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Removability of Parens Patriae Antitrust Actions Under CAFA To Be Considered by U.S. Supreme Court

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It appears that the U.S. Supreme Court will soon resolve a split among the circuits on the issue of whether *parens patriae* actions can be removed from state court as "mass actions" under the Class Action Fairness Act (CAFA). Earlier this week, the Court agreed to review a decision of the U.S. Court of Appeals in New Orleans, concluding that Mississippi's suit alleging state consumer protection and antitrust claims against manufacturers and distributors of liquid crystal display (LCD) panels qualified as a "mass action" under the CAFA and should be removed to federal court. According to the state, the Fifth Circuit is at odds with every other circuit that has decided this issue. The petition in *State of Mississippi v. AU Optronics Corp*., Dkt. 12-1036, was granted on May 28.

The State of Mississippi filed its petition for certiorari on February 19, asking the Supreme Court: "whether a state's parens patriae action is removable as a 'mass action' under CAFA when the state is the sole plaintiff, the claims arise under state law, and the state attorney general possesses statutory and common law authority to assert all claims in the complaint."

Mississippi's lawsuit is one of 13 parens patriae actions brought against the LCD companies for conspiring to fix prices. Other suits were brought by the attorneys general of Arkansas, California, Florida, Illinois, Michigan, Missouri, New York, Oregon, South Carolina, Washington, West Virginia, and Wisconsin. Five attorneys general—from California, Illinois, Mississippi, South Carolina, and Washington—commenced their actions in state courts asserting only state law claims. The defendants removed each of these actions to federal court, and in all five cases, the district court remanded. The only circuit court not to uphold the remand was the Fifth Circuit in the Mississippi action. The Fifth Circuit decision (701 F.3d 796, 2012-2 Trade Cases ¶78,150) followed a 2008 decision, *Louisiana ex rel. Caldwell v. Allstate Insurance Co*., 536 F.3d 418, which held that a state's parens patriae action is removable as a mass action under CAFA.

In its petition, Mississippi argued that "there is a circuit conflict that is so profound that cases involving the same claims, arising out of the same conduct, by the very same Defendants, have been remanded to state court in the Fourth, Seventh, and Ninth Circuits, but retained in federal court in the Fifth Circuit." The Fifth Circuit reversed a district court's decision remanding the case to state court.

The Supreme Court has yet to take action on a petition for review involving a decision of the U.S. Court of Appeals in Richmond, Virginia, on the same issue (699 F.3d 385, 2012-2 Trade Cases

¶78,100). That decision upheld the remand of two lawsuits brought by the State of South Carolina against the firms for conspiring to fix prices in violation of that state's antitrust law and Unfair Trade Practices Act. In their January 23 petition for *certiorari*, the LCD panel companies, including AU Optronics and LG Display, contended that removal was proper under CAFA.

Mississippi also contended that its petition is a better vehicle for deciding the question than the petition of the LCD companies for review of the Fourth Circuit decision. The state's petition provides a full explication of the Fifth Circuit's views, the state asserted.

Under CAFA, a mass action is a civil action in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the claims involve common questions of law or fact and include an amount in controversy exceeding $75,000. The Fifth Circuit held that, despite the state's contention that it was the only party in interest, the state and individual citizens who purchased products within Mississippi were the real parties in interest. The variety of allegations demonstrated that the real parties in interest were individual consumers. The court also held that the statutes at issue did not give the state sole authority to recover for injuries suffered by consumers. As a result, the Fifth Circuit found that the suit qualified as a mass action under CAFA.