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Commentary

ON A **ROLL**: **SUPREME COURT** TO HEAR SECOND CAFA CASE

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Anthony Rollo, Michael Ferachi and Kimberly Higginbotham of McGlinchey Stafford discuss the circuit split over the removability of certain cases under the Class Action Fairness Act and an eventual U.S. Supreme Court decision that could settle the situation.

The U.S. Supreme Court recently decided to resolve a split among the circuits on the removability of certain attorney general actions under the Class Action Fairness Act of 2005. This is only the second case involving CAFA to reach the high court.

Removability hinges on identifying the real party in interest, and the appellate courts are divided on the appropriate method for identifying such, specifically the "claim-by-claim" approach or the "complaint as a whole" approach.

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 nonenforcement-related claims in the suits.

The complaint as a whole, or whole-case approach, in contrast, requires the court to look to a state's complaint "as a whole" and subjectively determine on the basis of "the essential nature and effect of the proceeding" whether the state alone is the real party in interest.

The court had pending before it certiorari petitions from two different circuit decisions and has granted one of them in Mississippi ex rel. Hood v. AU Optronics Corp., 701 F.3d 796 (5th Cir. 2012).

[Editor's note: This is the second-ever interpretation of CAFA issued by the Supreme Court. The first came only a few months ago on March 19 in Standard Fire Insurance Co. v. Knowles, No. 11-1450, 2013 WL 1104735 (2013).

In Standard Fire, the court ruled that a named plaintiff cannot avoid removal of a class action simply by representing that he or she will only seek total damages that fall below CAFA's jurisdictional threshold. The court concluded that CAFA's amount-in-controversy requirement could not be made to bind class members before a class is certified to support remand of the class action. As a result, a federal district court's order remanding the case to state court was vacated and the court remanded the class action to the federal district court for further proceedings.

The question of parens patriae

CAFA provides for the removal of a "class action," which means "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 one or more representative persons as a class action." Removal likewise is proper if the action is a "mass action."

***2** A proposed amendment to CAFA clarified that state attorneys general should be exempt from CAFA. Nevertheless, Congress rejected the amendment.

Although Congress explicitly discarded this amendment, which would have exempted attorney general class actions from CAFA, courts are using the parens patriae label to work around CAFA's removal provisions.

In Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972), the Supreme Court established the right of a state to sue as parens patriae to prevent or repair harm to its quasi-sovereign interests.

Thus, the parens patriae label provides the courts with a means 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 state's quasi-sovereign interests and the individual interests of its citizens.

This practice has resulted in extensive judicial interpretation and commentary as well as a split among the federal appellate courts, which the Supreme Court may resolve.

The claim-by-claim approach

The 5th U.S. Circuit Court of Appeals laid the groundwork for the circuit split when it subscribed to the claim-by-claim approach to identify the real party in interest in a parens patriae action brought by the state of Louisiana in Louisiana ex rel. Caldwell v. Allstate Insurance Co., 536 F.3d 418, 430 (5th Cir. 2008).

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.

In addressing removability, the Caldwell court instructed to "pierce the pleadings" and look at the real nature of a state's claims so as to prevent "jurisdictional gamesmanship" on the following grounds:

> It 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.

Thus, the 5th 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.

The 'complaint as a whole' approach

Casting aside the 5th Circuit's claim-by-claim approach as set forth in Caldwell, the 7th Circuit blazed the "complaint as a whole" trail with its decision in In LG Display Co. v. Madigan, 665 F.3d 768 (7th Cir. 2011), which addressed an action filed by the Illinois attorney general against manufacturers of liquid crystal display panels for violations of the Illinois Antitrust Act.

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.

***3** The 7th Circuit first concluded that the action was not a class action because the IAA did not impose any of the Rule 23 constraints. The defendants, alternatively, contended that the action was a mass action.

However, the appellate court 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." The 7th Circuit seized upon the "general public" exception of CAFA and, with little explanation, found that the action fell within its bounds.

Looking at the complaint as a whole and concluding that the state was the real party in interest, the court 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."' Accordingly, the 7th Circuit lacked jurisdiction over an appeal from the remand order of the court below.

Following that lead, in Nevada v. Bank of America Corp., 672 F.3d 661 (9th Cir. 2012), the 9th Circuit subscribed to the "complaint as a whole" approach. The appellate court considered a parens patriae lawsuit filed by the Nevada attorney general against Bank of America and related entities, alleging that they misled consumers about the terms and operation of its home mortgage modification and foreclosure processes, in violation of the Nevada state law.

Bank of America removed the action as either a "class action" or "mass action." 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."

Granting leave to appeal, the 9th Circuit concluded that parens patriae actions are not removable under CAFA. Moreover, it found that the action otherwise did not satisfy the CAFA's "mass action" requirements.

Examining "the essential nature and effect of the proceeding as it appears from the entire record," the 9th Circuit concluded that Nevada -- not the individual consumers -- was the real party in interest. 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." Thus, the District Court lacked jurisdiction under CAFA.

With its decision in AU Optronics Corp. v. South Carolina, 699 F.3d 385 (4th Cir. 2012), the 4th Circuit joined the 7th and 9th circuits in adopting the "complaint as a whole" approach. AU Optronics Corp. involved a suit filed by the South Carolina attorney general under the Antitrust Act and the South Carolina Unfair Trade Practices Act, which claimed that the defendant manufacturers of LCD panels had engaged in a price-fixing conspiracy.

Citing the 9th Circuit's decision in Bank of America Corp., the 4th Circuit outlined that "[t]he complaint, read as a whole, demonstrates that [the state] is the real party in interest in this action." 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.

***4** Furthermore, South Carolina was the sole named plaintiff, and the provisions of the Antitrust Act and SCUTPA designated the state as the proper plaintiff.

Thus, the 4th Circuit, as had previously the 9th and 7th circuits, adopted the "case as a whole" approach by concluding that the nature and effect of the actions demonstrated that the state was the real party in interest. The decision to remand was affirmed. The AU Optronics Corp. defendants subsequently filed a petition for writ of certiorari to the Supreme Court. This petition has not been decided to date.

Recently, the 2nd Circuit, in dicta, weighed in on the debate in Purdue Pharma LP v. Kentucky, 704 F.3d 208 (2nd Cir. 2013), whereby the state, through its attorney general, commenced an action against Purdue Pharma LP and related entities.

The 2nd Circuit outlined that:

> Every circuit to consider this precise issue -- including the 4th, the 7th, the 9th and, most recently, the 5th -- has reached the same conclusion ... parens patriae suits are not removable as 'class actions' under CAFA."

Moreover, the 2nd 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. In so holding, the 2nd 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."

Nevertheless, the 2nd Circuit adopted neither approach and 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."

Claim-by-claim redux

In the wake of the 4th, 7th and 9th circuits' decisions referenced above, the 5th Circuit bolstered its reliance on the claim-by-claim approach in its November 2012 decision in Hood v. AU Optronics Corp. In that case, it held that an attorney general's parens patriae action was not removable as a "class action" under CAFA, but otherwise was removable under the CAFA's "mass action" provision.

In Hood, the Mississippi attorney general sued manufacturers and distributors of LCD panels, claiming that the manufacturers had engaged in a conspiracy to fix prices and that their conduct artificially inflated prices, which harmed the consumers who were forced to pay higher prices.

Resolving the removal issue, the 5th 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 similar rule of judicial procedure. The court, however, determined that the action was a mass action. Looking to the complaint, the state statutes and the state's parens patriae authority, the court held that the real parties in interest included both the state and individual consumers of LCD products.

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.

***5** On Feb. 19, 2013, the Hood plaintiffs petitioned for certiorari to the Supreme Court. It was granted May 28. Miss. ex rel. Hood v. AU Optronics Corp., No. 12-1036, cert. granted (U.S. May 28, 2013).

Implications of the approaches on class-action litigation

The extensive judicial decisions and commentary on the propriety of each method underscore the exigency of Supreme Court intervention in this expanding area of class-action litigation.

The court in Madigan and proponents of the "complaint as a whole" approach remind litigants that judicial restraint is appropriate when assessing removability in light of the 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.

Moreover, the Madigan court outlined that "considerations of comity" should make them "reluctant to snatch cases which a state has brought from the courts of that state, unless some clear rule demands it."

Furthermore, CAFA provides the following: that a “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, and 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; and the claims have been consolidated or coordinated solely for pretrial proceedings.

“Complaint as a whole” proponents argue that the application of the claim-by-claim approach risks negating the general public exception as well as the event of occurrence exception to the removability of mass actions.

Nevertheless, those in favor of the claim-by-claim approach caution that the concerns expressed in opposition to the defeated CAFA amendment, which would have excepted attorney general actions, have been realized 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 the CAFA.

Regardless of which approach we subscribe to, it is clear that the law on this issue is far from settled, and we look forward to the Supreme Court's guidance.

Footnotes

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