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Five Takeaways from the Supreme Court's AU Optronics Decision

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Court's decision provides key takeaways for class action defendants, including how the decision limits the use of CAFA's mass action provision to suits that actually name 100 or more persons as plaintiffs.

On January 14, the U.S. Supreme Court issued its decision in **Mississippi ex rel. Hood v. AU Optronics Corp**.,[1] holding that a **parens patriaeaction f**iled by the state of Mississippi on behalf of its citizens was not a **"mass action"** as defined by the **Class Action Fairness Act (CAFA)** and thus could not be removed to federal court on that basis. The Court interpreted the definition of "mass action" as requiring 100 or more parties to be actually named as plaintiffs. The Court also rejected arguments that the state's citizens should have been counted as the real unnamed parties in interest for purposes of the 100-person threshold. Instead, Mississippi's parens patriae lawsuit included only one plaintiff, the state.

There are five significant takeaways from AU Optronics that any potential defendant should understand. First, the decision limits the use of CAFA's mass action provision to suits that actually name 100 or more persons as plaintiffs. Second, the ruling likely enhances the incentive for private contingency-fee counsel to pair with state attorneys general and bringparens patriae actions in state court. Third, the opinion underscores the possibility that a defendant may face both class actions and parens patriae actions for the same alleged conduct—often in different courts. Fourth, private contingency-fee counsel may be further encouraged to urge state attorneys general to use parens patriae actions as an alternative to private class actions that would otherwise be barred, such as when potential class members have signed class action waivers. Finally, despite these possibilities, the AU Optronics decision is limited to jurisdiction under CAFA and does not eliminate or restrict the ability of litigants to remove attorney general cases on other grounds.

CAFA's Mass Action Provision

Congress enacted CAFA to expand federal jurisdiction and to provide for jurisdiction over class actions with national importance.[2]Among its various provisions, CAFA contemplates two types of cases: class actions and mass actions.[3] For both types of actions, CAFA loosened federal statutory jurisdictional requirements by only requiring minimal diversity among the parties[4] as well as an aggregate amount in controversy that exceeds $5 million.[5] Mass actions are defined under CAFA as

the following:

[A]ny civil action (except a [class action] within the scope of section 1711(2)) 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).[6]

Of particular note is the limitation in the final clause, providing that, unlike a typical class action under Federal Rule of Civil Procedure 23, federal jurisdiction in a **mass action "'shall exist only over those plaintiffs' whose claims individually satisfy the $75,000 amount in controversy requirement.**"[7] CAFA also provides certain exceptions for mass actions, including actions that involve principally local issues or raise matters of state concern.[8]

Supreme Court Opinion

In AU Optronics, the state of Mississippi, represented by private contingency-fee counsel, sued AU Optronics and other manufacturers of liquid crystal displays (LCDs), alleging that they formed an international cartel to restrict competition and raise prices of LCDs.[9] Mississippi brought a parens patriae action in state court on behalf of itself and Mississippi citizens who purchased LCD products at allegedly inflated prices. Defendants removed to the U.S. District Court for the Southern District of Mississippi. The district court found that the state's action qualified as a mass action because the state sought to represent the interests of many unnamed citizens, exceeding the "100 or more persons" requirement for a mass action.[10] The district court interpreted the words "persons" and "plaintiffs" in the mass action section of CAFA as including the real parties in interest. The district court remanded, however, finding that the "general public" exception applied.[11] The U.S. Court of Appeals for the Fifth Circuit agreed that the AU Optronics action qualified as a mass action but reversed the district court's finding that the suit fell within the general public exception.[12]

Justice Sonia Sotomayor, writing for a unanimous Court, disagreed with both the district court and the Fifth Circuit, instead interpreting the phrase "persons" as including only plaintiffs named in the action. Turning first to the statutory text, Justice Sotomayor observed that the "mass action" definition does not include "100 or more named or unnamed real parties in interest," instead referring to "100 or more persons."[13] According to the Court, had Congress intended to include the "unnamed real parties in interest," it could have drafted language to that effect as it did elsewhere within CAFA.[14] The Court also foresaw administrative complications for district courts if they were required to consider unnamed parties to a mass action, such as determining whether unnamed parties' claims satisfied the $75,000 requirement and how to handle claims valued at less than $75,000.[15]

Significantly, the Court observed that the mass action component of CAFA "functions largely as a backstop to ensure that CAFA's relaxed jurisdictional rules for class actions cannot be evaded by a suit that names a host of plaintiffs rather than using the class device."[16] In doing so, the Court rejected arguments that federal courts are required under CAFA to look at the substance of actions for jurisdictional purposes in order to determine the real parties in interest. While the Court agreed that analyzing the real parties in interest is a "background principle" for determining diversity, the justices disagreed with the conclusion that Congress intended that principle to apply to CAFA's mass action provision.[17]

Five Takeaways

AU Optronics creates a significant limitation for parties seeking to remove certain actions under CAFA's mass action provision generally and for attorney general actions specifically. There are five key takeaways for any potential class action party:

The Court limited use of CAFA's mass action provision to those actions that actually name "100 or more persons" as plaintiffs. In addition, although not expressly held by the Court, each plaintiff must have a claim in excess of $75,000 for the claim to remain in federal court. As the Court reasoned, the mass action provision serves as a "backstop" to CAFA's relaxed jurisdictional rules and ensures that plaintiffs cannot evade federal jurisdiction by naming "a host of plaintiffs rather than using the class device."[18]

As a practical matter, the Court's ruling enhances the incentive for private contingency-fee counsel to pair with state attorneys general and bring parens patriae actions in state court on behalf of state citizens in tandem with or immediately following private class actions. Thus, there is an increased possibility of follow-up actions after the settlement of a class action, possibly brought by the same private counsel under the authority of a state attorney general.

Such multiple cases for essentially the same conduct are likely to proceed in different courts. Chief Justice John Roberts homed in on this problem during oral argument in AU Optronics, questioning whether an attorney general could file a parens patriae action immediately following a class action settlement for the same alleged conduct.[19] Counsel for Mississippi responded by pointing out (among other things) that the state's interest inparens patriae actions is broader than those of a class seeking damages to individual consumers as it includes, for example, indirect harms. The concern about multiple actions, also reflected in questions by Justices Antonin Scalia and Anthony Kennedy, is an area of significant debate. Although the underlying issues are more substantive than jurisdictional, the Court may have the opportunity to address such concerns in the future.

The AU Optronics decision leaves open the possibility that private contingency-fee counsel may bring parens patriae actions on behalf of a state's citizens in state court where a class action would otherwise be impossible. For example, a parens patriaeaction may be a viable alternative to claims involving consumer products or services where a class action waiver has been signed.[20] In this way, AU Optronics presents a potential end run around other Supreme Court class action jurisprudence.

The holding in AU Optronics, although significant for attorney general actions, is limited to addressing jurisdiction over attorney general parens patriae actions under CAFA. The decision does not eliminate or restrict the ability of litigants to remove attorney general cases on other grounds, such as where state-law claims implicate significant federal issues, nor does it speak to situations where a single, diverse, private plaintiff invokes state law to attempt to recover more than $75,000 based on conduct harmful to other citizens.[21]

Removing a path to federal court under CAFA's mass action provision paves the way for attorney general actions to remain in state court and underscores the incentive for states and private contingency-fee counsel to pursue these actions. In fact, 46 states filed as amici curiae in support of Mississippi, suggesting that federal jurisdiction over parens patriaeactions improperly places state actions in federal courts.[22]

The full impact of AU Optronics will be revealed as new claims are pursued by or in the name of state attorneys general. The universe of potential defendants is broad and could include all producers or

sellers of goods or services within a state. Potential defendants should be aware of this important development, as it is increases the potential for class-like litigation in state courts and underscores the risk of multiple lawsuits involving the same conduct.

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[1]. No. 12-1036, (U.S. Jan. 14, 2014), available here.

[2]. Id., slip op. at 2.

[3]. Id.

[4]. Minimal diversity requires only that one member of a class be a citizen of a state different from any defendant. 28 U.S.C. § 1332(d)(2)(A);see also 28 U.S.C. § 1332(d)(11)(A) (providing that "a mass action shall be deemed removable under [§§ 1332(d)(2) through (d)(10)]").

[5]. 28 U.S.C. §§ 1332(d)(2), (d)(6), (d)(11)(a).

[6]. 28 U.S.C. § 1332(d)(11)(B)(i).

[7]. AU Optronics, No. 12-1036, slip op. at 3 (quoting 28 U.S.C. § 1332(d)(11)(B)(i)). Although framed in terms of jurisdiction over "plaintiffs," the limitation refers to subject matter jurisdiction over claims that do not meet the amount in controversy requirement of 28 U.S.C. § 1332(a).

[8]. Id. at 3 n.1; see also 28 U.S.C. § 1332(d)(3)-(5).

[9]. AU Optronics, No. 12-1036, slip op. at 3.

[10]. Mississippi ex rel. Hood v. AU Optronics Corp., 876 F. Supp. 2d 758 (S.D. Miss. 2012).

[11]. The general public exception excludes from the "mass action" definition "any civil action in which . . . all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically

authorizing such action." 28 U.S.C. § 1332(d)(11)(B)(ii)(III).

[12]. Mississippi ex rel. Hood v. AU Optronics Corp., 701 F.3d 796 (5th Cir. 2012). Although remand orders are not generally appealable, CAFA creates an exception to that principle.

[13]. AU Optronics, No. 12-1036, slip op. at 6.

[14]. Id.

[15]. Id. at 8–9.

[16]. Id. at 11.

[17]. Id. at 12.

[18]. Id. at 11.

[19]. Oral Argument Transcript at 17–22, AU Optronics, No. 12-1036 (Nov. 6, 2013), available here.

[20]. See American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013) (upholding use of class action waiver).

[21]. E.g., Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg., 545 U.S. 308, 314–16 (2005) (finding federal jurisdiction appropriate in quiet title action where the only contested legal and factual issues involved interpretations of federal law).

[22]. Brief of Amici Curiae State of Illinois and 45 Other States in Support of Petitioner at 19-20, AU Optronics, No. 12-1036 (July 29, 2013),available here.

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