On Issue of Significant Import to Companies, Supreme Court to Consider Whether State Attorney General Action Properly Removed to Federal Court

Yesterday, the Supreme Court granted *certiorari* to address the question of: "Whether a state's *parens patriae* action is removable as a 'mass action' under the Class Action Fairness Act of 2005 (CAFA) when the state is the sole plaintiff, the claims arise under state law, and the state attorney general possesses statutory and common-law authority to assert all claims in the complaint."

This is an issue of significant import to many companies who may find themselves as the targets of actions by state attorneys general for alleged deceptive practices or consumer fraud, which are generally filed in state, rather than in federal, court. The state attorneys general often argue that the cases are not removable on the ground that a state does not have citizenship for purposes of federal diversity jurisdiction.

In *Mississippi ex rel. Hood v. AU Optronics Corp*., 701 F.3d 796 (5th Cir. 2012), the Fifth Circuit Court of Appeals held that an action originally filed by the Mississippi attorney general against manufacturers and distributors of liquid crystal display (LCD) panels for alleged price fixing was removable to federal court under the "mass action" provision of CAFA. Under that provision, a case is removable to federal court if "monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiff's claims involve common questions of law." 28 USC § 1332(d)(11)(B)(i). CAFA includes an exception to its "mass action" provision where "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." 28 USC § 1332(d)(11)(B)(ii)(III) (the "general public exception").

The Fifth Circuit had previously held that in cases filed by a state attorney general on behalf of a subset of the state's citizens, a court must "pierce the pleadings and look at the real nature of a state's claims so as to prevent jurisdictional gamesmanship." *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, 536 F.3d 418, 429–30 (5th Cir.2008).

Applying the "claim-by claim" (rather than the complaint "as a whole") approach set forth in *Caldwell*, the court in *AU Optronics* therefore looked to the nature of the claims and found that the Mississippi state statutes under which the claims were brought did not grant the state "sole authority" to recover for injuries allegedly suffered by individual consumers. The court held that "the real parties in interest in this suit include both the State and individual consumers of LCD products. Because it is undisputed that there are more than 100 consumers, we find that there are more than 100 claims at issue in this case. The suit therefore meets the CAFA definition of a 'mass action.'" 701 F.3d at 802. In a concurring opinion in *AU*

Optronics, one judge concurred in the result based on the reasoning of *Caldwell*, but stated that the court "should reconsider *Caldwell* and correct our course in this area of the law." 701 F.3d at 803.

The court further found that CAFA's general public exception did not apply because "the requirement that 'all of the claims' be asserted on behalf of the public is not met here. . . . [I]ndividual consumers, in addition to the State, are real parties in interest, so there is no way that 'all of the claims' are 'asserted on behalf of the general public.'" 701 F.3d at 802. The court also acknowledged that its holding might "render such statutory exception a dead letter" and would "welcome congressional clarification of this issue. . . . [but] application of the exception must yield to our responsibility to apply the unambiguous, express language of a statute as written." 701 F.3d at 802. In support of its petition for *certiorari*, the attorney general asserted that the Fifth Circuit's approach is contrary to that taken by three other Circuits. *AU Optronics Corp. v. South Carolina*, 699 F.3d 385 (4th Cir. 2012), Petition for Certiorari filed (No. 12-911); *LG Display Co. v. Madigan*, 665 F.3d 768 (7th Cir. 2011); *Nevada v. Bank of America Corp*., 672 F.3d 661 (9th Cir. 2011).

There are a few additional nuanced points regarding the Fifth Circuit's decision that the case was removable only under CAFA's "mass action" provision, and not as a class action or otherwise. First, a "mass action" can only be transferred to a multidistrict (MDL) proceeding at the request of "a majority of the plaintiffs in the action." 28 U.S.C. § 1332(d)(11)(C)(i). In this context, query whether the "plaintiffs" are all the consumers within the state and a majority of those consumers would need to request MDL transfer. Second, although the Fifth Circuit concluded that the case was a "mass action," the court did not expressly address the issue of how CAFA's "mass action" jurisdictional requirement that federal jurisdiction would only exist over those plaintiffs in the "mass action" who seek in excess of the jurisdictional minimum amount in controversy (currently, in excess of $75,000) was satisfied, only that it was undisputed that the relief sought satisfied the amount in controversy requirement. See *Mississippi ex rel. Hood v. Entergy Mississippi, Inc.* 2012 WL 3704935, at *13 (S.D. Miss. Aug. 25, 2012) (in action brought by state attorney general, court denied remand under CAFA's "mass action" provision where defendant sought leave to amend notice of removal and provided "sufficient evidence that numerous plaintiffs, if considered real parties in interest, have damages claims" in excess of $75,000).

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