substantive limit on state-law causes of action overlooks that New York state courts apply the 901(b) standard to *federal* as well as state claims *on the ground that it is merely a matter of state-court procedure.* A versatile statute it may be, but it cannot be all things at once: it cannot apply to federal claims in state court because it is procedural, yet also apply to state claims in federal court because it is substantive.

Allstate's position that a class action otherwise proper under Rule 23 cannot be maintained in federal court because of section 901(b) thus reflects (as the Fifth Circuit characterized a similarly erroneous effort to

apply Mississippi's prohibition on class actions to claims brought in federal court), "a fundamental misunderstanding . . . of the principles that the *Erie* doctrine is limited to matters of state substantive law and that cases [in] federal court are governed solely by federal procedure." *Arnold v. State Farm Fire & Cas. Co.*, 277 F.3d 772, 777 (5th Cir. 2001). The encroachment on federal sovereignty entailed by this effort to import state law to govern procedural matters in the federal courts militates strongly in favor of the petition. The Second Circuit's decision to apply state law to a matter governed by the Federal Rules of Civil Procedure — an extraordinary departure from the body of post-*Hanna* jurisprudence — merits review and correction by this Court.

I.

ALLSTATE'S DEFENSE OF SECTION 901(b) RESTS ON A FUNDAMENTAL MISCHARACTERIZATION OF THE STATUTE

Allstate asserts that section 901(b) is nothing more than a state-law limitation on state-law claims, and that the Second Circuit correctly treated it as such. Opp. at 5. In fact, New York courts have repeatedly applied section 901(b) to federal claims, precisely for the reason that it is procedural. In *Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*, 799 N.Y.S.2d 795 (N.Y. App. Div. 2005), the Appellate Division held that section 901(b) precluded a class action under the federal Telephone Consumer Protection Act, reasoning that "although the TCPA creates a minimum measure of

recovery and imposes a penalty for willful or knowing violations, and the plaintiff is seeking the same, the TCPA does not specifically authorize a class action [as required under section 901(b)]." *Id.*, 799 N.Y.S.2d at 798. Ironically, the court specifically rejected the argument that "CPLR 901(b) is substantive in nature and, therefore, should not be applied" to a federal cause of action. *Id.* Rather, the court held that the application of this "for[m] of local practice" was not incompatible with the goals of the TCPA, *id.* at 800, and thus was permissible in light of this Court's recognition that "States may establish the rules of procedure governing litigation in their own courts" as long as they do not "defeat" federal rights. *Id.* at 799 (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)).

The Appellate Division has likewise looked to section 901(b) in determining whether to allow class actions to proceed on other purely federal claims. In *Vickers v. Home Fed. Sav. & Loan Ass'n of E. Rochester*, 390 N.Y.S.2d 747 (N.Y. App. Div. 1977) the court allowed a New York class action to proceed under the Truth In Lending Act on the ground that TILA's provisions expressly authorize class actions as required under section 901(b). *Vickers*, 390 N.Y.S.2d at 748. Similarly, the court in *Felder v. Foster*, 421 N.Y.S.2d 469 (N.Y. App. Div. 1979), *appeal dismissed*, 49 N.Y.2d 800 (N.Y. 1980), found that a class action under section 1983 of the Civil Rights Act passed muster under CPLR 901(b). *Felder v. Foster*, 421 N.Y.S.2d at 471 ("CPLR 901(b) does not preclude a class action where plaintiffs seek punitive damages under section 1983 . . . since such damages are not a 'penalty' or 'minimum measure of recovery created or imposed by statute'") (citations omitted).

The New York state courts' treatment of section 901(b) as a generally applicable procedural rule rather than a limitation only on specific state-law rights of action is understandable, because the statute itself says nothing to suggest that it is limited to state-law claims. It is merely a subpart of a section of New York's Civil Practice Law and Rules that is exclusively devoted to procedural matters and is, indeed, the state's direct analog to Federal Rule of Civil Procedure 23. That Allstate's defense of section 901(b)'s application in this case rests so heavily on claiming that it is something it is not strongly undermines its assertion that the Second Circuit's application of the statute to defeat a class action otherwise appropriate under Rule 23 does not merit this Court's attention.

II.

THE "PROCEDURE VS. SUBSTANCE" DEBATE DOES NOT LESSEN THE NEED FOR REVIEW

Allstate says that our federalism argument simply takes for granted that CPLR 901(b) is procedural and not substantive. But in addition to overlooking the state law that strongly supports our view, Allstate misapprehends the argument. The point is not so much that section 901(b) is procedural (though it is); the point is that the *class action device* is procedural — so that its use in federal court cannot properly be limited by state legislatures, any more than state legislatures may enact (ostensibly substantive) laws that limit the use of interrogatories, document requests or depositions in federal court. As the Seventh Circuit held in *Mace v. Van Ru Credit Corp.*, 109 F.3d 338 (7th Cir. 1997), the

requisites for certification of a class are "a matter of procedure, not substance," and "[t]he application of Rule 23 does not abridge, enlarge or modify any substantive right," *id.*. at 346; hence federal courts must apply Rule 23 in considering whether to certify a class notwithstanding rules of state law that seek to impose additional restrictions on when a class may be certified. *Id.*

Nor does Allstate's "conflict" analysis obviate the need for review. Section 901(b) is at odds with Rule 23 in precisely the manner that this Court and other federal courts have held creates a conflict that must be resolved in favor of application of the federal rule (consistent with *Hanna v. Plumer*): Rule 23 grants federal courts the discretion to certify class actions seeking statutory penalties if the Rule's extensive criteria are satisfied, while section 901(b) would deny such discretion. That is exactly the sort of "conflict" that this Court saw in *Burlington Northern RR Co. v. Woods*, 480 U.S. 1 (1987), where the affected federal rule was "sufficiently broad" to "control the issue," *id.* at 4-5, by allowing the federal court discretion that the state rule purported to deny. *Id.* at 7. Just as in *Burlington Northern*, there is no room for the operation of a state rule that purports to divest the federal courts of the discretion to certify a class that Rule 23 would otherwise provide.

Similarly, in *Mace*, the Seventh Circuit found enough of a "conflict" to invoke the principles of *Hanna* where a state rule purported to impose a notice requirement before a class action could be filed. Because Rule 23 does not require such notice (just as it does not prohibit class actions that seek statutory penalties), the court held

that the state rule, with its additional barrier to class certification, could not be applied. *See* 109 F.3d at 345-46. As one district court following *Mace* has explained, "Rule 23 does indeed set up the criteria for determining whether to certify a class," and a state statute that purports to deny some category of plaintiffs the ability to pursue a class action "adds another criterion . . . not contemplated by Rule 23's requirements of numerosity or commonality of issues"; moreover, "this criterion conflicts with Rule 23, and in such situations, the federal rule controls." *In Re Bridgestone/Firestone, Inc. Tires Products Liab. Litig.*, 205 F.R.D. 503, 516 (S.D. Ind. 2001), *rev'd in part on other grounds*, 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).[1]

Allstate's much narrower view of conflict, by contrast, fails to preserve the authority of the federal courts to govern their own procedure. The French Republic may have any number of laws that do not conflict with the Federal Rules of Civil Procedure in the

---

1. We note also that the commentary to section 901(b) acknowledges that

> CPLR 901(b) contains a substantive variance from the federal rule. In New York, class actions may not be used to recover a statutory "penalty" or "minimum measure of recovery" unless the statute in question specifically authorizes class-wide recovery.

N.Y. C.P.L.R. §901(b) note (McKinney 2007). Of course, Allstate itself argues that applying section 901(b) "would lead to very different results" than would be obtained under Rule 23 — though here Allstate presumably speaks of *procedural* results (since class treatment does not determine the outcome on the merits). *See* Opp. at 5.

sense Allstate would require. But the absence of such conflict is not a license for the French parliament to dictate when, how or whether federal procedural devices may be used in United States courts.

In our petition we noted that the Second Circuit's analysis would allow state legislatures to prohibit the use of interrogatories (for example) in federal diversity cases arising under state law. Allstate's only answer is to dismiss that prospect as "far-fetched." Yet the point of such hypotheticals is not prediction, but rather to illustrate the irreconcilability of the Second Circuit's ruling with our federal scheme of government. Though we share Allstate's confidence in the good intentions of state legislatures, under Allstate's analysis those good intentions are the only thing preventing our hypotheticals from coming to pass.

III.

REVIEW IS WARRANTED TO SAFEGUARD THE AVAILABILITY OF CLASS ACTIONS IN FEDERAL DIVERSITY CASES

In our petition we asked whether state law class actions might eventually disappear altogether, as more state legislatures (following New York's lead) declare them off limits to the federal courts. Far from denying that prospect, Allstate responds only by questioning why this Court should care.

This Court has an obvious and compelling interest in addressing state encroachments on federal sovereignty and federal court procedure. Moreover, the

importance and utility of the class action device (as it is employed in the federal courts) have been widely acknowledged by Congress, commentators and the federal judiciary. In enacting the Class Action Fairness Act, for example, Congress expressly found that "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm." Class Act Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005). A comprehensive study by the Rand Institute for Civil Justice likewise concluded that "research suggests that [class action] lawsuits do play a regulatory enforcement role in the consumer arena." *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, Rand Institute for Civil Justice, March 24, 1999, at 9. The Federal Judicial Center has reached the same conclusion. MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES (Federal Judicial Center 2005), at 1 (noting that class actions reach "fraudulent marketplace conduct that might otherwise escape regulation.") *And see Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981) ("Class actions serve an important function in our system of civil justice.")

The prospect of state legislatures pulling the class action rug out from under the federal courts may not concern Allstate Insurance Company; but it should concern this Court.

IV.

THE ISSUE IS FEDERALISM, NOT FORUM SHOPPING

The class action device is, again, procedural; it does not decide the merits, and does nothing to determine whether or not any class member is entitled to recover. Allstate's liability to Shady Grove thus turns entirely on the merits, and not on whether Shady Grove may ultimately act in a representative capacity. Similarly, and in the unhappy event that this case is not maintained as a class action, absent class members will retain the right to sue Allstate in individual actions. The legal right of absent class members to recover against Allstate (as opposed to their practical ability to do so) does not depend in the slightest on class certification. Therefore, "[w]hether that substantive right can be vindicated through a class action or whether it must be pursued individually is a procedural question." *Bridgestone/Firestone*, 205 F.R.D. at 515.

In other words, neither the availability nor the unavailability of the class action device constitutes a substantive "result." That being the case, forum shopping is not an issue: there should be no different substantive result in federal court than would be achieved in state court for any individual claim. Nor can any litigant be genuinely accused of forum shopping simply because he or she displays a preference for procedural mechanisms (here, the class action device) that might be available in one court but not another. As Justice Harlan observed, "litigants often choose a federal forum merely to obtain what they consider the

advantages of the Federal Rules of Civil Procedure . . . ." *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J. concurring).

The issue here is thus not one of forum shopping, but of federalism: *whether a state legislature may properly dictate the use or nonuse of federal procedural devices in the federal courts.* To resolve this important question, the writ should be granted.

CONCLUSION

For the reasons stated above, and for the reasons set forth in Shady Grove's petition, Shady Grove respectfully requests that writ of certiorari be allowed.

Respectfully submitted,

JOHN S. SPADARO
JOHN SHEEHAN SPADARO, LLC
724 Yorklyn Road
Suite 375
Hockessin, DE 19707
(302) 235-7745

Attorney for Petitioner