Supreme Court to Decide Removability of *Parens Patriae* Actions Under CAFA

On May 28, 2013, the U.S. Supreme Court granted certiorari in *Mississippi v. AU Optronics Corporation,* No. 12-1036, to consider whether a *parens patriae* action brought by a state attorney general is removable as a "mass action" under the Class Action Fairness Act (CAFA). *Parens patriae* is a doctrine under which a State, acting as named plaintiff, may maintain a legal action as a representative of its citizens where the State's citizens have been allegedly harmed and where the State maintains a quasi-sovereign interest. The Fifth Circuit Court of Appeals has held that a *parens patriae* lawsuit is analogous to a mass action and is therefore removable to federal court under CAFA, which provides for removal of class actions and mass actions where there is minimal diversity and the amount in controversy exceeds $5 million, among other requirements. Three circuits—the Fourth, Seventh, and Ninth—have held otherwise.

In *AU Optronics*, Mississippi filed an action in state court alleging that the defendants had engaged in price fixing. The lawsuit was brought in the name of the state, asserting claims under the Mississippi Antitrust Act and the Mississippi Consumer Protection Act, seeking injunctive relief, civil penalties, and restitution to the State and to its citizens who purchased products from defendants. Defendants sought to remove the case to federal court. The district court, relying on Fifth Circuit precedent, *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008), found that the action was a mass action under CAFA. 28 U.S.C. § 1332(d). However, the district court remanded the case because it found that all of the claims had been asserted "on behalf of the general public (and not on behalf of individual claimants or members of a purported class)" and therefore fell into the "general public exception" to CAFA mass action jurisdiction. On appeal, the Fifth Circuit reversed. Applying a "claim-by-claim approach" set out in *Caldwell*, the Fifth Circuit found that "the real parties in interest include not only the State, but also individual consumers residing in Mississippi." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796 (5th Cir. 2012).

The Mississippi suit was one of more than a dozen similar *parens patriae* lawsuits brought by attorneys general of various states against the defendant electronics makers. In cases brought by other states, the defendants attempted removal on a similar theory. In those cases, however, the courts of appeal have held that a *parens patriae* action is neither a "class action" nor a "mass action" under CAFA and is therefore not removable. *See AU Optronics Corp. v. South Carolina*, 699 F.3d 385 (4th Cir. 2012), *petition for cert. filed*, No. 12-911 (Jan. 23, 2013); *LG Display Co. v. Madigan*, 665 F.3d 768 (7th Cir. 2011); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 848-49 (9th Cir. 2011).

The Supreme Court's decision to hear *AU Optronics* comes at a time when the Court is considering a series of cases regarding class actions and related issues. Already this term, the Court has decided a CAFA issue in *Standard Fire Insurance Co. v. Knowles*, No. 11-1450, holding that a damages stipulation by the named plaintiff cannot bind the class and defeat CAFA jurisdiction. (Click here for a copy of the Sutherland Legal Alert on *Knowles*.) Also this term, the Court held that a district court may not certify a class action without first resolving whether the plaintiff class has introduced adequate evidence to show that the case is susceptible to an award of classwide damages. *Comcast Corp. v. Behrend*, No. 11-864 (click here for the Sutherland Legal Alert). Other class action decisions this term have addressed offers

of judgment (click here for the Sutherland Legal Alert on *Genesis HealthCare Corp. v. Symczyk*) and materiality in securities fraud cases (click here for the Sutherland Legal Alert on *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*). The Court's decision to add a CAFA case to its docket for next terms portends a continued focus in the area of class action practice.

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