

## **Class Actions in the Supreme Court: Arguing *Shady Grove v. Allstate***

Scott L. Nelson  
Public Citizen Litigation Group  
Washington, DC

How do you tell a Supreme Court Justice what an opinion she wrote really means? Very carefully.

That was the situation I found myself in this past November 2, when, early in my argument on behalf of the petitioner in *Shady Grove Orthopedic Associates v. Allstate Insurance Company*, Justice Ruth Bader Ginsburg asked a series of questions suggesting that her opinion in *Gasperini v. Center for Humanities* was adverse, if not outright fatal, to my argument. I had to disagree with that reading of *Gasperini* in a way that would be both respectful toward the questioner and (I hoped) persuasive to at least five Justices. Needless to say, that was not a relaxing moment.

I should back up here and explain that the issue in *Shady Grove* was whether a New York law (Civil Practice Law and Rules § 901(b)), which prohibits class actions in state-court cases seeking statutory penalties, applies to a diversity action filed in federal court under the Class Action Fairness Act when the claim of the putative class is based on New York substantive law. The case raised thorny questions of how to apply the Supreme Court's decisions in *Erie Railroad Co. v. Tompkins* and *Hanna v. Plumer*, as well as the confusing (to put it mildly) body of precedents they have spawned.

The Supreme Court's decision in the case, issued on March 31 of this year, held that the availability of a class action in such a case is governed not by the state-law rule set forth in CPLR 901(b), but by federal law—specifically, Federal Rule of Civil Procedure 23, which contains no prohibition on class actions in statutory penalty cases. Justice Scalia wrote the lead opinion (part of which commanded a majority); Justice Stevens wrote a concurring opinion; and Justice Ginsburg dissented. In short, the class action plaintiff prevailed.

I'll leave it to others to analyze the Court's holding and its implications for other cases and other state laws limiting class actions, as well as to comment on the interesting (to say the least) alignment of Justices. The purpose of this short article is to discuss the experience of arguing the case before the Supreme Court.

I was asked to handle briefing and argument of the case for the petitioner (that is, the class action plaintiff who argued that Rule 23 rather than the New York rule should apply in federal court) shortly after the Court agreed to hear the case in May of last year. Delaware lawyer John Spadaro had written the petition for certiorari that brought the case before the Court, and I had offered him some informal advice about his reply in support of the petition after the respondent

brought in attorneys with substantial Supreme Court expertise to oppose the petition. When the Court granted certiorari, Mr. Spadaro asked me to take on the role of counsel of record, while he remained in the case as cocounsel in the Supreme Court (as well as lead counsel in any proceedings on remand).

Although the focus of my comments here is on preparing for and presenting oral argument rather than on writing Supreme Court briefs, I need to begin by saying that the best preparation for arguing before the Court is to take the leading role in writing the merits briefs yourself, as I did in *Shady Grove*. Writing the briefs, or at least playing a major role in the team effort of putting them together, immerses you in the case and acquaints you, early on, with both its strengths and vulnerabilities. And if you've shaped the argument from the outset and made the major strategy calls about how to present it in the briefs, you'll be much more likely to feel comfortable and in command when the time comes to argue it. You'll also be more likely to present the Court with a consistent message, which can be important: It doesn't look good if, at argument, an advocate appears to be making arguments that are inconsistent, or in tension with, the thrust of the briefs, and that is less likely to happen if you are arguing your own briefs rather than someone else's.

When the advocate has been intimately involved in writing the briefs, preparing for oral argument is more a process of review and synthesis than of learning (or cramming). The advocate already knows the critical facts, the arguments, and the important cases from having pored over them in the writing process. That's not to say that substantial additional preparation is not necessary, just that the process is already well underway—its foundation has been laid.

As I started to prepare intensively in the weeks leading up to the argument, I began by rereading the briefs, attempting to do so with a fresh eye, looking for nuances I might have overlooked when writing them and questions that they opened up but did not completely answer. I also made sure I had mastered the relevant facts and procedural history of the case (which fortunately here was quite easy because the case arose from a Rule 12 dismissal).

I then reread all the cases cited in the briefs, which comprised almost the entirety of the Supreme Court's *Erie* canon as well as many of its decisions involving class actions. That process, together with my review of the briefs, raised questions in my mind about points (some important, some peripheral) that required additional reading to nail down. I ended up reviewing not only the few post-*Erie* cases that had not been cited in the briefs, but also a substantial number of pre-*Erie* decisions that were important to understanding the evolution of the law in the area.

Based on that review, I prepared "cheat sheets" listing all the Court's *Erie* cases (as well as a few other important cases) and describing their circumstances and holdings as briefly as possible—in three lines or less. Anything more detailed would be useless at argument; I wanted something that could fit in the small binder I would take to the podium and that could remind me of the critical information

about any case that was likely to come up. As back-up, I also had a huge binder filled with complete copies of all of the decisions.

Having completed the review process, I turned to trying to synthesize my thoughts into an argument. That task involved deciding on the small number of points I wanted to be certain to get out during my half hour before the Court, writing a short introductory statement that would strike my major themes as clearly as possible in the minute or two before the Court was likely to start pelting me with questions, and preparing a very schematic, two-page argument outline showing the order in which I would, ideally, address the major issues in the case. Again, the goal was to have something that could easily be referred to at the podium, not to prepare a script that would have to be tossed aside in any event once the Justices began their questioning.

As backup, I had not only my cheat sheets listing the relevant cases, but also a page of notes telling me where in the briefs I could find the text of each of the relevant statutes and rules (which in this case included CPLR 901(b), Federal Rule 23, the Rules Enabling Act, the Rules of Decision Act, and a few others). It is not uncommon at oral argument for one or more Justices to ask where the exact wording of a statute or rule can be found so that he or she can follow the argument, and the advocate should be able to say without a lot of fumbling or hesitation that rule such-and-such can be found at page 4 of the blue brief (i.e., petitioner's brief) or in the appendix of the red brief (i.e., respondent's brief) at A-5. I also had a few pages of notes with points to remember in answering particular questions that were likely to arise, and key language from some of the cases.

Like most attorneys who argue before the Court, I had a few tryouts on the road before opening on Broadway. That is to say, the week before the argument itself I did three formal moot courts, one with my colleagues from Public Citizen Litigation Group, one at American University College of Law, and one at the Supreme Court Institute of Georgetown University Law Center. In each of the moot courts, my "Justices" were either experienced advocates or law professors (or both), who attempted to be at least as rigorous in their questioning as the actual Justices were likely to be. In each of the moot courts I argued for at least an hour, until both the moot court Justices and I were exhausted, and then we broke for a discussion of how to improve the argument.

I can't say too much about the importance of moot courts for someone about to argue before the Supreme Court. They are a great learning process for the advocate and invariably offer fresh insights on how to argue your case better. And if they are done vigorously enough, as mine were, they leave you feeling confident that you've faced and answered most of what you're likely to hear from the Court itself. Despite the arduous questioning I eventually got from the Court, I had already heard almost all of it in my moot courts.

On the morning of argument, you arrive at the Court, go through security, and join the crowd milling around on the Court's ground floor waiting for the time

when they will be allowed up to the main floor and into the courtroom. At 9:00, arguing counsel and their colleagues who will be seated at counsel table are conducted up to the “lawyers’ lounge,” a waiting room reserved for members of the Supreme Court bar. There, at 9:15, the Clerk of the Court, William Suter, appears and delivers a short set of remarks explaining what will happen in the courtroom, where counsel are to sit, how to operate the height adjustment crank on the lectern, how to address members of the Court, and similar subjects. Most of this should not come as real news to someone who has prepared for argument (and certainly not to lawyers who have previously appeared before the Court), but it is good advice delivered in a friendly and reassuring tone, and it helps take the edge off an experience that can be stressful for newcomers and repeat players alike.

Counsel are then given courtroom passes and are free to enter the courtroom (after going through another set of metal detectors). Generally, lawyers who are arguing or are sitting at counsel table are at their places in the courtroom by somewhere between 9:30 and 9:45 and then kill time for the remaining minutes before the Justices enter at 10:00.

On the day of the *Shady Grove* argument, we were up second, so we were seated at tables immediately behind the ones where the attorneys arguing the first case were seated. Whenever I am arguing a case in any court, I like to listen to the arguments that precede mine in order to get a feel for the court and the rhythm of questions and answers. Sometimes, as well, something said in an earlier argument may resonate with a point at issue in my case or generate some new, relevant insight. On this day, I was also interested in the subject of the first case (the circumstances under which mutual fund investment advisers may be found to have received excessive compensation) and was well acquainted with one of the attorneys arguing, so I was particularly interested in listening.

My main impression from that argument was that Justice Alito was, uncharacteristically, completely silent, and that Justice Breyer asked fewer questions than usual, which he himself said was attributable to laryngitis. I wondered whether Justice Alito might also be ill. The other Justices participated in the argument to about the same extent as usual.

When the first argument ended, counsel in that case vacated the front table and left the courtroom. We moved our materials forward as quickly as possible, and I went to the podium. The Chief Justice called the *Shady Grove* case and I began.

I had prepared an introduction of about five sentences that I hoped to get out before the first question. As it turned out, that was exactly what I was able to say before I received my first question, from Justice Ginsburg. From that point forward, much of the argument consisted of a back-and-forth exchange between Justice Ginsburg and me. In the 26 minutes of my opening argument, I got somewhere in the neighborhood of 35 questions (depending on what counts as a question), and well over half were from Justice Ginsburg, with the rest split fairly evenly among the Chief Justice and Justices Stevens, Scalia, and Sotomayor.

Justice Ginsburg's questioning was daunting because she has great command of the subject matter of *Erie* and *Hanna*. Her questions were highly skeptical of my position and, in many instances, involved the details of prior decisions of the Court. Supreme Court arguments often focus very little on the ins and outs of past decisions and lines of doctrine, but this argument was an exception. I felt that my preparation allowed me to discuss the cases with confidence, but the questioning seemed to suggest that Justice Ginsburg's view of the overall body of the Court's precedent in the area was not compatible with my argument. Increasingly it seemed that my answers to her questions would have to persuade other Justices in order for my side to win.

As in the first argument of the day, Justice Alito was silent throughout the *Shady Grove* argument, and Justice Breyer asked me no questions and only a few of my opposing counsel, possibly in part because of his laryngitis. Justices Kennedy and Thomas were also silent throughout the argument. My sense as an advocate, however, was that the entire Court was engaged. At one point in my argument, as I was discussing one of the Court's past decisions (I believe it was *Byrd v. Blue Ridge Electrical Cooperative*), Justice Thomas asked an attendant to bring him a copy of the U.S. Reports so that he could check on my characterization of the case.

My able opposing counsel, Christopher Landau, received an equally thorough grilling by the Court, although not nearly as much concentrated attention from any one Justice as I had received from Justice Ginsburg. The transcript indicates that he got, if anything, a few more questions than I did, but the questioning was fairly evenly divided among the Chief Justice, Justices Sotomayor, Stevens, Breyer and Ginsburg, with one question from Justice Scalia. Neither of us received many questions that were not challenges to our arguments, though a few of Justice Ginsburg's questions to Mr. Landau sounded somewhat friendly to his position.

My rebuttal, for which I had reserved four minutes, provoked three more difficult questions from Justice Ginsburg, but I was happy to get them. The Supreme Court is generally, and accurately, viewed as a "hot bench," but often the Justices seem less responsive during rebuttal, and rebuttal time sometimes seems wasted as a result. It may be that the Justices are just less inclined to interrupt when they know that counsel has very little time to make a few points, but frequently it feels as if rebuttal receives less attention. I at least felt as if I had engaged someone in my final four minutes.

Justice Brennan used to say that in the Supreme Court, the most important skill you can have is the ability to count to five. As the argument ended, I felt that there were ways I could count to five in *Shady Grove*, but that the same could also be said for my opponent. The questions asked by the Chief Justice and Justices Stevens, Scalia, Breyer and Sotomayor did not suggest to me that any of them was committed to one side or the other, and three Justices had said nothing at all.

I think the argument left some observers with the impression that my side was not likely to prevail because it appeared that we had not convinced Justice

Ginsburg, and it seemed to them unlikely that a class action plaintiff could prevail in the Supreme Court without her vote. I did not share the latter part of that view, though Justice Ginsburg's questions certainly did not lead me to expect her to vote our way.

As it turned out, those who expected Justice Ginsburg to vote that New York's class-action prohibition applied in federal court were correct, but the expectation that she would carry the Court with her was not. The class action plaintiff counted to five, barely, with the unusual combination of Justice Scalia, Chief Justice Roberts, and Justices Stevens, Thomas and Sotomayor.

Whether the oral argument made a difference I cannot say. I think it is fairly likely that the outcome would have been the same had the case been decided by these nine Justices on the briefs alone. But that does not mean that oral argument is unimportant in general, or that it was unimportant in this case. The argument, if nothing else, provides a focal point for the members of the Court as they study the case—an hour during which they, together with counsel, think and talk about the case together as they approach the moment of decision, which takes place when they vote on the outcome later in the same week. Given that the argument is the last chance of counsel to have any influence on the decision, and possibly the last impression of the case that the Justices take with them into the conference where they cast their votes, it certainly behooves counsel to prepare for and perform argument as if it were likely to be decisive.

And, in any event, it is an unforgettable experience for anyone fortunate enough to have had the opportunity to participate in it.