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Class Action Alert

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Supreme Court: AG Suits Not Removable Under CAFA

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On January 14, 2014, the Supreme Court held in *Mississippi ex rel. Hood v. AU Optronics Corp. (Hood)* that a suit filed by a state as the sole plaintiff does not constitute a "mass action" under the Class Action Fairness Act of 2005 (CAFA). This decision reinforces traditional practice and the long-understood right of state attorneys general to bring consumer protection enforcement actions in their home forums without exposing their suits to removal risks. The Hood decision removes doubt – expressed as a minority view in federal court decisions addressing this issue – that these actions may be removed to federal court under CAFA. While we expect the *AU Optronics* decision will facilitate the growing role that state attorneys general have begun to play in the nation's consumer protection regime, we do not think the decision on its own will cause attorney general enforcement actions to increase, nor will it change the CAFA landscape for traditional private class actions.

Mississippi ex rel. Hood v. AU Optronics

In March 2011, the State of Mississippi sued several liquid crystal display (LCD) manufacturers, alleging that defendants violated two Mississippi statutes by forming a cartel to restrict competition and raise prices in the LCD market. Among other forms of relief, Mississippi sought restitution for its own purchases of LCD products *and* for purchases made by Mississippi citizens. Defendants removed the action to federal court, arguing that the AG's case was a "mass action" as defined by CAFA a "civil action...in which monetary claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."

The district court had ruled that Mississippi's suit qualified as a "mass action." The district court found that 100 or more Mississippi consumers had purchased LCD screens, and these consumers were the real parties in interest to the State's restitution claim. But the trial court nevertheless remanded to state court, concluding that CAFA's "general public exception" excluded the AG's case from the statutory definition of "mass action."

The Court of Appeals for the Fifth Circuit reversed. It agreed with the district court that the real parties in interest were the Mississippi consumers who had purchased defendants' LCD screens, but found that CAFA's "general public exception" did not apply. Because the Fifth Circuit's decision conflicted with decisions issued by the Fourth, Seventh, and Ninth Circuits, the Supreme Court granted certiorari to resolve the circuit split.

In a unanimous opinion by Justice Sotomayor, the Supreme Court reversed the Fifth Circuit, squarely holding that *parens patriae* actions such as Mississippi's do not qualify as mass actions under CAFA. The Court analyzed the statute's plain language and concluded that the statute means precisely what it says: "100 or more persons" qualify as a mass action. Had Congress meant that "100 or more named or unnamed real parties in interest" could qualify as a mass action, it would have said so. The Court noted that the very same statutory provision later specified the "100 or more persons" as "plaintiffs" – a term which cannot be construed to include unnamed parties. Similarly, the Court found that, had Congress meant to make such *parens patriae* actions removable under CAFA (because, as defendants argued, they "are in substance no different from class actions"), it would have done so through the class action mechanism, not the mass action provisions.

Impact of *Mississippi ex rel. Hood v. AU Optronics*

We doubt that *AU Optronics* will have much impact in the consumer protection space. The Supreme Court's decision comports with historical treatment of state attorneys general actions, and we do not believe that it will lead to an increase in such actions. The decision is grounded in straightforward statutory interpretation, rather than any analysis of state sovereignty or constitutional requirements. State attorneys general already have been playing an increasingly active role in consumer protection and antitrust enforcement. This trend has been bolstered by provisions of the Dodd-Frank Act which expressly enlist the aid of state attorneys general in pursuing the Consumer Financial Protection

Bureau's goals. While some commentators have opined that the decision will somehow allow private class action lawyers to ride the coat-tails of state attorney general enforcement actions in a way that evades application of CAFA, we think this concern is far-fetched.