Several states have statutes restricting the availability of class actions as an enforcement mechanism. These restrictions vary; some are broadly applicable bans, some apply to certain categories of cases or remedies, and some are included in and specific to particular substantive statutes. However, some of these legislative restrictions may not apply if the case is brought in federal court. The Supreme Court’s decision in Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co. delineates the analysis that a federal court must perform when deciding whether to apply a state law restriction on class actions.

In Shady Grove, the plaintiffs sued in federal court to enforce a New York state law that provides statutory penalties for late payment of insurance benefits. Federal jurisdiction was based upon the Class Action Fairness Act of 2005 (CAFA). New York’s class action rules prohibit the class action procedure for lawsuits seeking a statutory penalty, unless the state statute explicitly authorizes class actions. The district court and the Second Circuit held that this state limit on class actions was enforceable in federal court, but the Supreme Court reversed.

Although five justices agreed that New York’s class action restriction did not apply in federal court, they were split four to one on the precise analysis that was required. All five justices agreed that the first step is to determine whether the federal rule is “sufficiently broad to control the issue before the court” and, if so, the next step is to determine whether it is a valid procedural rule under the Rules Enabling Act. Justice Stevens, however, parted company with the rest of the majority in his approach to the second question. In their plurality opinion, the other four looked at Rule 23 alone and considered the nature of the state law irrelevant because “[a] Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes).” However, in Justice Stevens’ view, if the particular state rule was “sufficiently interwoven with the scope of a substantive right or remedy, there would be an Enabling Act problem, and the federal rule would have to give way” even though the federal rule was otherwise valid.

Some federal courts that have addressed this issue have concluded that Justice Stevens’ concurrence is the controlling portion of the Shady Grove opinion, since it presents the narrowest grounds for the decision. At least one court has held, however, that “Justice Stevens’ opinion is [not] the ‘logical subset’ of the plurality’s [and] that Stevens’ opinion [does not] represent [ ] a common denominator.” As explained below, the question of whether Justice Stevens’ concurrence is controlling may be outcome determinative.

Justice Stevens’ approach dictates that a class action ban that is part of the state’s general procedural rules will not apply in federal court, but a class action restriction that is tightly interwoven with the scope of a substantive right will apply in federal court. Precisely where the line should be drawn is a difficult question. Justice Stevens distinguished the New York rule (which does not apply in federal court) from damages caps (which might apply) on the basis that the former does not alter the total potential liability of a defendant, merely the number of lawsuits it might face.

However, lower courts have not focused on this distinction in the effect of the provision but rather have focused on how closely it is tied to the substantive right. Many of these courts have looked to the actual language of the state statute and have concluded that, if the explicit or implicit class action ban appears within the text of the statute providing the substantive right at issue, and applies only to actions brought to enforce that right, then the ban is so intertwined with a state’s substantive remedies that applying Rule 23 would violate the Rules Enabling Act. Thus, one federal court found that class claims could not be brought in federal court under the Tennessee Consumer Protection Act because “the very statutory provision that authorizes a private right of action for a violation of the TCPA limits such claims to those brought ‘individually.’ “ Also, a federal court in Indiana held that state law rules requiring potential class members in wage-and-hour suits to opt in to the class were enforceable notwithstanding the contrary practice under Rule 23 because the opt-in rules “apply only to actions under the state wage and hour laws and are part of the statutes that created the underlying substantive rights.” Similarly, a federal court in Ohio dismissed class claims under the Ohio Consumer Sales Practices Act because the act allows class actions only when there has been a prior Ohio state court decision or regulation declaring the practice unfair or unconscionable. Consistent with the “textualist” approach to the Shady Grove analysis, the Ohio court concluded that the provision providing the right of action had to be read “in pari materia” with a separate provision of the same Act requiring class plaintiffs to establish that a prior state court decision had held the practice at issue illegal. On the other hand, a provision in the Michigan Consumer Practices Act (MCPA) that class actions may be brought under it only “on behalf of persons residing or injured in this state” was found to conflict with Rule 23 and therefore held not to prevent non-residents from pursuing class-action claims under the MCPA.

Statutes limiting the damages available for particular class claims are also likely to be found substantive even though the Shady Grove majority explicitly left this issue undecided. Some courts, particularly those that do not consider Justice...
Stevens’ opinion controlling, might be receptive to a more functional analysis, allowing a class action to proceed when application of Rule 23 would, in the words of the *Shady Grove* plurality, affect merely “how the claims are processed,” that is, on an aggregate or individual basis, notwithstanding the structure and language of the state statute.\(^8^9\)

One other permutation of the interplay between federal Rule 23 and state class action bans bears mention. When a federal statute explicitly incorporates state limitations on the availability of claims, those limits may be applied in federal court. Thus the Second Circuit found (on remand from the Supreme Court) that precisely the same New York procedural rule held inapplicable in *Shady Grove* eliminated the availability of class claims for statutory penalties under the federal TCPA because that Act explicitly incorporated state statutes and rules of court in defining the private right of action.\(^9^0\)

### Footnotes

68 See [Appx. C](#) [1], infra (survey of state class action law).

69 See Ch. 2 [2], infra (discussing the prerequisites—and pros and cons—of federal jurisdiction).


71 Note that different sections of the plurality opinion have the votes of five, four, three, and one of the justices—and the decision hinges on the proper application of the Rules Enabling Act, the Rules of Decision Act, and the Supreme Court’s Erie-Hanna jurisprudence.

72 [N.Y. C.P.L.R. 901(b) (2005) (McKinney)](https://library.nclc.org) ("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.").


75 *Id.* 130 S. Ct. at 1456 (Stevens, J., concurring).

76 See, e.g., [Godin v. Schencks, 629 F.3d 79, 86 (1st Cir. 2010)](https://library.nclc.org) (also finding that Maine’s anti-SLAPP statute applied in federal diversity cases notwithstanding Federal Rules of Civil Procedure 12(b)(6) and 56 because federal rules were not broad enough to cover same issues as the state law); [In re Packaged Ice Antitrust Litig., 779 F. Supp. 2d 642, 660 (E.D. Mich. 2011); Bearden v. Honeywell Int’l, Inc., 2010 WL 3329825 (M.D. Tenn. Aug. 16, 2010). See also Tait v. BSH Home Appliances Corp., 2011 WL 1832941, at *8–9 (C.D. Cal. May 12, 2011).](#)


78 *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S. Ct. 1431, 1459, 176 L. Ed. 2d 311 (2010) (Stevens, J., concurring) (New York’s rule is not “a damages proscription . . . or limitation”); *id.* 130 S. Ct. at 1459 n.18 (Stevens, J., concurring) (“[C]lass certification would transform 10,000 $500 cases into one $5,000,000 case. 

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It may be that without class certification, not all of the potential plaintiffs would bring their cases. But that is true of any procedural vehicle.


80 Tenn. Code Ann. § 47-18-109(a)(1) (“Any person who suffers an ascertainable loss . . . as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages.”) (emphasis added).


83 Ohio Rev. Code Ann. § 1345.09(B) (West).


85 Id. at 748.


87 The Shady Grove respondent’s brief and the dissent list a number of such state statutes. For example, the Connecticut Truth in Lending Act specifies that statutory damages for certain violations are limited to $500,000 or 1% of the creditor’s net worth. Conn. Gen. Stat. § 36a-683(a).


The TCPA provides that “[a] person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State . . . an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater.” 47 U.S.C. § 227(b)(3) (emphasis added).
[2] https://library.nclc.org/nclc/link/Class.02
[3] https://library.nclc.org/nclc/link/Class.02.01
[4] https://library.nclc.org/nclc/link/Class.07.04.02