RECENT DEVELOPMENTS IN CLASS ACTION LAW:

SCOTUS TACKLES THE "MASS ACTION" PROVISION UNDER CAFA BUT DUCKS INTERPRETING THE "GENERAL PUBLIC" EXCEPTION IN *MISS. EX REL. HOOD v. AU OPTRONICS CORP.*

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SCOTUS Tackles the "Mass Action" Provision Under CAFA but ducks interpreting the "General Public" Exception in *Miss. ex rel. Hood v. AU Optronics Corp.*

Perhaps the most important Supreme Court decision to date on the application of the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d), and its impact on federal jurisdiction came in early 2014 in the Supreme Court's decision in *Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014). *In AU Optronics*, the Supreme Court analyzed whether a lawsuit in which the State Attorney General is the sole plaintiff but is proceeding *parens patriae* to recover on behalf of unnamed individual citizens and consumers can constitute a "mass action" under CAFA thereby invoking federal diversity jurisdiction. Under CAFA, defendants in a civil suit may remove a case to federal court if the suit qualifies as a "mass action." The statute defines "mass action" as a "civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law and fact."

The United States District Court for the Southern District of Mississippi had held that the suit qualified as a mass action under CAFA because the individual consumers on whose behalf the Attorney General was proceeding were unnamed "real parties in interest." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 876 F. Supp. 2d 758, 769 (S.D. Miss. 2012). The District Court nevertheless ordered remand, finding that the suit fell within CAFA's "general public" exception. *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(III). The Fifth Circuit reversed the District Court's remand order, agreeing that the suit was a mass action under CAFA but rejecting the application of the general public exception. The Supreme Court reversed the Fifth Circuit by a 9-0 vote, ultimately determining that a State Attorney General's *parens patriae* lawsuit did not constitute a "mass action" for the purpose of supporting federal jurisdiction. The Court held that the 100 or more persons contemplated by the statute must be named plaintiffs, and that, because the State of Mississippi was the only named plaintiff, the case must be remanded. The case was ultimately remanded back to state court.

I. CAFA Was Intended to Loosen Diversity Requirements for "Class Actions" and "Mass Actions."

The Court laid the groundwork for its discussion of mass actions by explaining Congress' expansion of federal court diversity jurisdiction through CAFA. Congress enacted CAFA out of a concern that the diversity requirements found in 28 U.S.C. § 1332 effectively relegated certain cases of "national importance" to state courts. Accordingly, CAFA provides for more relaxed diversity requirements for "class actions," which it defines as any civil action filed under Rule 23 of the Federal Rules of Civil Procedure, and for "mass actions," which are civil actions where "monetary relief 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." 28 U.S.C. § 1332(d)(11)(B)(i).

For both types of action, CAFA expanded diversity jurisdiction by replacing the more strident requirement of complete diversity with a more relaxed requirement of "minimal diversity." That is, rather than requiring that all plaintiffs be diverse from all defendants, minimal diversity requires only that at least one member of the class of plaintiffs be diverse from at least one defendant.

CAFA's second significant change related to the amount in controversy required to invoke jurisdiction. For both class actions and mass actions, CAFA grants federal diversity jurisdiction for actions in which the aggregate amount in controversy exceeds $5 million. However, for mass actions, federal jurisdiction "shall exist only over those plaintiffs" whose individual claims satisfy the $75,000 amount in controversy requirement of 28 U.S.C. § 1332.

II. *AU Optronics* Tees Up Both the Mass Action and the General Public Exception Issues for the U.S. Supreme Court.

On March 25, 2011, the State of Mississippi sued a host of companies involved in the manufacture of liquid crystal displays ("LCDs") in Mississippi state court, alleging that they had engaged in price-fixing by forming an international alliance to restrict competition and drive up the prices of LCD components in consumer electronice devices, such as cell phones, tablet computers and televisions. The State claimed that these actions violated two state statutes: the Mississippi Antitrust Act, Miss. Code Ann. § 75-21-1 *et seq*. and the Mississippi Consumer Protection Act, Miss. Code Ann. § 75-24-1 *et seq*.

Defendants in the state court action removed the case to federal court, asserting that the case was either a "class action" or a "mass action" under CAFA. The District Court correctly noted that Mississippi has no rule permitting class actions and then launched into a fairly extensive discussion of class action under CAFA before determining that the "suit is not a CAFA class action because it was not brought pursuant to Federal Rule of Civil Procedure 23 or a 'similar State statute or rule of judicial procedure.'" *Mississippi ex rel. Hood v. AU Optronics Corp.*, 876 F. Supp. 2d 758, 769 (S.D. Miss. 2012).

However, the District Court found that the suit qualified as a mass action because it was a civil action "in which monetary relief 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 relied on Fifth Circuit precedent in *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008), which had squarely held that "persons" or "plaintiffs" in the mass action definition could be also read to

mean “real parties in interest” when a State Attorney General is proceeding *parens patriae* on behalf of individual consumers. Applying what it determined to be the law in *Caldwell*, the District Court found that 100 or more unidentified Mississippi consumers had purchased LCDs and were therefore real parties in interest for the purpose of meeting the mass action requirement. Nonetheless, the District Court ordered remand of the case because it determined that the “general public” exception to mass actions applied to the State’s claims. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 876 F. Supp. 2d at 775, *interpreting* 28 U.S.C. § 1332(d)(11)(B)(ii)(III). The general public exception excludes from the mass action definition actions in which all claims are asserted on behalf of the general public rather than individual claimants or members of a purported class pursuant to a state statute. *Id.*

The Fifth Circuit reversed, agreeing with the District Court in all aspects of its decision except its determination that the suit fell within the general public exception to the definition of “mass action.” *State ex rel. Hood v. AU Optronics, Corp.*, 701 F.3d 796, 802-803 (5th Cir. 2012). The Fifth Circuit noted that its decision departed from the decisions of three other Circuit Courts of Appeals which had found similar lawsuits not to be mass actions removable under CAFA.

III. The Supreme Court Resolves the Circuit Split in Favor of Remand.

The “mass action” provision of CAFA provides as follows:

> [T]he term mass action means any civil action (except a [class action]) in which monetary relief 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, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

28 U.S.C. §1332(d)(11)(B)(i). In analyzing the language of the mass action provision, the Supreme Court observed that the parties agreed that the definition of “mass action” would include suits involving 100 or more named plaintiffs who proposed to try their claims together. *Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 741 (2014). The issue before the Court was whether the statute “also includes suits brought by fewer than 100 named plaintiffs on the theory that there may be 100 or more unnamed persons who are real parties in interest as beneficiaries to any of the plaintiffs’ claims.” The Court looked to statutory construction and Congressional intent and unanimously reversed the Fifth Circuit, holding that the statute meant 100 or more named plaintiffs not 100 or more named or unnamed real parties in interest.

The Court pointed to several problems with a loose interpretation of the language “100 or more persons” as used in the “mass action” definition. First, the court observed

that the language does not lend itself to the inference that Congress meant "100 or more named or unnamed real parties in interest" because Congress could have, but did not, use that specific language. The Court further observed that certain provisions of the same statutes specifically contemplate unnamed parties. For example, the numerosity requirement for removal of class actions defines class members as "the persons (named or unnamed) who fall within the definition of the proposed or certified class." The Court also noted that "persons" referenced in the beginning of the sentence are later referred to as "plaintiffs" in the same sentence and that interpreting "plaintiffs" to include unnamed parties in interest contravenes existing law and creates serious administrative problems in interpreting those laws according to the proposed broader definition.

Justice Sotomayor, writing for the Court, specifically took issue with the fact that "persons" in the beginning of the sentence, obviously becomes "plaintiffs" later in the same sentence. The Court asserted that CAFA clearly intends the term "plaintiff" to be construed as "a party who brings a civil suit in a court of law, not anyone, named or unnamed whom the suit may benefit." The Court extrapolated the proposed definition of "plaintiffs" as any named or unnamed person to the provision for mass actions placing jurisdiction "only over those plaintiffs whose claims [exceed $75,000]" and noted such construction would create "an administrative nightmare that Congress could not possibly have intended." The Court reinforced its decision by citing to § 1332(d)(11)(B)(ii)(II), which prohibits defendants from joining unnamed individuals to the lawsuit. The Court found that Congress clearly intended to focus on the "persons who are actually proposing to join together as named plaintiffs in the suit" and condemned a rule that would require courts to look behind the pleadings to ascertain the unnamed persons interested in the suit.

Thus, having determined that the Mississippi suit was not a mass action under CAFA, the Court never reached the general public exception relied upon by the Mississippi District Court and rejected by the Fifth Circuit. Instead, *AU Optronics* stands for the single principle that "plaintiffs" cannot not be expanded and read to include "unnamed real parties in interest" when attempting to invoke federal jurisdiction under CAFA. Therefore, State Attorneys General may side-step the clear intent of CAFA – to bring mass joined claims in "cases of national importance" back to federal court – by proceeding *parens patriae* on behalf of unnamed individual consumer citizens. While the wisdom of this practice and policy may still be in question, the Supreme Court's interpretation of CAFA's mass joinder provision is now settled law.