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Supreme Court Decides *Parens Patriae* Suits Must Remain in State Court

On January 14, 2014, the U.S. Supreme Court held in an unanimous decision that *parens patriae* lawsuits filed by state attorneys general alleging only violations of state law may not be removed to federal court under the Class Action Fairness Act of 2005 (CAFA). The Court concluded these suits are not "mass actions" within the meaning of the statute and must remain in state courts.

Background

A 2006 Department of Justice (DOJ) investigation established that several liquid crystal displays (LCD) manufacturers formed a global cartel between 1999 and 2006 to fix prices on LCDs, which prompted several attorneys general to file antitrust actions to recover for their increased costs. The defendant manufacturers settled with eight of the attorneys general in December 2011 for nearly $539 million.[1] Mississippi was one of the few states to abstain from the settlement and instead brought a *parens patriae* case in state court, alleging that the LCD manufacturers violated the Mississippi Antitrust Act and the Mississippi Consumer Protection Act.[2] In addition to seeking injunctive relief, civil penalties and restitution for the state's own losses from LCD purchases, the state sought restitution for the LCD purchases of its citizens.[3]

The LCD manufacturers removed the case to federal district court, arguing it was a mass action under CAFA. CAFA defines mass action to mean "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."[4] The U.S. District Court for the Southern District of Mississippi concluded that "persons" should be defined to mean the "real parties of interest" to the restitution claim, which were the unidentified Mississippi consumers who purchased the LCD screens.[5] The district court nonetheless remanded the case to state court due to a "general public exemption" provision in CAFA.[6] On appeal, the Fifth Circuit agreed with the district court that the lawsuit satisfied the removal requirements of CAFA, as the "real parties of interest in Mississippi's suit are those more than 100 … individual citizens who purchased the [LCD] products within Mississippi."[7] The court reasoned that when a

1 Don Jeffrey & Phil Milford, "Samsung, LCD Makers Agree to Pay $538.6 Million to Settle Antitrust Claims," *Bloomberg Law* (Dec. 27, 2011), http://www.bloomberg.com/news/2011-12-27/sharp-samsung-propose-539-million-settlement-in-panel-antitrust-cases.html.

2 *Mississippi ex rel. Hood, Attorney General v. AU Optronics Corp et al.*, No.12-1036, slip op. at 3 (U.S.S.C. Jan. 14, 2014).

3 *Id.*

4 28 U.S.C. § 1332(d)(11)(B)(i).

5 *Mississippi ex rel. Hood, Attorney General v. AU Optronics Corp et al.*, 876 F. Supp. 2d 758, 771 (S.D. Miss. 2012).

6 *Id.*

7 *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F. 3d 796, 779 (5th Cir. 2012).

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state brings actions to enforce the rights of consumers, the state is "not asserting its sovereign interest[s]" but should be viewed as acting "as a class representative" and "pursu[ing] the interests of … private part[ies]."[8] Because the Fourth, Seventh and Ninth Circuits previously reached the opposite conclusion in similar actions, the Supreme Court granted certiorari to determine whether a suit filed by a state as the sole plaintiff constitutes a "mass action" under CAFA where it includes a claim for restitution based on injuries suffered by the state's citizens.

Opinion

The LCD manufacturers urged the Court to adopt the Fifth Circuit's rationale that "claims of 100 or more persons" refers to the real parties in interest to the claims, "regardless of whether those persons are named or unnamed."[9] Justice Sotomayor, however, writing for a unanimous Court, quickly dismissed that interpretation and focused solely on the plain language of CAFA to reverse the Fifth Circuit. The Court held that *parens patriae* actions do not qualify as "mass actions," but rather the "100 or more persons" language refers to named plaintiffs only. The Court noted that Congress knew how to include unnamed parties in a class definition — as it did with the numerosity requirement found in CAFA, which specifically states that class members can include "named or unnamed" members — but did not elect to do so within the mass action provision.[10] "Congress chose not to use the phrase 'named or unnamed' in CAFA's mass action provision, a decision we understand to be intentional."[11] The Court further noted that in the same provision, the "100 or more persons" are described as "plaintiffs" and that the term "plaintiffs" could not feasibly include unnamed parties.[12] Interpreting "plaintiffs" to include unnamed real parties in interest, according to the Court, "stretches the meaning of 'plaintiff' beyond recognition" of its common understanding as a party who brings a civil suit.[13] Based on the plain language of the statute, the Court thus concluded that Mississippi was the only named plaintiff in the action and remanded the case to state court.[14]

Implications

By deciding the case strictly based on statutory language, the Court was able to side step the policy implications of prohibiting removal under CAFA even though at least some of the justices expressed unease during oral argument that having these suits in state court may create the potential for duplicative recovery and reduce incentives for defendants to settle these large actions.

For example, the decision leaves open a significant question as to whether a consumer settlement in a private class action bars or precludes the state attorney general's subsequent litigation where it presents identical claims under a different statutory authority. Here, the Mississippi attorney general argued that because the state's lawsuit seeks restitution, a public remedy, the private class action settlement should not preclude this action under Mississippi law. Defendants have reason for concern that any argument that the consumer settlement does bar the attorney general's action may now only be adjudicated in the attorney general's home state court.[15] At oral argument, Chief Justice Roberts

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8 *Id.* at 801.

9 *Mississippi ex rel. Hood, Attorney General v. AU Optronics Corp et al.*, No.12-1036, slip op. at 6 (U.S.S.C. Jan. 14, 2014).

10 *Id.*

11 *Id.*

12 *Id.* at 6-8.

13 *Id.* at 8-9.

14 *Id.* at 1.

15 Transcript of Oral Argument at 11, *Mississippi ex rel. Hood, Attorney General v. AU Optronics Corp. et al.*, No.12-1036, slip op. (U.S.S.C. Jan. 14, 2014).

remarked that there would be nothing to prevent "attorneys general from around the country sitting back and waiting [as] private class actions proceed, and as soon as one settles or the plaintiffs' class prevails, taking the same complaint, maybe even hiring the same lawyers [to bring an action]," with the advantage of knowing the parameters of the trial and settlement.[16] As state attorneys general often outsource these *parens patriae* lawsuits to members of the private plaintiffs' bar, there now appears to be little incentive to forgo bringing the additional lawsuit.

In addition, this threat of parallel private class action litigations and identical *parens patriae* lawsuits in state court may also minimize the incentive for defendants to settle the class actions. Chief Justice Roberts also focused on this concern during argument, stating there is nothing to prevent 50 attorneys general from filing a *parens patriae* action "every time there is a successful class action as to which somebody in [the] state purchased one of the items."[17] He further stated that "it would make no sense for a defendant in a class action brought by consumers to ever settle the case. It's going to have to pay twice. It's going to have to pay consumers, and then it's going to have to pay [the state]."[18]

Because the Supreme Court did not resolve or even address any of these policy concerns in its decision, it remains to be seen what impact the *AU Optronics* decision will have on the potential for double recovery from antitrust defendants and ultimately the types of settlements they will be willing to enter. But it certainly appears likely that the opinion will incentivize state attorneys general to bring more of these types of lawsuits in the future.

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16 *Id.* at 17, 19.

17 *Id.* at 18.

18 *Id.* at 13.