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Defining the Word 'Maintain'; Context Counts

Jack H. Friedenthal
George Washington University Law School, jfried@law.gwu.edu

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Let us assume that a major New York corporation with one of its manufacturing plants in Vermont determines to eliminate 500 of its employees, all of whom are employees at will. The purpose of the layoff is to cut costs because the company's profits have declined substantially in a down market.

A number of the Vermont employees seek the advice of a Vermont attorney to determine if they may have their employment status restored. The lawyer erroneously decides that the workers have a valid case under Vermont law. A class action, based on diversity of citizenship, is brought in the Vermont federal court requesting equitable relief. The federal trial court immediately dismisses the case on the ground that the plaintiffs have no substantive cause of action. Sounds simple.

But wait a minute – plaintiff's attorney points to Federal Rule of Civil Procedure 23. He notes that all the "prerequisites" of Rule 23(a) are met and the case also meets the requirements of Rule 23(b). The attorney then notes the language of Rule 23(b) which says that a "class action may be *maintained"* if Rules 23(a) and (b) are met. He argues that The Oxford English Dictionary[1] gives as one of sixteen definitions of the word "maintain" "to carry on (an action at law); to have *ground for sustaining* (an action)." (Emphasis added.) Therefore , he argues that under the specific terms of Rule 23, the case can continue and be submitted to a jury for a determination.

The attorney's proposed result in our hypothetical is, of course, absurd, but that is true only because in context that is not what Rule 23 means by the term"maintain." To understand what a word means, especially one such as "maintain"that has multiple formal definitions, one must consider the background and purpose for which it is utilized. With regard to Rule 23 in a diversity of citizenship case one must define the word in light of the United States Supreme Court decision in Erie R. Co. v. Tompkins[2] requiring federal courts to apply state substantive law, the Rules Enabling Act[3]
prohibiting federal procedural rules that "abridge, enlarge or modify any substantive right," and

[1] Vol. IX pp. 223-24 (2d ed. 1989).

[2] 304 U.S. 64 (1938).

[3] 28 U.S.C. § 2072 (1934).

the background and purpose of Rule 23. Given these factors an interpretation of the word "maintain" to permit a direct alteration of the state substantive law would not only be improper, but would raise significant questions as to the validity of the rule.

Unfortunately, in Shady Grove Orthopedic Associates v. Allstate Ins. Co.[4], Justice Scalia, writing for himself and three others,[5] does not appear to recognize that the word "maintain" has significant different meanings depending upon the context in which it is used. When faced with an argument that Rule 23 has separate meanings and must be interpreted not to overstep the Rules Enabling Act, he responded, " If the Rule were susceptible to two meanings–one that would violate § 2072(b) and another that would not–we would agree. . . . But it is not. Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met."[6] That statement is meaningless until one analyzes and understands the proper interpretation of the word "maintain" in the context used. It cannot be said that all one has to do is to read the words as printed in the rule, because, as we have seen in the above hypothetical, "maintenance" of a case, without understanding the context and purpose, could have an entirely different meaning--one that has a definite substantive aspect that would allow a plaintiff's case to go forward in direct opposition to the applicable substantive law.

In the *Shady Grove* case, a diversity case in a federal court, the Supreme Court was required to determine whether a New York statute conflicted with Federal Rule 23. That statute reads;

> 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. [7]

If the statute is merely a procedural limitation on class suits that conflicts with Rule 23, then of course, in a case in a federal court, the federal rule controls.[8] But if the New York provision is designed only to eliminate a class' right to relief to obtain redress for a penalty, it is a substantive provision that does not conflict with Rule 23 and must be applied by the federal court. Here Justice Scalia makes it very clear that we care not at all what was meant by the New York legislature when it enacted the provision. All we care about is what the legislation says! In

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[4] 130 S. Ct. 1431 (2010).

[5] Justice Scalia's opinion was joined by Chief Justice Roberts and Justice Thomas. Justice Sotomayor also joined that portion of the opinion relevant to the above discussion.

[6] *Id.* At 1441-42.

[7] N.Y.C.P.L.R. 901(b) (McKinney 1975).

[8] Hanna v. Plumer, 380 U.S. 460 (1965).

responding to the argument of the dissent,[9] a cogent analysis based on evidence of the New York legislature's purpose, he states that such analysis "cannot override the statute's clear text."[10] But what is that "clear text"? Justice Scalia merely adopts, without discussion or analysis, one of the various meanings of the word "maintained." "By its terms, the [New York] provision precludes a plaintiff from 'maintain[ing]' a class action seeking statutory penalties. * * * [I]t prevents the class actions it covers from coming into existence at all. "[11] Thus he attributes the same meaning to "maintained" in the New York law as it has in Federal Rule 23. Under that assumption, the two conflict and the state rule must be ignored. But is that position at all legitimate? Assume that we accept his general view that we should not try to ascertain the underlying purpose of legislation on the basis that to do so is too complex and time consuming for the federal courts.[12] Nevertheless when we are left only to deal with the words written, aren't we at least bound to find some rational way to decide what those words mean in the context they are used, especially when the words are subject to different interpretations? The Supreme Court itself, as late as 2003, struggled with the ambiguity of the word "maintain." As stated in Breuer v. Jim's Concrete of Brevard, Inc.:[13]

> "[T]he word 'maintain' enjoys a breadth of meaning * * *. 'To maintain an action' may mean 'to continue to litigate as opposed to 'commence' an action. Black's Law Dictionary 1143 (3d ed. 1933). But "maintain" in reference to a legal action is often read as 'bring' or 'file'; '[t]o maintain an action or suit may mean to commence or institute it; the term imports the existence of a cause of action.'"

Is it justifiable for members of the Court merely to adopt an interpretation convenient to their thesis without consideration of the surrounding factors that could give us quite a different result?

I submit that the New York statute does not "clearly" state that a class action for a penalty cannot, in Justice Scalia's words, "come into existence at all" and his opinion provides no reason why one should read the word "maintain" to convey such a procedural meaning. It is certainly arguable that "maintain" means no more than that a plaintiff class has no substantive cause of action for a penalty. If that is the case, then of course, a class action for a penalty can be *pleaded* in federal court and if it meets the requirements of Rule 23, it can, indeed must, be *dealt with* as a class action. But that is as far as Rule 23 goes. The fact that a class action meets the requirements of Rule 23 and thus can be "maintained" in a procedural sense, certainly does not mean that the

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[9] Shady Grove Orthopedic Associates v. Allstate Ins. Co., 130 S. Ct. at 1464-65 (dissenting opinion of Justice Ginsberg joined by Justices Kennedy, Breyer, and Alito).

[10] *Id.* at 1440.

[11] *Id.* at 1439.

[12] *Id.* at 1440-1441.

[13] 538 U.S. 691, 695 (2003).

case, or a portion of it, cannot be dismissed on the merits. See, for example, Ashcroft v. Iqbal. [14] Federal Rule 23 cannot create a cause of action in a diversity case if no such cause exists under state law.

Therefore it should have been incumbent on Justice Scalia and the three other justices who joined his opinion in *Shady Grove* to decide exactly what the state statute means when it uses the ambiguous word "maintain." And that requires analysis that is missing from Justice Scalia's opinion.

Justice Stevens, in his concurrence in the case, takes the position that even if the state statute could be said to govern procedure, if it is intimately involved with the substance of the underlying cause, application of Rule 23 would violate the Rules of Enabling Act.[15] Justice Scalia responded that so long as the state rule has a procedural element that conflicts with a federal rule of procedure, the federal rule must apply, even though its application may affect substantive elements of the case.[16] Whatever the outcome of that debate, it is beside the point if the state provision is purely substantive and thus only determines that no cause of action exists.

In carrying out his analysis, Justice Stevens, who provides the fifth, and deciding, vote for the Court's decision, reaches the question of whether the New York provision is entwined with a substantive right and determines, without discussing the legislature's meaning of the word "maintain," that it is fundamentally procedural. [17] Thus, based on his analysis of the legislative history of the New York statute[18] and its "plain textual reading,"[19] he concludes that it conflicts with Rule 23 and cannot be applied under the facts of *Shady Grove*.[20] One can question the reasons Justice Stevens gives for his conclusion[21] but it does not excuse other justices from

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[14] 129 S.Ct. 1937 (2009).

[15] Shady Grove Orthopedic Associates v. Allstate Ins. Co., 130 S.Ct. at 1452-53.

[16] *Id.* at 1445-47. Justice Sotomayor did not join this portion of Justice Scalia's opinion.

[17] *Id.* at 1457.

[18] *Id.* at 1457-59.

[19] *Id.* at 1459-60.

[20] *Id.* at 1457-60.

[21] Justice Stevens relies on the fact that the New York statute, on its face, governs cases based on the federal law or the law of other states and that it is procedural in form. *Id.* at 1457. It is true that the New York provision is part of that state's general procedural statute governing class actions and appears in the New York procedural code (N.Y.C.P.L.R). On the other hand it is located in a separate section "b" of that statute and, moreover, that is the logical place for the provision to be placed. Where else in the New York code would it appear so as to be known to courts and practitioners? As Justice Ginsberg indicates in the dissent, it would makes no sense to

reaching that fundamental issue by assuming there is a "clear text" that has but one possible meaning.

Discussion of the meaning of the New York statute is hardly frivolous. Frequently usage of "maintain" in connection with a party's ability to carry on a lawsuit refers to whether there is or is not a valid claim for relief under the substantive law, rather than whether the case has no business being in court under some procedural proscription. The New York legislature[22] and Court of Appeal[23] have used "maintain" in that context and so has the Supreme Court of the United States.[24] The *Shady Grove* case required much more serious consideration than it was given by Justice Scalia and those who signed onto his opinion. The consequences of the decision are of substantial significance. It effectively permits a final substantive outcome in the case that is at odds with what would have been decided in a New York court. It thus results in forum shopping of an extreme nature. One can only wonder if the Rules Enabling Act should be read to permit such a determination. The case travels far beyond the scope of other decisions regarding application of a federal rule in a diversity case. For example, in Hanna v. Plumer,[25] the issue was

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have "embedded the limitation in every provision creating a cause of action for which a penalty is authorized." *Id.* at 1466. A number of other provisions, dealing with substantive matters, have also been placed in New York's procedural code. See *id.* at 1469. Moreover, as the dissent also notes, *ibid.*, the fact that the statute appears to govern cases allegedly based on the law of other states is understandable. State legislatures, when writing such a law designed only for application in their own states, are not likely to add specific language to limit application with regard to the laws of the federal government or other states.

It is interesting to note that even though the laws of another state could be applied because of that state's contacts with the case, so long as New York has its own reasonable contacts with the case, New York courts are free under the Constitution to apply New York substantive law. Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981). However, in 2009 the Supreme Court held in a five to four decision, that under the Supremacy Clause of the Constitution, a state cannot prohibit its courts from entertaining a federal claim, even though the state bars its own courts from hearing identical claims under state law. Haywood v. Drown, 129 S. Ct. 2108 (2009).

[22] *See* N.Y.C.P.L.R. 9804 (McKinney 1973).

[23] *E.g.*, Estate of Schneider v. Finmann, 15 N.Y.3d 306, 308-09 (2010); Barry v. Niagra Frontier Transit System, 324 N.E.2d 312 (N.Y.1974); Nader v. General Motors Corp., 255 N.E.2d 765, 771 (N.Y.1970).

[24] *E.g.*, Anza v. Ideal Steel Supply Corp., 547 U.S 451, 457 (2006); United States v. Smith, 507 U.S. 197, 212 (1993).

[25] 380 U.S. 460 (1965).

whether a federal rule regarding service of process would apply rather than a different state provision. But the consequences of the decision are not of major importance. A defendant in a federal court must be served according to a federal rule rather than a state provision. That does not
have any relation to the merits of the action. Future parties can easily adjust to the different methods of service and neither plaintiff nor defendant need lose its case thereby. But under *Shady Grove* a future defendant is substantively disadvantaged. A protection afforded under state law, going directly to the outcome of the case, is removed simply because the case is in a federal court, and there is nothing that a defendant can do about it.

Conclusion

Whether or not the decision in the *Shady Grove* case is correct on the merits, the oversimplified analysis of four members of the Court who made up the majority of five is disturbing, leading to a general concern about the method by which those Justices engage in statutory interpretation.

Jack Friedenthal
Howrey Professor of Law
George Washington University

Note that a copy of this article, in final form, is to be published in the Akron Law Review as part of a symposium on the *Shady Grove* case.