

Supreme Court Reaffirms Rule 23 Dominance

BY JASON MORRIS



Supreme court ruling may send mixed signals to lower courts

In a modern sequel to the famous *Erie R.R. Co. v. Tompkins* decision, the Supreme Court, in a splintered March 23, 2010 opinion, held that Federal Rule 23 controls when a class action lawsuit may be pursued in federal court. Given the different rationales espoused by the concurring justices, however, the states might sidestep this result by adopting subtle language in future legislation.

Writing for the 5-4 majority in *Shady Grove Orthopedic v. Allstate Ins. Co.*, Justice Scalia rejected the Second Circuit's view that Rule 23 and a New York law banning certain class action claims seeking statutory penalties could live harmoniously. Scalia, calling Rule 23 "a one-size-fits-all formula for deciding the class-action question," reasoned that the Court "cannot contort its text, even to avert a collision with state law that might render it invalid." Scalia found that Rule 23 was valid under the Rules Enabling Act, as "it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule."

Justice Stevens concurred that the federal and state rules were conflicting and that Rule 23 was valid under the Rules Enabling Act, but he did so by different reasoning, arguing that the Rules Enabling Act requires courts to focus on both the state law affected and the federal rule. In short, the federal rule applies so long as it does not displace a state law that defines substantive rights.

Stevens' rationale is controlling, under *Marks v. United States*, because his rationale was the narrowest ground for concurrence in the judgment. However, given the fractured nature of the opinion, the lower courts are likely to struggle with this issue.

California Supreme Court to Rule on the Extent Unfair Competition Laws Apply to Insurance Companies

BY BRIAN PERRYMAN

On February 10, 2010, the California Supreme Court granted review in the appeal of *Zhang v. Superior Court*. The lower appellate court held that alleged fraudulent conduct by an insurer which would violate California's Unfair Insurance Practices Act (UIPA) can give rise to a private civil action under California's Unfair Competition Law. Earlier, in *Moradi-Shalal v. Fireman's Fund Insurance Companies*, the California Supreme Court held that UIPA does not afford private litigants a right of action. In 2004, another intermediate appellate court extended this ruling to also bar any derivative liability under the

Unfair Competition Law. The questions now certified for review by the high court are: "(1) Can an insured bring a cause of action against its insurer under the unfair competition law (Bus. & Prof. Code, § 17200) based on allegations that the insurer misrepresents and falsely advertises that it will promptly and properly pay covered claims when it has no intention of doing so? (2) Does *Moradi-Shalal v. Fireman's Fund Insurance Companies* (1988) 46 Cal.3d 287 bar such an action?" No argument date has been set.