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## US high court takes on state antitrust action removability case

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Companies accused of antitrust wrongdoing must prepare for a multi-front battle in different courts in different places on different timelines. To survive, they must hire defense counsel with sufficient scale and agility to manage multiple cases, in which each action in one case can reverberate to the others. It isn't easy to do it right, particularly today where many battles happen in foreign

jurisdictions.

The U.S. Supreme Court recently agreed to weigh in on whether defendants can employ the Class Action Fairness Act (CAFA) to, in at least one circumstance, limit the jurisdictional-bounds of a complex action. The court granted certiorari in *Mississippi ex rel. Hood v. AU Optronics Corporation, et al.*, on the issue of whether and under what circumstances a parens patriae action by the state itself in state court against a defendant is removable as a "mass action" under CAFA.

### CAFA

A parens patriae action, in this context, is one where the state commences litigation for the benefit of its residents for alleged antitrust or unfair competition violations. The term itself connotes the authority of the state to act for those that cannot act on their own behalf. But, in this context, it is more or less a standing doctrine. There is, in fact, a long line of plaintiff attorneys - sometimes known as private attorney generals - that are willing to represent a "class" of individuals with even the smallest individual antitrust concerns. Parens patriae actions by states are a common part of the "piling-on" that occurs after a government investigation or settlement is announced.

Congress passed CAFA in 2005 to expand federal jurisdiction over many large class-action and mass-action lawsuits. The act has a number of specific requirements and exceptions, but fundamentally it converted the requirement for complete diversity of citizenship to one of minimal diversity, which is satisfied when "any member of a class of plaintiffs" is a citizen of a state different from any defendant. 28 U.S.C. Section 1332 (d)(2). It also introduced an aggregate matter-in-controversy requirement of \$5,000,000 for class actions. To qualify as a mass action under CAFA, at issue here, a civil action must involve monetary relief claims of 100 or more persons.

CAFA's express purpose is to funnel large national class actions from state to federal court. Informing Congress' consideration of the legislation were findings of abuse in the class-action system itself, whereby plaintiffs' attorneys were constantly bringing cases in the same infamous state courts. Defendants were then blocked by complete-diversity requirements from removing these cases to federal court. As a result, certain state courts were deciding a disproportionate number of important national and sometimes international actions, thus interfering with the free flow of interstate commerce. Indeed, oftentimes the state cases that were protected from removal related to conduct that was concurrently litigated in federal court. CAFA, by addressing this problem, diminished some of the advantages of forum-shopping.

### *Mississippi ex rel. Hood*

Respondents - as winners below - typically oppose a request for certiorari to the Supreme Court. But that didn't happen here. Instead, respondents acknowledged a

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circuit conflict and provided their own reasons for the Supreme Court to take this case. While unusual, it is not surprising in these circumstances. This case is a good illustration of how government antitrust actions turn into a sprawling series of inter-related lawsuits.

This is one of many lawsuits from an alleged global price-fixing conspiracy among manufacturers of liquid crystal display (LCD) panels, all of them part of corporate families headquartered in Asia. The Department of Justice's enforcement actions against this alleged conspiracy spawned dozens of cases in both state and federal court, including a multi-district proceeding in the Northern District of California. In fact, as is common, some of the complaints - including the one here, according to respondents - are just carbon copies of complaints filed in federal court. This does not even include the actions and investigations outside of the U.S.

While this might seem like overkill, it is not uncommon. Announcement of just a government investigation, by itself, will initiate a stampede to courthouse doors all over the country. The federal cases, if there are enough of them, are usually consolidated in a multi-district proceeding, as was the case here. The state cases, however, to the extent they are not removable, remain in each respective state as separate litigation.

As was true with many states, the state of Mississippi wanted its piece of the action and brought a parents patriae action against defendants "on its own behalf, and on behalf of Mississippi residents, including local governmental entities," seeking, among other relief, restitution for consumers and government entities that purchased products at an artificially inflated price.

The disputed issue is whether this is a "mass action" under CAFA, which factually comes down to whether the suit in question involves claims of 100 or more persons. If it is a mass action, it is removable; otherwise it stays in state court. Defendants prevailed below because the 5th U.S. Circuit Court of Appeals applies a "claim-by-claim" approach that looks at the real nature of the state's claims and the real parties in interest, regardless of how the caption reads. In this case, the 5th Circuit concluded that the real parties in interest include the state of Mississippi, but also individuals who purchased LCD products within Mississippi - far in excess of 100 persons.

In contrast, the 4th, 7th and 9th Circuits apply a different standard known as the "whole-case" approach. These circuits will look at the "essential nature and effect of the proceeding" as a whole to determine the real party in interest. Indeed, the 4th Circuit applied that approach to almost the exact same case relating to the alleged global conspiracy brought by South Carolina in its parens patriae role, but with a different result. Defendants, respondents here, sought certiorari in that case. This is an unabashed circuit conflict.

It is rarely a good idea to predict how any court will rule, let alone the U.S. Supreme Court. And I won't do so here. But there are some interesting statutory interpretation issues that could create a narrow decision on this increasingly-common question of whether a parens patriae lawsuit seeking restitution for state consumers is removable. This is, however, a prime opportunity for the court to weigh in on the dilemmas and massive costs that these overlapping lawsuits create for defendants and to offer some guidance to courts on how to better manage them.

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