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States' Standing to Bring Mass Torts in Concert Tested

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During the last two decades, state attorneys general have emerged as successful pursuers of major fraud by corporations. However, their efforts now face an aggressive challenge in the U.S. Supreme Court by the nation's business community.

In *Mississippi v. AU Optronics Corp*., the justices will decide whether so called “parens patriae” lawsuits filed by state attorneys general to recover money on behalf of their state citizens can be removed from state courts to federal courts under the Class Action Fairness Act (CAFA).

If Mississippi loses, "it potentially would be quite damaging," said Stephen Houck, executive director of the Center for State Enforcement of Antitrust and Consumer Protection Laws, an amicus supporter of Mississippi. "The ultimate purpose here is to prohibit state attorneys general from being active antitrust enforcers. What struck me is this is basically what state attorneys general do—they bring actions in state courts to enforce their laws. If they get removed to federal court and transferred out of state, it becomes all the more difficult and expensive. Smaller states will be less likely to bring these kinds of cases."

Business has long viewed the federal courts as a more hospitable forum than state courts and their local juries. CAFA itself was heavily lobbied for by business as a way to put some limits on increasingly expensive and numerous class actions.

The high stakes for both sides are belied by the seemingly technical question facing the court. The case, to be argued on Nov. 6, pits the states and consumer and senior citizen organizations against the National Association of Manufacturers, the Pharmaceutical Research and Manufacturers of America, DRI (formerly the Defense Research Institute) and other business interests.

Illinois, joined by 45 states, tells the justices in an amicus brief that allowing CAFA removal "forces States to litigate in federal court cases they bring in their own courts, under their own laws, for conduct occurring within their own borders. Worse, this approach encourages federal courts to override a State's determination that a particular action and mode of relief will serve the public interest."

DRI counters in its amicus brief that not applying CAFA "would allow plaintiffs' lawyers to avoid federal review of cases with national implications by teaming up with state attorneys general to bring class or mass actions seeking to recover huge awards under the guise of a parens patriae action and thus avoid the removal provisions that Congress enacted for class and mass actions."

Assisting the enforcers

The high court case stems from a parens patriae lawsuit filed in state court by Mississippi against manufacturers of liquid crystal display panels. The state alleged a price-fixing conspiracy in violation of state antitrust law and sought restitution, among other relief, for its consumers who had purchased the LCD panels during the price-fixing period.

Parens patriae is a doctrine under which a state, acting as named plaintiff, may bring a lawsuit on behalf of its citizens when they allegedly have been harmed and when the state maintains a quasi-sovereign interest. The U.S. Court of Appeals for the Fifth Circuit held that the Mississippi's suit was a "mass action" removable under CAFA because individual consumers were the real parties in interest and the state was acting as a class representative, not asserting its sovereign interest.

Mississippi's lawsuit is one of 13 parens patriae suits brought against the same defendants by the attorneys general of Arkansas, California, Florida, Illinois, Michigan, Missouri, New York, Oregon, South Carolina, Washington, West Virginia and Wisconsin. Five of the 13, including Mississippi, brought only state law claims in their state courts and, in each case, the defendants moved for removal to federal courts under CAFA. Unlike the Fifth Circuit, the Fourth, Seventh and Ninth circuits held that removal was improper.

The Center for State Enforcement of Antitrust and Consumer Protection Laws is a relative newcomer to Supreme Court battles.

"We've submitted a couple of amicus briefs, but we normally don't do that," said Houck, who also is of counsel to New York's Menaker & Herrmann and a former chief of the antitrust bureau within the New York State Attorney General's Office. "We were asked by Mississippi to take a look at it. They wanted some support. We thought there was going to be an amicus brief by a number of states as well. One of my concerns was we contribute something a little bit different."

The center was started in 2005. Kevin O'Connor, formerly chief of antitrust and consumer protection in the Wisconsin attorney general's office, came up with the idea and now serves on the center's board. "The idea was [that] a state center would be a resource for state attorneys general, to provide some money and training to help them do a better job enforcing antitrust and consumer protection laws," Houck said. "It has become more important over time because of state budgetary issues."

The center has developed a panel of economists to provide 20 hours of free advice to states at the beginning of antitrust cases. It also provides grants to allow them to hire their own experts and to use document management software for big cases.

"The Department of Justice has a huge staff of economists to help them," said Houck. "Most states don't."

In the consumer protection area, the center has organized five regional conferences to provide training for attorneys general and encourage them to work together across state lines. "Right now, we're trying to organize an effort among attorneys general to coordinate their efforts in fighting fraud against veterans," said Houck. "It's very piecemeal. Massachusetts is pretty active, but the same bad guy is doing something to vets in California. We're trying to organize to act more efficiently."

Private attorneys general

In the center's amicus brief in Mississippi's high court case, Houck said, a major focus was on opponents' attacks on the hiring of outside counsel by state attorneys general to assist in these lawsuits. The Fifth Circuit also relied on an earlier ruling that the hiring of private counsel was an influential factor in a decision to pierce a state's pleadings.

"The use of private counsel (especially those with special skills or expertise in a complex subject matter like antitrust), however, does not transform a law enforcement action into a class action or mass action," Houck writes. "Nothing in the language or legislative history of CAFA suggests that a state attorney general should be barred from prosecuting a parens patriae action brought in state court for violation of state law based on his or her choice of counsel."

In fact, Houck notes, as the LCD antitrust litigation itself demonstrates, an attorney general's choice of counsel is "irrelevant." The Mississippi and South Carolina attorneys general, he adds, have relied on private counsel to assist in prosecuting their LCD parens patriae antitrust actions, while the Illinois, Washington and California attorneys general have not."

And the United States, with far greater resources than most states, he adds, hired private counsel—David Boies of Boies, Schiller & Flexner—for its Microsoft trial, and John Roberts Jr., now chief justice of the United States, represented 18 states in that appeal.

In the high court, Mississippi Attorney General Jim Hood argues that CAFA's text and structure make clear that parens patriae suits are not mass actions under CAFA. "If there were any doubt, principles of federalism would compel that removal statutes be narrowly construed," he adds. "The tradition of parens patriae actions and the longstanding 'real party in interest' test also confirm that the State is properly the sole plaintiff in an attorney general suit."

His opponent, Christopher Curran of White & Case, counters that the suit was properly removed because it involves claims on behalf of more than 100 persons for amounts in excess of $5 million. "This action—brought against out-of-state defendants by private plaintiffs' lawyers retained by the Attorney General and duplicating allegations of private class actions—is exactly the type of mass action Congress intended to be removed to federal court."

The center's Houck, of course, is unconvinced by Curran. "It's an effort to impede a very basic enforcement tool that attorneys general have," he said. "If they can't do this, what can they do?"

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