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Antitrust

SCOTUS Accepts Second CAFA Case: Removability of AG Actions to Be Weighed

By Jessie Kokrda Kamens

The U.S. Supreme Court said May 28 that it will consider whether a state attorney general's parens patriae antitrust action is removable as a mass action under the Class Action Fairness Act of 2005 (*Mississippi v. AU Optronics Corp.,* U.S., No. 12-1036, *certiorari granted* 5/28/13).

The case may resolve a split that has developed between the U.S. Court of Appeals for the Fifth Circuit, where this case arose, and the Fourth, Seventh and Ninth Circuits.

In *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008) (9 CLASS 627, 8/8/08), the Fifth Circuit articulated a claim-by-claim analysis to determine CAFA jurisdiction in parens patriae actions.

Under that approach, the court pierces the pleading to determine the real party in interest: the state or the consumers in that state. It counts the number of consumers for each claim that may benefit from relief in a parens patriae action, and if the number of consumers exceeds 100, the suit is a mass action under CAFA.

BNA Snapshot

Mississippi v. AU Optronics Corp., U.S., No. 12-1036, 5/28/2013

Key Development: The U.S. Supreme Court is poised to resolve a widening circuit split about whether parens patriae actions are removable as mass actions under CAFA. This will be the court's second case interpreting the CAFA statute.

In this case, the Fifth Circuit doubled down on that approach when it decided that Mississippi Attorney General Jim Hood's (D) suit alleging a price-fixing conspiracy against LCD manufacturers should stay in state court (13 CLASS 1365, 12/14/12).

The Fourth, Seventh, and Ninth Circuits have taken a "whole case" approach, considering the entire complaint to determine the real party in interest. For example, in *Nevada v. Bank of America Corp.*, 672 F.3d 661 (9th Cir. 2012) (13 CLASS 253, 3/9/12) the Ninth Circuit determined the state was the real party in interest, leaving it 99 persons short of a CAFA mass action.

What's at Stake?

Scott L. Nelson, attorney at Public Citizen Litigation Group in Washington, D.C., told BNA in an email May 28 that it would have been surprising if the court had not granted certiorari on this issue in light of the split.

He said persistent efforts by defendants to remove these kinds of cases suggest that they see some strategic or tactical advantage in removing; for example, they may think federal courts will be somewhat less hospitable to state-law enforcement actions by state officials than state courts.

"But I think it is fair to say that what is at stake is whether state AGs are going to be able to pursue actions in courts of their choosing or have their efforts impaired, even if only marginally, by this defense tactic," he said.

Public Citizen filed an amicus curiae in support of the Mississippi attorney general's petition.

But Anthony Rollo, a class action defense attorney at McGlinchey Stafford in New Orleans, suggested that parens patriae actions may be a vehicle for keeping otherwise removable actions in state court. He told BNA May 28 that anecdotally practitioners have observed that there are a larger number of state attorney general parens patriae actions filed post-CAFA.

"Some people would say it's partly driven by a new partnership of sorts between private class action counsel and attorneys general who are seeking to avoid federal court," he said.

Second Look at CAFA

This case will mark the Supreme Court's second look at the CAFA statute since it was enacted in 2005.

Earlier this year, the court decided *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (U.S. 2013) (14 CLASS 331, 3/22/13), which held that a plaintiff's pre-certification stipulation capping damages in a class action below $5 million for all putative class members does not defeat federal jurisdiction under CAFA.

Does *Standard Fire* Provide Guidance?

Rollo said that the court's language in the unanimous *Standard Fire* decision might provide some insight as to how the court will analyze this case.

In *Standard Fire*, the Supreme Court said that treating a nonbinding stipulation as if it were binding would "exalt form over substance, and run directly counter to CAFA's primary objective: ensuring federal court consideration of interstate cases of national importance."

Rollo said that the Fifth Circuit's analytical framework seeks substance over form: It considers what is really being sought, and who is the real party in interest. "[T]he claim-by-claim approach of the Fifth Circuit is more consistent with what the Supreme Court said [in *Standard Fire*] than the other circuits' approach," he posited.

Price-Fixing Allegations

In this case, Mississippi sued several LCD manufacturers in state court under the Mississippi Consumer Protection Act and the Mississippi Antitrust Act for allegedly conspiring to fix prices of LCD panels, causing harm to consumers by forcing them to pay artificially inflated prices. The case is one of 13 similar parens patriae actions brought in other states.

In its complaint, the state said that it had a "quasi-sovereign interest in the direct and indirect effects" in the alleged conspiracy. It also sought money damages for injuries to consumers.

The LCD manufacturers removed the case to the federal district court, saying the case was a "class action" or a "mass action" under CAFA.

The state then moved to remand the case to state court, and the district court granted the motion.

The district court found that the action qualified as a mass action under CAFA, but it remanded the case because it found the case was asserted "on behalf of the general public (and not on behalf of individual claimants or members of a purported class)." Accordingly, the court found the case fell under the "general public exception" to CAFA jurisdiction.

Appeals Court Reverses

On appeal, the Fifth Circuit agreed with the district court that the case was a mass action, but reversed its ruling that the general public exception was applicable.

That exception requires that "all of the claims" are "asserted on behalf of the general public."

The Fifth Circuit concluded that individual consumers, in addition to the state, were the real parties in interest, and so there was "no way that all of the claims are asserted on behalf of the general public."

The appeals court acknowledged that finding the general public exception inapplicable in this instance may have rendered the exception "a dead letter" because finding a suit to be a mass action bars the exception from applying. It said it welcomed congressional clarification on the issue.

No Action in Similar Case

The Supreme Court took no action in another case considered at its May 23 conference presenting the same issue, *AU Optronics v. South Carolina*, No. 12-911. There, the Fourth Circuit joined the Seventh and Ninth Circuits in holding that a claim for restitution, when brought with other claims being properly pursued by the state, does not alter the state's quasi-sovereign interest in enforcing its own laws, nor the nature and effect of the proceedings (13 CLASS 1239, 11/9/12).

Nelson speculated on the court's decision to accept the Fifth Circuit case.

"The court's decision to grant this one may reflect that the Fifth Circuit's position is an outlier; it may reflect the court's perception of which parties are most likely to present the issues effectively; or it may have been influenced by the fact that both sides in this case (including respondents here who were also petitioners in the Fourth Circuit case) agreed that this is the best case for resolving the issue, while the respondent in the Fourth Circuit case opposed certiorari," he said.

Oral argument is expected in the fall.

Mississippi Attorney General Jim Hood was counsel of record for Mississippi.

Christopher M. Curran of White & Case LLP in Washington, D.C., was counsel of record for the defendants.

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