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Expert Analysis

Removal of Parens Patriae Actions Under Class Action Fairness Act

On May 28, 2013, the Supreme Court granted certiorari in *Mississippi v. AU Optronics,*[1] agreeing to consider whether a state attorney general's parens patriae action is removable to federal court as a "mass action" under the Class Action Fairness Act (CAFA).[2] The court's decision will resolve a circuit split on the issue, providing litigants with clarity on how to proceed with complex disputes that include claims brought by a state on behalf of its citizens. The U.S. Court of Appeals for the Fifth Circuit first considered the issue in 2008, finding that a state attorney general's action is removable under CAFA where the action seeks monetary recovery for individual citizens. Three other circuits have decided otherwise—the Fourth, Seventh, and Ninth circuits have concluded that a parens patriae action does not fall within the reach of CAFA and is not removable under the statute. The implications for practitioners are significant, as most defendants (antitrust included) prefer to have parens patriae actions litigated in federal court where the analysis and outcomes arguably are less provincial.

The *AU Optronics* case involves an action brought by the Attorney General of the State of Mississippi against several liquid crystal display (LCD) manufacturers. The attorney general's action alleges price-fixing claims under the Mississippi Antitrust Act and the Mississippi Consumer Protection Act. The complaint requests several remedies, including injunctive relief, civil penalties, restitution for the state's own losses from its purchases of LCD panel products, restitution to the state on behalf of its citizens and local governments, punitive damages, and costs and attorney fees.

The defendant LCD manufacturers sought to remove the action as a "class action" or "mass action" under CAFA. But the District Court for the Southern District of Mississippi granted the attorney general's motion to remand the case to state court, finding that the parens patriae action was brought to "protect the state's 'quasi-sovereign' interest in its economy and its citizens' economic wellbeing."[3] The court did so after analyzing the action under Fifth Circuit precedent requiring a "claim-by-claim" analysis to determine jurisdiction under CAFA. Using this analysis, the court "pierces the pleadings" to determine if the action includes claims for which there may be more than 100 beneficiaries of the requested monetary relief, such that the action could be a "mass action" under the statute.[4]

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While the district court found that the attorney general's action was a "mass action," the court applied the "general public exception" to mass action jurisdiction under CAFA, given that the action was brought "on behalf of the general public" rather than individual claimants. The Fifth Circuit agreed to hear the defendants' appeal of the remand order, exercising its discretion to review remand orders in actions that were removed under CAFA.

The Fifth Circuit's Decision

On appeal, the Fifth Circuit decided that the attorney general's action against the LCD manufacturers was not a common law parens patriae action but rather a "mass action" removable under CAFA.[5] Consistent with its precedent, the court applied a "claim-by-claim" analysis, finding that the "real parties of interest include not only the State, but also individual consumers." In reaching this conclusion, the court reasoned that the complaint seeks remedies not only for "generalized harm" to the state, but also for "injury suffered by the purchaser consumer"; the attorney general's action was therefore a "mass action." The court found the "general public exception" inapplicable, explaining that because the real parties of interest included consumers, this was not a case where "all of the claims were asserted on behalf of the general public" rather than individual claimants.

The court also noted that the state statutes at issue did not give the state sole authority to recover for consumers' injuries, so the state could not "assert 'ownership' over all individualized claims in the name of the State." The court found that, where the state sought to recover for consumers' injuries, it acted "not in its parens patriae capacity, but essentially as a class representative." Because the Mississippi statutes did not permit double recovery, a decision in the attorney general's action providing recovery would eliminate the right of consumers to recover in a separate class action. Finding that there was "no statutory or common law that permits the State to extinguish the right and remedy the consumer has for his injury," the court concluded that the attorney general could not recover for consumers' injuries under the common law parens patriae authority, but instead did so as a representative in a "mass action."

> The Supreme Court's decision will likely consider the statutory intent of the Class Action Fairness Act and particularly its "mass action" provisions.

Conflict Among Circuit Courts

The Fifth Circuit was the first to address this removal question, but it continues to be the only circuit court to interpret a parens patriae action as a "mass action." In 2008, the Fifth Circuit addressed this issue in *Louisiana ex rel. Caldwell v. Allstate Ins.*[6] There, the court found that the Attorney General of Louisiana's parens patriae action qualified as a "mass action" under CAFA,

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and that it was therefore removable to federal court. Three other circuit courts have since addressed the issue. In *LG Display v. Madigan*,[7] the U.S. Court of Appeals for the Seventh Circuit decided that a parens patriae action was not removable under CAFA. The Ninth and Fourth circuits came to the same conclusion in *Nevada v. Bank of America*[8] and *AU Optronics v. South Carolina*,[9] respectively.

The Seventh Circuit's decision involved a parens patriae action against LCD manufacturers for violations of the Illinois Antitrust Act—claims based on the same conduct and against most of the same defendants as the action now before the Supreme Court. The Seventh Circuit rejected the "claim-by-claim" analysis applied by the Fifth Circuit in *Caldwell*, finding that the approach had no basis in the language of CAFA. Rather, the court looked at the complaint as a whole and determined that the parens patriae action was not a "mass action."

The U.S. Court of Appeals for the Ninth Circuit addressed this issue the same year, agreeing with the Seventh Circuit's conclusion that a parens patriae actions is not removable as a "mass action." The case there involved a parens patriae action against Bank of America for violations of the Nevada Deceptive Trade Practices Act, alleging that the bank misled consumers through the terms of its home mortgage modification and foreclosure process. Like the Seventh Circuit, the Ninth Circuit rejected the "claim-by-claim" analysis in favor of looking at the case as a whole, finding that the "real party of interest" was the state. While the attorney general's action had also requested relief on behalf of injured consumers, the state had brought the claim to protect "its interest in protecting the integrity of mortgage loan servicing." Concluding that the state's interest was "not diminished merely because it has tacked on a claim for restitution," the court found that the parens patriae action was not a "mass action" under CAFA.

As with the Seventh Circuit's decision and the Fifth Circuit's most recent decision on this issue, the case considered by the U.S. Court of Appeals for the Fourth Circuit also involved a parens patriae action against LCD manufacturers. The Fourth Circuit's opinion, issued earlier this year, concluded that the Attorney General of South Carolina's action was not removable under CAFA. There, the attorney general brought claims under the state's antitrust and consumer protection laws, which provided for restitution to injured citizens. The court agreed with the Seventh and Ninth circuits, finding that the requested restitution to citizens was "incidental to the State's overriding interests and to the substance of [the] proceedings." The action therefore did not qualify as a "mass action" and was not removable.

Supreme Court's Decision

The *AU Optronics* case will likely have several implications for litigation of complex disputes. Most obviously, the decision should put a stop to the current inconsistency in removal orders involving similar cases. The case is a classic example of lower court confusion involving the same alleged misconduct. In addition to Mississippi's Attorney General, several other state attorneys general filed similar parens patriae actions against the LCD manufacturers. While some of these actions alleged federal claims and were brought in federal court, others, like Mississippi's, only asserted claims under state laws. Notably, some of these actions have been remanded to state court upon findings in the Fourth, Seventh, and Ninth circuits that the actions were not removable. One such action, considered by the Fourth Circuit, prompted the LCD manufacturers to file a petition for writ of certiorari on this same issue.[10] These differing outcomes in frequent and costly cases were good reasons alone for the court to resolve the circuit split.

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A decision for either party would also have implications for the efficiency of litigating complex cases that affect claims in numerous states. On the one hand, permitting the cases to be heard in federal court potentially allows for less costly litigation and a lesser burden on courts. As one author notes, "treating a parens patriae action as a CAFA mass action comports with judicial economy and fairness."[11] Where removal can allow for federal multidistrict litigation, defendants can avoid the costs of duplicative litigation. For example, several state attorney generals' federal court actions (which also allege claims under federal law) against LCD manufacturers are proceeding as a consolidated multidistrict litigation. On the other hand, removal may require that some state claims be severed (such as an attorney general's claims for injunctive relief and civil penalties).

The Supreme Court's decision will likely consider the statutory intent of CAFA, and particularly its "mass action" provisions, where the circuit courts have diverged in interpreting the language of the statute. The stated purposes of the statute—one of which is "to restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction"[12]—may suggest a decision in favor of the respondents. CAFA's provision for federal jurisdiction based on minimal diversity was explicitly aimed to prevent "abuses of the class action device," which allowed cases against out-of-state defendants to be heard in state courts by naming a plaintiff with the same citizenship as a defendant. This intent arguably is furthered by allowing removal where a state attorney general seeks recovery for individual citizens, given that such claims essentially replace the class action process where the laws bar consumers from double recovery through a separate class action. As the Fifth Circuit reasoned, this type of proceeding can allow what effectively is a class to employ a loophole to avoid federal class action procedures—that is, the class can functionally be represented by the state.[13]

In their brief on the petition for writ of certiorari, the respondents in *AU Optronics* argued that the action falls within the category of "interstate cases of national importance" that CAFA intended for federal court.[14] This, they argued, is readily apparent as the case involves several multinational defendants and allegations of out-of-state activities. Conversely, allowing removal of a parens patriae action in some real sense interferes with states' sovereignty over the enforcement of state laws. Given that three circuits, including the influential Seventh, have squarely rejected removal under CAFA for these types of parens patriae actions, one might jump to the conclusion that the court is likely to reverse in *AU Optronics*. At the same time, the court of late has shown a great interest in class action mechanisms and policies, and it may well be that it wishes to confirm that states may not avoid CAFA where they seek damages or other monetary compensation for their citizens in a mass action.

1. See Petition for Writ of Certiorari in *Mississippi v. AU Optronics*, No. 12-1036.
2. Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 9-12.
3. *Mississippi v. AU Optronics*, 876 F.Supp.2d 758, 774 (2012).
4. The definition of "mass action" under CAFA also requires that the claims involve common questions of law or fact and that the amount in controversy exceeds $75,000.
5. *AU Optronics v. Mississippi*, 701 F.3d 796 (5th Cir. 2012).
6. 536 F.3d 418 (5th Cir. 2008).
7. 665 F.3d 768 (7th Cir. 2011).
8. 672 F.3d 661 (9th Cir. 2011).
9. 699 F.3d 385 (4th Cir. 2013).
10. See Petition for Writ of Certiorari in *AU Optronics v. South Carolina*, No. 12-911.
11. Enrique Schaerer, "A Rose by Any Other Name: Why a Parens Patriae Action Can Be a 'Mass Action' Under the Class Action Fairness Act," 16 N.Y.U J. Legis. & Pub. Pol'y 39, 86 (2013).
12. Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 5.
13. *AU Optronics v. Mississippi*, 701 F.3d 796 (5th Cir. 2012) (citing Jacob Durling, "Waltzing Through a Loophole: How Parens Patriae Suits Allow Circumvention of the Class Action Fairness Act," 83 U. Colo. L. Rev. 549 (2012)). But see Alexander Lemann, "Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act," 111 Colum. L. Rev. 121 (2011) (arguing that removal of parens patriae actions is inconsistent with both the scope of CAFA and principles of federalism).
14. See Brief for Respondents on Petition of Writ of Certiorari in *Mississippi v. AU Optronics*, No. 12-1036.