Before deciding to represent any plaintiff in a class action, counsel should carefully interview, evaluate, and educate the individual seeking to be a class plaintiff.[188] One requirement for class certification is that the named plaintiff will "adequately" protect the interest of the class.[189] The role of a class representative is in the nature of a fiduciary for the class. The named plaintiff must possess the personal characteristics and integrity necessary to act in that capacity.[190] A class representative must not have interests antagonistic to those of the class, must be willing to put aside individual interests they may have, and must act in the best interest of the class. However, the fact that a representative may have an additional claim against the defendant relating to the same or even a previous transaction—or vice versa—does not necessarily make the plaintiff an inadequate representative. The class representative should understand the nature of a class action and the named plaintiff's responsibilities as a class representative and should generally know the reason the lawsuit was filed and the remedy that is being sought, but they need not understand all of the legal issues involved.[191] For a review of the law governing the adequacy of individuals as class representatives, see § 10.3.4 [1], *infra*.

Reliable class representatives are essential because they must be available throughout the case to respond to discovery, to give depositions, and to testify at trial. The representative will also need to be readily available to confer with counsel on settlement offers and sometimes to sign a release if the case settles. A class representative should be able to withstand pressure. Typical defense tactics include an exhaustive deposition of the named plaintiffs about the claims in the case and their duties as a class representative. The class representative should have enough interest in the case to read all of the documents sent for review by class counsel.

The plaintiff's attorney should pay special attention to the facts underlying the claims of the named plaintiff. The court will necessarily focus its attention on the facts relating to the class representatives when ruling on all aspects of the case. The egregiousness of these facts and harm to the class representative, if any, will often be determinative of the court's willingness both to certify a class of the breadth requested and to grant appropriate relief to the class. However, named plaintiffs with perfect facts may be difficult or impossible to find, and some suffer no pecuniary harm.

For example, in a class action against a finance company and a related used car dealer for a "revolving repossession" or "churning" scheme,[192] damages might be sought based on a failure to conduct commercially reasonable resales of secured property as required by former section 9-507 of the Uniform Commercial Code. A plaintiff's case would be nearly ideal if (1) the finance company held an unadvertised "public sale" that was not attended by any bidders other than the finance company, (2) the finance company sold the car to itself for a small fraction of the price paid by the plaintiff just a few months prior to the repossession sale and the car was in the same condition as it was at the time of purchase, (3) the finance company sought a large deficiency from the plaintiff, (4) the car was later transferred to the same used-car dealer that had originally sold the car to the plaintiff, and (5) the dealer resold the car to another consumer for nearly as much as the plaintiff had originally paid for it. The facts would be even more compelling if the named plaintiff defaulted because of a sudden job layoff, was married with children, and needed the car to drive to a new job or to obtain new employment.

Footnotes

188 {188} Failure to fully investigate the putative class representative and the facts of their potential case against the named defendant(s) will put counsel at risk for possible sanctions under the provisions of Federal Rule of Civil Procedure 11, 28 U.S.C. § 1927, or other state or federal rules and statutes intended to curb improper behavior by trial attorneys.

A case in point is Jensen v. Phillips Screw Co., 2007 WL 3104625 (D. Mass. Sept. 26, 2007), in which the district court imposed sanctions based on findings that the plaintiffs' law firm had unreasonably and vexatiously multiplied the proceedings in a class action by proffering four successive putative class representatives who subsequently withdrew from the case (the first because an accord and satisfaction apparently already existed before the filing of the action, the second because the individual did not want to sue but preferred a private accommodation, the third because they had not, in fact, used the product that was the subject of the litigation, and the fourth who withdrew for no stated reason).

The court of appeals subsequently vacated the sanctions order on technical bases and remanded the matter to the district court for further proceedings with a stern warning to the law firm. Jensen v. Phillips Screw Co., 546 F.3d 59 (1st Cir. 2008).

189 {189} Fed. R. Civ. P. 23(a)(4).

190 {190} United Food & Commercial Workers Union v. Chesapeake Energy Corp., 281 F.R.D. 641, 653 (W.D. Okla. 2012).

191 {191} The test is not one of legal sophistication. Chisolm v. TranSouth Fin. Corp., 194 F.R.D. 538, 556 n.15 (E.D. Va. 2000). *See also* William B. Rubenstein, Alba Conte & Herbert B. Newberg, 1 Newberg on Class Actions § 3:67 (5th ed. 2011).

192 {192} This term refers to repeated repossession and resale of a single automobile through self-dealing between the car dealer and the finance company. *See* National Consumer Law Center, Repossessions § 11.1 [2] (10th ed. 2022), *updated at* www.nclc.org/library.

Links
[1] https://library.nclc.org/nclc/link/CLASS.10.03.04
[2] https://library.nclc.org/nclc/link/REPO.11.01

One of the most important issues to consider in evaluating a potential class action is whether the consumer contract includes a clause requiring any dispute to be submitted to binding arbitration and prohibiting arbitration on a classwide basis. An arbitration requirement is a matter of contract. So, if there is no arbitration requirement in the contract, or if the consumer did not assent to the provision, and the defendant cannot take advantage of another entity's binding arbitration requirement, then arbitration should not be a concern. On the other hand, if there is an arbitration requirement that prohibits class actions, this will complicate any effort to maintain a class action.

As described in § 1.7.2.3 [1], *infra*, there are many grounds to challenge an arbitration requirement, depending on the nature of the case and the arbitration agreement. Moreover, do not assume that all contracts include arbitration clauses. While arbitration clauses are widespread in some industries, they are less so in others. Also, some defendants in class actions have not even entered into contracts with consumers, and thus have no opportunity to impose an arbitration requirement. For example, this is generally the situation with respect to acts or omissions by a consumer reporting agency that violate a consumer's rights.

Nevertheless, in many consumer contracts there is an arbitration requirement. This leaves the plaintiff's attorney with two options. One is to try to pursue the class action within the arbitration proceeding. Such a class will face several hurdles, which may be insurmountable in many cases, but successful certification typically puts the class in a stronger position than a certified class in a court proceeding. This option is discussed at § 1.7.2.2 [2], *infra*.

The other option is to challenge the enforceability of the arbitration requirement. While § 1.7.2.3 [1], *infra*, lists a number of such challenges, depending on the arbitration clause and the transaction such challenges may not be successful and may involve extensive litigation, including appeals. This option is summarized in § 1.7.2.3 [1], *infra*, but far more detail on this subject is found in NCLC's *Consumer Arbitration Agreements*.[39]

Footnotes

39 {39} National Consumer Law Center, Consumer Arbitration Agreements [3] (8th ed. 2020), *updated at* www.nclc.org/library.

Source: National Consumer Law Center, Consumer Class Actions [10th Ed.], updated at www.nclc.org/library
Source URL: https://library.nclc.org/class/01070201-0

Links
[1] https://library.nclc.org/nclc/link/CLASS.01.07.02.03
[2] https://library.nclc.org/nclc/link/CLASS.01.07.02.02
[3] https://library.nclc.org/nclc/link/ARB

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.[68] However, some of these legislative restrictions may not apply if the case is brought in federal court.[69] The Supreme Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[70] delineates the analysis that a federal court must perform when deciding whether to apply a state law restriction on class actions.[71]

The *Shady Grove* 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.[72] The district court and the Second Circuit held that this state limit on class actions was enforceable in federal court,[73] 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)."[74] 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.[75]

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.[76] 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."[77] 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.[78]

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.[79] Thus, one federal court found that class claims could not be brought in federal court under the Tennessee Consumer Protection Act[80] 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.' "[81] 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."[82] Similarly, a federal court in Ohio dismissed class claims under the Ohio Consumer Sales Practices Act[83] 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.[84] 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.[85] 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.[86]

Statutes limiting the damages available for particular class claims are also likely to be found substantive[87] even though the *Shady Grove* majority explicitly left this issue undecided.[88] 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.[89]

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.[90]

Footnotes

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

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

70 {70} Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010). *Shady Grove* is also briefly discussed in §§ 2.1 [3] and 7.4.2 [4], *infra*.

71 {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 {72} N.Y. C.P.L.R. 901(b) (2005) (McKinney) ("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.").

73 {73} Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 549 F.3d 137 (2d Cir. 2008), *rev'd*, 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010).

74 {74} Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010) (plurality opinion Part II-B).

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

76 {76} *See, e.g.*, Godin v. Schencks, 629 F.3d 79, 86 (1st Cir. 2010) (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 3239285 (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).

77 {77} *In re* Hydroxycut Mktg. & Sales Practices Litig., 299 F.R.D. 648, 653–654 (S.D. Cal. 2014).

78 {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. 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.").

79 {79} Lisk v. Lumber One Wood Preserving, L.L.C., 993 F. Supp. 2d 1376, 1384 (N.D. Ala. 2014) (collecting cases).

80 {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).

81 {81} Bearden v. Honeywell Int'l, Inc., 2010 WL 3239285, at *8 (M.D. Tenn. Aug. 16, 2010). *See also* S.C. Code Ann. § 39-5-140.

82 {82} Harris v. Reliable Reports, Inc., 2014 WL 931070, at *8 (N.D. Ind. Mar. 10, 2014).

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

84 {84} McKinney v. Bayer Corp., 744 F. Supp. 2d 733 (N.D. Ohio 2010).

85 {85} *Id.* at 748.

86 {86} *In re* OnStar Contract Litig., 2010 WL 3516691 (E.D. Mich. Aug. 25, 2010).

87 {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).

88 {88} Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 130 S. Ct. 1431, 1439, 176 L. Ed. 2d 311 (2010).

89 {89} *In re* Hydroxycut Mktg. & Sales Practices Litig., 299 F.R.D. 648, 654 (S.D. Cal. 2014).

90 {90} Holster v. Gatco, Inc., 618 F.3d 214 (2d Cir. 2010), *remanded from*, 559 U.S. 1060, 130 S. Ct. 1575, 176 L. Ed. 2d 716 (2010).

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).

Links
[1] https://library.nclc.org/nclc/link/CLASS.AC
[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