

Parens Patriae Meets the Class Action Fairness Act

ON NOVEMBER 6, 2013, THE U.S. SUPREME Court heard oral argument in *Mississippi ex. rel. Jim Hood v. AU Optronics Corporation*. The issue presented in *Hood* is an interesting one for those who follow the Court's evolving class action jurisprudence: whether *parens patriae* actions initiated in state courts by State Attorneys General are subject to removal to federal court under the Class

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fair amount regarding the Justices' attitudes towards class actions and federalism more generally.

Background on CAFA

Congress passed CAFA in response to concerns that "cases of national importance" were increasingly being litigated in plaintiff-friendly state courts where out-of-state defendants did not fare very well. Prior to passage of the legislation, defendants found it very difficult to remove class actions to federal court on diversity grounds both because of the requirement that there be complete diversity between the defendant and the named class plaintiffs and because of the amount-in-controversy requirement. A smart plaintiffs' counsel could virtually guarantee that a class action would remain in state court by naming one non-diverse, class representative and alleging that each plaintiff's claim was worth less than \$75,000.

CAFA relaxed the rules governing removal of class actions. Nearly all class actions involving more than \$5 million in the aggregate and minimal diversity (i.e., at least one class member who is a citizen of a state different than the defendant) can now be removed to federal court. A lesser known provision of CAFA also permits the removal of "mass actions" from state to federal court. "Mass actions" are defined as cases involving "monetary relief claims of 100 or more persons that are proposed to be tried jointly." Such actions can also be removed to federal court, provided there is \$5 million in controversy in

the aggregate and minimal diversity.

Issues Presented in Briefing and Oral Argument in *Hood*

The question presented in *Hood* is whether a *parens patriae* action qualifies as a "mass action" under CAFA. Mississippi Attorney General Jim Hood commenced an action in state court seeking restitution on behalf of both the State of Mississippi and individual citizens who were harmed by an alleged price-fixing conspiracy. After the defendants removed the case to federal district court, the Attorney General attempted to have the case remanded to his chosen state court forum on the ground that it would offend principles of federalism for Congress to infringe on the rights of states to litigate their cases in state court. The district court agreed with the Attorney General, concluding that while *parens patriae* actions qualify as "mass actions" under CAFA, they fall into the general-public exception to CAFA. 28 U.S.C. §1332(d)(11)(B)(ii)(III) (exempting cases where "all of the claims in the action are asserted on behalf of the general public"). The Fifth Circuit reversed, finding that the case was subject to removal to federal court under CAFA because the "real parties in interest" in the lawsuit were various residents of Mississippi and therefore not all of the claims alleged fell within the general-public exception.

The parties and various *amicus curiae* submitted briefs to the Supreme Court after certiorari was granted. One of the more interesting submissions was from Allstate Insurance Company which argued that the Fifth Circuit was correct in holding that the Attorney General's lawsuit fell within the definition of a "mass action" under CAFA. Referencing its role in a prior Fifth Circuit case, *Louisiana ex rel. Caldwell v. Allstate*, the company argued that the Attorney General's action was nothing more than a class action improperly labeled as a *parens patriae* action in order to avoid removal under CAFA. Allstate contended that, in certain states like Louisiana and Mississippi, private plaintiffs are enlisting state attorneys general

offices to hire them on a contingent fee basis to bring what essentially are private actions to recover class action damages on behalf of the state's residents. Worse, according to Allstate, the claims made and damages sought in both *Caldwell* and *Hood* are essentially duplicative of those brought by plaintiffs in private class actions.

The Justices noted many of these same concerns in oral argument. Justice Ginsberg began the questioning by asking the Attorney General whether any monies collected in the case would ultimately be distributed to citizens of Mississippi injured by defendants' alleged conduct. Counsel replied that such a distribution would be unlikely since it would be difficult to identify such citizens and, therefore, the most likely recipient of any such funds would be the state treasury. Counsel argued that the only named plaintiff in the suit is the Attorney General and therefore no analysis regarding the "real parties in interest" is necessary, even if non-parties to the litigation, like Mississippi consumers, ultimately might benefit from the litigation. Various Justices pressed the Attorney General as to whether there is anything that might prevent states from filing *parens patriae* lawsuits as follow-on actions to private class or mass actions, and counsel had to concede that, in states like Mississippi, no such prohibition exists. Nonetheless, counsel stressed, state attorneys general are not "running around following class actions to try and piggyback on top of them."

During defense counsel's argument, one justice pointed out that the underlying antitrust claims of Mississippi consumers in the case had, in fact, already been settled by the defendants and questioned whether the Attorney General would thus have to show that the "monetary relief claims of 100 or more persons [could] be tried jointly" since only the State's claims remained to be adjudicated. Counsel for the defendants countered that the Attorney General ultimately would have to proffer evidence of the damages suffered by each of its citizens in order to prevail, even if it was proceeding as the only named plaintiff in the case, and suggested that *parens patriae* actions fall within the category of actions that Congress sought to include in CAFA. Citing legislative history showing that state attorneys general mounted an unsuccessful effort to carve themselves out of the statute, defense counsel said that Congress was sensitive about "federalism concerns" but acted on that concern by exempting

actions from CAFA where a State or a State official is the primary defendant—not by exempting *parens patriae* actions that seek restitution for private parties.

Potential Outcomes in *Hood*

As of the date of this article, the Supreme Court has issued no decision in *Hood*. The Court could rule in a variety of ways. The Court could issue a ruling affirming the Fifth Circuit and holding that *parens patriae* actions like *Hood* are removable under CAFA so long as at least one claim in the lawsuit seeks damages for someone other than the State itself. The Court could issue an even broader ruling holding that all *parens patriae* actions are "mass actions" and therefore subject to CAFA regardless of the public interest label placed on such lawsuits. Finally the Court could hold that *parens patriae* actions are not "mass actions" at all and therefore not subject to CAFA since, by their very nature, they assert claims on behalf of the general public.

Given the Supreme Court's increased hostility to class actions and the abuses that sometimes accompany them, *Hood* will test the Court's views on federalism. A ruling that permits defendants to remove *parens patriae* actions to federal court arguably infringes on states' rights and could lead to conflicts between federal and state courts on issues such as whether state attorneys general can obtain damages for citizens who already have collected damages via private litigation. On the other hand, a ruling that allows *parens patriae* actions like *Hood* to remain in state court could further encourage plaintiffs' attorneys to use state attorney general offices to fight their battles for them.

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