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REMOVAL

SUPREME COURT

U.S. Supreme Court Grants Certiorari in Appellate Case to Solve the Split On Removal of Attorney General Actions Under Class Action Fairness Act

By Anthony Rollo, Michael Ferachi, and Kimberly Higginbotham

The U.S. Supreme Court has decided to resolve a split among the circuits on the removability of certain attorney general actions under the Class Action Fairness Act of 2005 (CAFA).

The Court had pending before it certiorari petitions from two different circuit decisions, and the Court granted one of them. These petitions presented an opportunity for the Court to solve the split on the issue and provide us with a unified resolution.

Anthony Rollo, senior member of McGlinchey Stafford in Baton Rouge, heads the Consumer Class Action Defense Group. Rollo, a member of the Advisory Board of the Class Action Litigation Report and supervising editor of the CAFA Law Blog (www.cafalawblog.com), is available at arollo@mcglinchey.com. Michael Ferachi, senior member of McGlinchey Stafford, practices in the same group and is editor-in-chief of the CAFA Law Blog, and is available at mferachi@mcglinchey.com. Kimberly Higginbotham, an associate, also practices in the same group, and is available at khigginbotham@mcglinchey.com.

On May 28, 2013, the Court granted certiorari to review the U.S. Fifth Circuit Court of Appeal's decision in *Mississippi ex rel. Hood v. AU Optronics Corp.* regarding this issue.[1] Since the Fifth Circuit's decision earlier in *In re Katrina Canal Litig. Breaches*, 524 F.3d 700 (5th Cir. 2008), finding that CAFA applied to attorney general class actions, extensive judicial resources have been expended attempting to resolve the question of when such actions are removable. The removability of the attorney general class actions turns on whether the state or the numerous individuals on whose behalf it seeks restitution are the real parties in interest.

The appellate courts are divided on the appropriate method for identifying this real party in interest, specifically the ''claim-by-claim'' approach[2] or ''complaint as

[1] *Mississippi ex rel. Hood v. AU Optronics Corp.*, 12-1036, —- S. Ct. —— (U.S. May 28, 2013).

[2] The ''claim-by-claim'' approach finds that attorney general class actions are ''really'' to recover damages for the individuals joined who purportedly are the real parties in interest for the non-enforcement-related claims in the suits. *See e.g. Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 669 (9th Cir. 2012)

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a whole'' approach.[3] Petitions for writs of certiorari were filed from the Fifth Circuit's pro-''claim-by-claim'' decision in *Mississippi ex rel. Hood v. AU Optronics Corp.*[4] and the Fourth Circuit's pro-''complaint as a whole'' decision in *AU Optronics Corp. v. S. Carolina*.[5] The high court has granted certiorari from the Fifth Circuit's decision but, notably, has not ruled yet on the petition from the Fourth Circuit's decision.

While the Court prepares to hear oral argument in *Hood* and considers the remaining application, this article serves as a primer discussing the statutory background of CAFA and parens patriae actions; the ''claim-by-claim'' and ''complaint as a whole'' methodologies, as well as the federal, appellate decisions on each side of the split; and analyzes the implications of the courts' decisions on class action litigation. Additionally, this article concludes with a gaze at the crystal ball and guesses whether the U.S. Supreme Court's recent decision in *Standard Fire Ins. Co. v. Knowles* may foreshadow a decision in *Hood*.

CAFA's Removal Provisions: Class Action, Mass Action, or Parens Patriae?

CAFA defines ''class action'' to mean ''any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar state statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.''[6] The Senate Judiciary Committee Report on CAFA states that the definition of a class action should be interpreted liberally, and its application ''should not be confined solely to lawsuits that are labeled ''class actions'' by the named plaintiff or the state rulemaking authority. Generally speaking, lawsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions.''[7]

CAFA authorizes removal of any civil action which is a class action in which (1) ''the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs'';(2) ''any member of a class of plaintiffs is a citizen of a state different from any defendant''; and (3) there are 100 or more plaintiff class members.[8]

Removability under CAFA likewise is proper if the action qualifies as a ''mass action'' which, for purposes of CAFA, is ''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,'' except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the $75,000.00 jurisdictional amount in controversy requirement.[9]

Noteworthy in the present context, ''mass action'' does not include any civil action in which all of the claims in the action arise from an event or occurrence in the state in which the action was filed, and that allegedly resulted in injuries in that state or in states contiguous to that state; the claims are joined upon motion of a defendant; all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a state statute specifically authorizing such action; or the claims have been consolidated or coordinated solely for pretrial proceedings.[10]

When assessing the impact of CAFA's removal provisions on attorney general class actions, CAFA's legislative history is instructive. During the CAFA debate in the U.S. Senate, Senator Mark Pryor proposed an amendment ''clarifying that State attorneys general should be exempt from S. 5 and be allowed to pursue their individual State's interests as determined by themselves and not by the Federal Government.''[11]

The amendment was opposed on the grounds that it could create ''a very serious loophole,'' and risked ''creating a situation where state attorneys general can be used as pawns so that crafty class action lawyers can avoid the jurisdictional provisions of [CAFA],'' and ''would allow plaintiffs' lawyers to bring class actions and simply include in their complaint a State attorney general's name as a purported class member, arguably to make their class action completely immune to the provisions of [CAFA]. Plaintiffs' lawyers could simply ask State attorneys general to lend their name to a class action lawsuit so as to keep them in the State court.''[12] Accordingly, Congress rejected the Pryor amendment.

Nevertheless, another loophole has emerged in the attorney general class action context, specifically the parens patriae label. Leaving aside a discussion of the parens patriae action's origins in the English constitutional and feudal systems, the United States first recognized its nature in *Louisiana v. Texas*,[13] noting that Louisiana was attempting to sue, not because of any particular injury to a business of the state, but as parens patriae for all her citizens.[14] Subsequent cases have established the right of a state to sue as parens patriae to prevent or repair harm to its quasi-sovereign interests.''[15]

In noting the statutory basis of each attorney general suit (i.e., a statute authorizing the attorney general to file suit independently of any consumer complaints, as the legal representative of the state), courts are utilizing the parens patriae label to remand removed attorney general class actions to state court, holding that the actions are not a ''class action'' or ''mass action'' under CAFA, but rather an action intended to vindicate the

(*citing LG Display Co., v. Madigan*, 665 F.3d 768 (7th Cir. 2011)).

[3] The ''complaint as a whole'' or ''whole case'' approach, on the other hand, requires the court to look to a state's complaint ''as a whole,'' and subjectively determine if the state, alone, is the real party in interest based on ''the essential nature and effect of the proceeding.'' *Id*.

[4] *Hood*, 701 F.3d 796 (5th Cir. 2012).

[5] *AU Optronics Corp. v. S. Carolina*, 699 F.3d 385 (4th Cir. 2012).

[6] 28 U.S.C. § 1332(d)(1)(B).

[7] *W. Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 183 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 761, 181 L. Ed. 2d 484 (U.S. 2011) (J. Gilman dissent) (*citing* S.Rep. No. 109–14, at 35, 2005 U.S.C.C.A.N. 3, 34 (2005)).

[8] *See McGraw*, 646 F.3d at 174 (citations omitted); 28 U.S.C. § 1332(d).

[9] 28 U.S.C. § 1332(d)(11)(A)—(B)(i).

[10] 28 U.S.C. § 1332(d)(11)(B)(ii).

[11] *See* 151 *Cong. Rec.* S1157-02 (daily ed. Feb. 9, 2005).

[12] *McGraw*, 646 F.3d at 182 (J. Gilman dissent) (*citing* 151 *Cong. Rec.* S1157, 1163-64 (daily ed. Feb. 9, 2005)).

[13] *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257-258 (1972) (citing *Louisiana v. Texas*, 176 U.S. 1 (1900)).

[14] *Id.*

[15] *Standard Oil Co. of Cal.*, 405 U.S. at 257-258 (citations omitted).

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state's quasi-sovereign interests and the individual interests of its citizens.

The 'Claim-by-Claim' Approach: The Fifth Circuit

In *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*,[16] the Fifth Circuit adopted the ''claim-by-claim'' approach to identify the real party in interest in a parens patriae action brought by Louisiana. In *Caldwell*, the Louisiana attorney general filed an antitrust suit against several insurance companies, alleging a scheme to undervalue insurance claims and seeking to enforce the Louisiana Monopolies Act and to recover treble damages, among other relief.[17]

In addressing removability, the *Caldwell* court instructs to ''pierce the pleadings,'' and look at the real nature of a state's claims so as to prevent ''jurisdictional gamesmanship'' on the grounds that ''[i]t is well-established that in determining whether there is jurisdiction, federal courts look to the substance of the action and not only at the labels that the parties may attach . . . . This court has recognized that defendants may pierce the pleadings to show that the claim has been fraudulently pleaded to prevent removal.''[18]

Thus, the Fifth Circuit analyzed the claims to ''conclude that as far as the State's request for treble damages is concerned, the policyholders are the real parties in interest,'' because the plain language of the Monopolies Act authorized only injured individuals to recover for treble damages.[19]

Louisiana's argument that it was the real party in interest was undercut by the language in the complaint, which sought recovery of ''damages suffered by individual policyholders.''[20] The Fifth Circuit also relied upon the essential nature of an antitrust proceeding, reasoning that ''given that the purpose of antitrust treble damages provisions are to encourage private lawsuits by aggrieved individuals for injuries to their business or property,'' it had no reason to believe that individual policyholders were not the real parties in interest.[21] For these reasons, federal court jurisdiction was deemed proper.

The Fifth Circuit's reliance on the ''claim-by-claim'' approach was cemented in its November 2012 decision in *Mississippi ex rel. Hood v. AU Optronics Corp.*,[22] where it held that an attorney general's parens patriae action was not removable as a ''class action'' under CAFA, but otherwise was removable under CAFA's ''mass action'' provision. In *Hood*, Mississippi, through its attorney general, sued manufacturers and distributors of liquid crystal display (LCD) panels, claiming that the manufacturers had engaged in a conspiracy to fix prices for LCD panels and that their conduct artificially inflated prices, which harmed the consumers who were forced to pay higher prices.[23]

At the outset of resolving the removal issue, the Fifth Circuit determined that the action did not qualify as a class action because the state did not bring this suit under Rule 23 or a rule of judicial procedure and because Mississippi state law explicitly prohibits class actions.[24] Instead, the action was brought under the Mississippi Consumer Protection Act (MCPA) and the Mississippi Antitrust Act (MAA), neither of which are similar to Rule 23.[25] Thus, the Fifth Circuit was required to determine whether the suit qualified as a mass action under CAFA whereby removal would be proper.

In determining that the action was a mass action, the Fifth Circuit looked to the complaint, the state statutes, and the state's parens patriae authority, and held that the real parties in interest included both the state and individual consumers of LCD products.[26] First, the variety of allegations of the complaint (i.e., ''generalized harm'' to the state as a whole, and the monetary relief sought was for the injury suffered by the purchaser consumer) demonstrated that the real parties in interest included not only the state, but also individual consumers residing in Mississippi.[27]

Second, neither the MCPA nor the MAA give the state sole authority to recover for particularized injuries suffered by consumers.[28] Finally, Mississippi was not acting in its parens patriae capacity, but essentially as a class representative.[29] Mississippi law prohibited double recovery for the same harm to respective class members, and the state could not recover for the injury to the consumers and still preserve the right of the consumers to recover, a right that the consumers clearly have under the statutes pursuant to which the suit was brought.[30]

The Fifth Circuit then addressed CAFA's disqualifying exceptions to removal, specifically the general public exception.[31] The Fifth Circuit gave short shrift to this analysis determining that the requirement that ''all of the claims'' be asserted on behalf of the public was not met because the individual consumers, in addition to the state, were the real parties in interest, so it was impossible that ''all of the claims'' were ''asserted on behalf of the general public.'' Thus, because the suit was found to be a mass action under CAFA, the district court's granting of the motion to remand was reversed.

On Feb. 19, 2013, the *Hood* plaintiffs petitioned for certiorari to the Supreme Court to determine ''[w]hether a state's parens patriae action is removable as a 'mass action' under the Class Action Fairness Act when the state is the sole plaintiff, the claims arise under state law, and the state attorney general possesses

[16] *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 430 (5th Cir. 2008).
[17] *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 669 (9th Cir. 2012) (citing *Caldwell*, 536 F.3d at 423).
[18] *Hood*, 701 F.3d at 799 (*citing Caldwell*, 536 F.3d at 424-25, 429 (citations and inset quotation marks omitted).
[19] *Nevada*, 672 F.3d at 669 (*citing Caldwell*, 536 F.3d at 429).
[20] *Id.* (*citing Caldwell*, 536 F.3d at 428).
[21] *Id.* (*citing Caldwell*, 536 F.3d at 430 (*citing Hawaii*, 405 U.S. at 262).
[22] *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796 (5th Cir. 2012).
[23] *Id.* at 800.
[24] *Id.* at 799.
[25] *Id.*
[26] *Id.* at 802.
[27] *Id.* at 799.
[28] *Id.* at 800.
[29] *Id.* at 801.
[30] *Id.*
[31] The ''general public'' exception ''provides that a suit is not a mass action if 'all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action.' '' *Hood*, 701 F.3d at 802 (*citing* 28 U.S.C. § 1332(d)(11)(B)(ii)(III)).

statutory and common-law authority to assert all claims in the complaint.''[32]

Citing decisions of the Fourth, Seventh and Ninth Circuits, the petitioners argue that the ''claim-by-claim'' approach has been ''disavowed by every other court of appeals to consider the question,'' and ''[r]eview is . . . amply warranted because the Fifth Circuit's judgment runs counter to elementary principles of federalism and state sovereignty and conflicts with [the Supreme Court's] precedent regarding the nature of parens patriae actions, the 'real party in interest' test, and the narrow construction of removal statutes.''[33] On May 28, 2013, the Court granted certiorari.[34]

The 'Complaint as a Whole' Approach: The Fourth, Seventh, and Ninth Circuits

Contrary to the ''claim by claim'' analysis of the Fifth Circuit, the Fourth, Seventh and Ninth Circuits subscribe to the ''complaint as a whole'' approach for assessing the real party in interest in attorney general class actions while strongly criticizing the methodology employed by the Fifth Circuit. Additionally, although not espousing a particular methodology, the Second Circuit expressly has declined to ''adopt the claim-by-claim approach'' and has noted that the ''whole-complaint'' approach is the ''majority rule.''

The Fourth Circuit

The Fourth Circuit in *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*,[35] addressed a case whereby the West Virginia attorney general brought suit against five pharmacies under the Pharmacy Act and the West Virginia Consumer Credit Protection Act (WVCCPA), alleging that they sold generic drugs to in-state consumers without passing along the cost savings.[36]

The Fourth Circuit concluded that ''while a 'similar' state statute or rule need not contain all of the other conditions and administrative aspects of Rule 23, it must, at a minimum, provide a procedure by which a member of a class whose claim is typical of all members of the class can bring an action not only on his own behalf but also on behalf of all others in the class. . . .''[37]

Under the state statutes, the attorney general was not designated as a member of the class whose claim would be typical of the claims of class members.[38] Instead, he was authorized to file suit independently of any consumer complaints, as a parens patriae, that is, as the legal representative of the state to vindicate the state's sovereign and quasi-sovereign interests, as well as the individual interests of the state's citizens.[39]

Moreover, neither the Pharmacy Act nor the WVCCPA contained any numerosity, commonality, or typicality requirements essential to a class action; furthermore, the state statutes authorized the attorney general to proceed without providing notice to overcharged consumers, which would also be essential in a Rule 23 class action seeking monetary damages.[40] For these reasons, the Fourth Circuit held that the action was not covered by CAFA as a class action.[41]

However, until its decision in *AU Optronics Corp. v. S. Carolina*,[42] the Fourth Circuit had not addressed directly the issue of whether the ''case as a whole'' or the ''claim-by-claim'' approach should be utilized in determining the removability of attorney general actions. In *AU Optronics Corp.*, the attorney general of South Carolina filed suit claiming that the defendant manufacturers of LCD panels had engaged in a price-fixing conspiracy from 1996 through 2006 under the Antitrust Act and the South Carolina Unfair Trade Practices Act (SCUTPA).[43]

Citing the Ninth Circuit's decision in *Bank of America Corp.*, *infra*, the Fourth Circuit outlined that ''[t]he Complaint, read as a whole, demonstrates that [the State] is the real party in interest in this action.''[44] South Carolina's claims for relief were deemed to be unique to the state and consistent with its role as parens patriae, inasmuch as the state possesses a quasi-sovereign interest in enforcing, in state court, its laws with respect to price-fixing conspiracies.[45] Furthermore, South Carolina was the sole named plaintiff, and the provisions of the Antitrust Act and SCUTPA designated the state as the proper plaintiff.[46]

The Fourth Circuit, therefore, joined the Ninth and Seventh Circuit adopting the ''case as a whole'' approach and rejected the claim-by-claim approach, concluding that the nature and effect of the actions demonstrated that the state was the real party in interest.[47] Per the Court, a claim for restitution, when tacked onto other claims being properly pursued by the state, altered neither the state's quasi-sovereign interest in enforcing its own laws, nor the nature and effect of the proceedings.[48] Therefore, the decision to remand was affirmed.

On Jan. 24, 2013, the *AU Optronics Corp.* defendants filed a petition for writ of certiorari to the Supreme Court to determine ''[w]hether the citizenship of the persons on whose behalf monetary relief claims are brought by a state may satisfy CAFA's minimal diversity requirement as set forth in 28 U.S.C. § 1332(d)(2)(A)-(C) and (d)(1)(D) for purposes of CAFA mass action jurisdiction even if those persons are not named plaintiff.''[49] Citing the U.S. Supreme Court's recent CAFA decision in *Standard Fire Ins. Co. v. Knowles*,[50] petitioners argue that the Fourth Circuit's decision ''undermines Congress's purpose in expanding federal diver-

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[32] Petition for Writ of Certiorari at *i, *Mississippi ex rel. Hood v. AU Optronics Corp.* (No. 12-1036).

[33] *Id* at *6.

[34] *Hood*, 12-1036, —- S. Ct. —— (U.S. May 28, 2013).

[35] *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169 (4th Cir. 2011).

[36] *Id*. at 171-72.

[37] *Id*. at 175.

[38] *Id*. at 176.

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] *AU Optronics Corp. v. S. Carolina*, 699 F.3d 385 (4th Cir. 2012).

[43] *Id*. 699 F.3d at 387.

[44] *Id*. at 394 (*citing Bank of Am. Corp.*, 672 F.3d at 672).

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] *Id*.

[49] Petition for Writ of Certiorari at *i, *AU Optronics Corp. v. S. Carolina* (No. 12-911).

[50] *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013); *see also* Anthony Rollo, Michael Ferachi & Kimberly Higginbotham, ''*Finally! The Inaugural Class Action Fairness Act Case Before the U.S. Supreme Court and What It's All About,*'' BNA Insight, 13 CLASS 1472, Dec. 28, 2012.

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sity jurisdiction over class and mass actions through CAFA,'' and allows plaintiffs to circumvent CAFA and bring a class action in state court without fear of removal.[51] Although the *AU Optronics Corp.* petition for certiorari was filed earlier than that in *Hood*, the Supreme Court, to date, has not rendered a decision on whether certiorari is warranted.

The Ninth Circuit

The Ninth Circuit most recently upheld the ''complaint as a whole'' approach in *Nevada v. Bank of Am. Corp.*[52] However, as a matter of background, the Ninth Circuit addressed parens patriae actions in *Washington v. Chimei Innolux Corp.*[53] The attorneys general of Washington and California brought a self-styled parens patriae action alleging that the defendants engaged in a conspiracy to fix the prices of thin-film transistor liquid crystal display (TFT–LCD) panels, and that state agencies and consumers were injured by paying inflated prices for products containing TFT–LCD panels.[54]

In affirming the district court's remand order, the Ninth Circuit in *Chimei Innolux* expressly joined the Fourth Circuit and explained that ''[t]he question under CAFA is whether the state statute authorizes the suit 'as a class action.' ''[55] However, none of the state statutes forming the basis of the suits contained the typical class action requirements of showing numerosity, commonality, typicality, or adequacy of representation.[56] Thus, the Ninth Circuit found that the district court correctly concluded that parens patriae suits filed by attorneys general may not be removed to federal court because the suits were not class actions within the plain meaning of CAFA.[57]

In *Nevada v. Bank of Am. Corp.*, *supra*, the Ninth Circuit considered a parens patriae lawsuit filed by Nevada, through its attorney general, against Bank of America Corporation and several related entities, alleging that they misled Nevada consumers about the terms and operation of its home mortgage modification and foreclosure processes, in violation of the Nevada Deceptive Trade Practices Act.[58] Bank of America removed the action, asserting federal subject matter jurisdiction as either a ''class action'' or ''mass action.''[59] Denying Nevada's motion to remand, the district court concluded that it had jurisdiction over this action as a CAFA ''class action,'' but not as a ''mass action.''[60]

Granting leave to appeal, the Ninth Circuit, citing its own precedent in *Chimei*, *supra*; the Fourth Circuit's decision in *McGraw*, *supra*; and the Seventh Circuit's ruling in *LG Display Co.*, *infra*, once again concluded that parens patriae actions are not removable under CAFA.[61] Moreover, the court found that the action did not otherwise satisfy CAFA's ''mass action'' requirements.

Examining ''the essential nature and effect of the proceeding as it appears from the entire record,'' the Ninth Circuit concluded that Nevada—not the individual consumers—was the real party in interest.[62] Applying the ''whole-case'' approach, the court concluded that ''Nevada's sovereign interest in protecting its citizens and economy from deceptive mortgage practices is not diminished merely because it has tacked on a claim for restitution.''[63] Thus, the district court lacked jurisdiction under CAFA.

The Seventh Circuit

In *LG Display Co. v. Madigan*,[64] the Illinois attorney general filed an action against manufacturers of liquid crystal display panels for violations of the Illinois Antitrust Act (IAA).[65] The state alleged that the defendants unlawfully inflated prices on LCD products sold to the State, its agencies, and residents and requested injunctive relief, civil penalties, and treble statutory damages for the State as a purchaser and, as parens patriae, for harmed residents.[66]

At the outset, the Seventh Circuit concluded that the action was not a class action, based upon the phrasing of the IAA, which does not impose any of the Rule 23 constraints. The defendants, alternatively, contended that the action was a mass action. The Seventh Circuit, however, reasoned that the suit did not involve ''monetary relief claims of 100 or more persons . . . proposed to be tried jointly,'' as required by CAFA, because ''only the Illinois Attorney General makes a claim for damages (among other things), precisely as authorized by the IAA.''[67] The Seventh Circuit then seized upon the ''general public'' exception of CAFA and, with little explanation, found that the action fell within its bounds.[68]

The defendants argued that the court should apply a ''claim by claim'' analysis to conclude that the action was ''really'' to recover damages for the hundreds of persons who purchased the unlawfully priced LCD panels and that those purchasers were the real parties in interest for the non-enforcement-related claims in the suit, thus satisfying the ''mass action'' requirements.[69]

The Seventh Circuit, nevertheless, rejected this approach, instead looking at the complaint as a whole, and concluding that the state was the real party in interest.[70] It reasoned that ''[w]hether a state is the real party in interest in a suit 'is a question to be determined from the essential nature and effect of the proceeding.' ''[71] Accordingly, the Seventh Circuit found that it lacked jurisdiction over an appeal from the district court's remand order.

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[51] *Id.*
[52] *Nevada v. Bank of Am. Corp.*, 672 F.3d 661 (9th Cir. 2012).
[53] *Washington v. Chimei Innolux Corp.*, 659 F.3d 842 (9th Cir. 2011).
[54] *Id.* at 846.
[55] *Id* at 848-49.
[56] *Id.* at 848.
[57] *Id.* at 847.
[58] *Bank of Am. Corp.*, 672 F.3d 661 at 664.
[59] *Id.* at 664-65.
[60] *Id.* at 665.
[61] *Id.* at 667.
[62] *Id.* at 670 (citation omitted).
[63] *Id.*
[64] *LG Display Co. v. Madigan*, 665 F.3d 768 (7th Cir. 2011).
[65] *Id.* at 769.
[66] *Id.*
[67] *Id.* at 772.
[68] *Id.*
[69] *Nevada*, 672 F.3d at 669 (*citing LG Display, Co.* 665 F.3d at 772–73).
[70] *Id.* (*citing LG Display, Co.* 665 F.3d at 774).
[71] *Id.* (*citing LG Display, Co.* 665 F.3d at 773 (*quoting Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 250 (7th Cir. 1981) (internal quotation marks omitted)).

The Second Circuit

On Jan. 9, 2013, in dicta, the Second Circuit weighed in on the debate in *Purdue Pharma L.P. v. Kentucky*,[72] whereby Kentucky, through its attorney general, commenced an action against Purdue Pharma LP and related entities, alleging it violated state law through misleading health care providers, consumers, and government officials regarding the risks of addiction associated with the prescription drug OxyContin, which Purdue manufactures, markets and sells.[73] The action was brought under state statutory and common law, ''including [his] parens patriae authority,'' to recover, *inter alia*, ''all the costs the Commonwealth . . . incurred in paying excessive and unnecessary prescription costs''; ''all the costs expended for health care services and programs associated with the diagnosis and treatment of adverse health consequences of OxyContin use''; and ''all the costs consumers have incurred in excessive and unnecessary prescription costs related to OxyContin.''[74]

At the outset, the Second Circuit addressed whether the attorney general actions were class actions under CAFA. The Second Circuit outlined that ''every Circuit to consider this precise issue—including the Fourth, the Seventh, the Ninth and, most recently, the Fifth—has reached the same conclusion . . . parens patriae suits are not removable as ''class actions'' under CAFA.''[75]

Moreover, the Second Circuit found that the state statutes, pursuant to which the suits were brought, did not authorize a suit as a class action and did not bear any resemblance to Rule 23.[76] In so holding, the Second Circuit declined the defendants' invitation to ''adopt the claim-by-claim approach to unmask the 'class action' lurking underneath,'' and noted that the ''whole-complaint'' approach was the ''majority rule.''[77]

Nevertheless, the Second Circuit did not adopt either approach as it deemed such unnecessary to resolve the matter.[78] Instead, the court held that, ''[h]aving concluded, in the first instance, that this parens patriae action is not a ''class action'' within the plain meaning of CAFA, our inquiry is at an end. We need not ''pierce the pleadings'' any further, particularly in light of the Supreme Court's directive to construe removal statutes strictly and resolve doubts in favor of remand.''[79] As such, despite equating the ''complaint as a whole'' approach to ''majority rule,'' the Second Circuit has not adopted a position in this dispute.

Implications and Considerations of Each Approach

In assessing the implications of the ''complaint as a whole'' approach, Judge Gilman, in his *McGraw* dissent, noted that the concerns of Senators Grassley and Hatch expressed in opposition to the defeated Pryor amendment have come to fruition through the ''complaint as a whole'' approach whereby attorneys general are being used as pawns so that private class action attorneys can remain in state court and avoid the impact of CAFA.[80]

Nevertheless, proponents of the ''complaint as a whole'' approach remind litigants that judicial restraint is appropriate when assessing removability in light of the Supreme Court's directive that removal statutes should be ''strictly construed'' as well as the sovereignty concerns that arise when a case brought by a state in its own courts is removed to federal court.[81] Moreover, ''considerations of comity'' should make courts ''reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it.''[82]

Finally, some argue that the application of the ''claim by claim'' approach risks negating the general public exception[83] as well as the event or occurrence exception[84] to the removability of mass actions. The Seventh Circuit in *Madigan*, in particular, determined that attorney general actions are not mass actions according to the plain language of the general public exception.[85] According to Judge Elrod's concurrence in the *Hood* decision, if the court was to ''deny the applicability of the general public exception when individual consumers are parties in interest, then, as a practical matter, we will have eliminated the exception.''

Some commentators argue, however, that the general public exception does not apply when some claims are asserted on or on behalf of individual consumers. In his recent article titled ''*A Rose By Any Other Name: Why A Parens Patriae Action Can Be 'Mass Action' Under the Class Action Fairness Act*,'' Enrique Schaerer outlines that the Seventh Circuit's interpretation of the general public exception ''flouts the plain language of the exception, which requires that 'all' claims be asserted for the general public'' because ''[b]y extension, no claims can be asserted for individual claimants or members of a purported class for mass action purposes, including interested persons who are not named plaintiffs.''[86]

''That monetary relief claims may fall within the State's quasi-sovereign interest in the health and well-being of its residents does not mean that those claims are not also brought on behalf of individual claimants. To the contrary, although those claims may benefit the general public through deterrence and the like, the fact that they are brought on behalf of individual claimants

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[72] *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208 (2nd Cir. 2013).
[73] *Id*. at 210.
[74] *Id*. at 211.
[75] *Id*. at 212.
[76] *Id*. at 216.
[77] *Id*. at 218-219.
[78] *Id*. at 219.
[79] *Id*. at 220.
[80] *McGraw*, 646 F.3d at 182 (J. Gilman dissent).
[81] *LG Display, Co.*, 665 F.3d at 774 (*citing Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002)).
[82] *Id*. (*citing Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 21 n. 22 (1983)).
[83] *Hood*, 701 F.3d at 807 (J. Elrod concurrence).
[84] The event or occurrence exception provides that a suit is not a mass action where ''all of the claims in the action arise from an event or occurrence in the State in which the action was filed.'' *See* Enrique Schaerer, *A Rose By Any Other Name: Why A Parens Patriae Action Can Be 'Mass Action' Under the Class Action Fairness Act*, 16 *N.Y.U. J. Legis. & Pub. Pol'y* 39, at 81 (2013) (*citing Nevada v. Bank of America Corp.*, No. 11-135-RCJ-RAM, slip op. at 5-6 (D. Nev. July 5, 2011), *rev'd*, 672 F.3d 661 (9th Cir. 2012); 28 U.S.C. § 1332(d)(11)(B)(ii)(I).).
[85] *Madigan*, 665 F.3d at 772.
[86] Schaerer, *supra*, at 79-80.

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precludes application of CAFA's general public exception.''[87]

Schaerer further outlines the inapplicability of the event or occurrence exception to parens patriae actions seeking monetary relief because such actions ''seldom arise from a single event or occurrence,'' and often ''identify many unique consumer interactions that give rise to liability.''[88] ''[T]he fact that attorneys general in different states file similar actions at similar times refutes the notion that 'all' of the claims in any given action arise from a single 'event or occurrence' in one state. Surely, these are the type of far-reaching, aggregated actions that Congress had in mind when it enacted CAFA.''[89]

A proponent of the ''claim-by-claim'' approach, Schaerer argues, ''[a] parens patriae label cannot defeat CAFA jurisdiction where the case is, at bottom, a mass action.''[90] ''This approach accords proper deference to important considerations of federalism and federal-state comity and promotes the public interest in judicial efficiency and fairness.''[91]

Per Schaerer, it ''readily fulfills Congress's federalism goals in CAFA.''[92] Moreover, it ''comports with notions of federal-state comity'' because Congress has power to confer federal jurisdiction over minimally-diverse, parens patriae actions as ''CAFA provides a federal forum for such actions precisely because they are likely to have far-reaching interstate effects and, hence, implicate significant federal interests.''[93] ''Finally, treating a parens patriae action as a CAFA mass action comports with judicial economy and fairness'' because ''as Senator Hatch explained in the floor debates on CAFA:

> [I]f the lawsuit is aimed at an out-of-State corporation for conduct that affects citizens in multiple States, or if the lawsuit is interstate in nature, then that suit should be removed to Federal court. Removal of such a case is particularly appropriate because there would likely be similar suits brought in a number of courts, and one of the central purposes of this legislation is to promote judicial efficiency and fairness by allowing copy-cat class actions to be coordinated in one Federal proceeding.''[94]

The extensive decisions and commentary on the propriety of each methodology underscore Judge Gilman's admonition that the ''analytical framework in which a court examines a state's claims for relief has a powerful impact on the court's ultimate conclusion as to whether the state has a quasi-sovereign interest in all the relief it seeks.''[95] Nevertheless, it is clear that the law on this issue is far from settled, and we look forward to the Supreme Court's guidance.

Crystal Ball: Does *Standard Fire v. Knowles* Portend a Decision in *Hood?*

The language of the U.S. Supreme Court in its unanimous decision in *Standard Fire Ins. Co. v. Knowles*[96] may provide some insight on a decision in *Hood*. In *Standard Fire*, the Supreme Court stated that treating a nonbinding stipulation as a binding stipulation would ''exalt form over substance, and run directly counter to CAFA's primary objective: ensuring federal court consideration of interstate cases of national importance.''[97]

The Fifth Circuit's analytical framework in *Hood* seeks substance over form. It considers what is really being sought and who the real party in interest is. The claim-by-claim approach of the Fifth Circuit is more consistent with the Supreme Court's warning of exalting form over substance than the Fourth Circuit's decision in *AU Optronics Corp. v. S. Carolina*, which arguably is more consistent with form over substance.

Using the language of *Standard Fire* to predict an affirmation of the Fifth Circuit's decision in *Hood* appears to be a good bet. However, such a prediction is about as reliable as predicting the outcome of a case based upon questions at oral argument.

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[87] *Id* at 80.
[88] *Id* at 81-82 (citations omitted).
[89] *Id*.
[90] *Id* at 76.
[91] *Id* at 83.
[92] *Id* at 83.
[93] *Id* at 84.
[94] *Id* at 86 (*citing* 151 *Cong. Rec.* S1157, 1164 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch)).
[95] *McGraw*, 646 F.3d at 181 (J. Gilman dissent) (*citing West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 447 (E.D.Pa. 2010)).
[96] *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013).
[97] *Id*. at 1350.