

High Court To Resolve CAFA Circuit Split In LCD Case

By **Melissa Lipman**

Law360, New York (May 28, 2013, 9:13 PM ET) -- The U.S. Supreme Court agreed Tuesday to consider whether a price-fixing suit Mississippi's attorney general brought against several electronics makers belonged in federal court under the Class Action Fairness Act, in a case that will settle a split among the circuits over how to treat states' damages suits on behalf of consumers.

The justices will review the Fifth Circuit's ruling that the *parens patriae* case Mississippi Attorney General Jim Hood brought on behalf of the state's consumers against Toshiba Corp. and the other liquid crystal display manufacturers counted as a "mass action" under CAFA. Under that relatively young statute, defendants can remove class or mass actions to federal court if they seek high enough damages and meet other thresholds.

So far, only the Fifth Circuit has concluded that *parens patriae* cases — in which the state is the sole plaintiff acting on behalf of residents — count as mass actions, while three other appeals courts reviewing the issue have all reached the opposite conclusion. That includes rulings from the Seventh Circuit and Ninth Circuit over the same alleged LCD price-fixing.

The LCD case will give the Supreme Court a chance to settle the circuit split, and the move could have significant implications for how a variety of state-led damages actions play out.

"Depending on how broadly the questions are posed and, more importantly, how they're answered, [this case] could potentially reach any kind of situation where the state is a named plaintiff," University of Iowa law professor Herbert Hovenkamp said. "The reason the defendants want to remove the case to federal court is because they can take advantage of more restrictive [federal] class action rulings.

As with many other attorneys general, Hood sued on behalf of Mississippi residents after a 2006 U.S. Department of Justice investigation revealed that AU Optronics Corp. and other LCD makers orchestrated a global conspiracy to fix prices on the displays, which are widely used in laptops, monitors and other electronic devices.

But when the rest of the states signed a \$539 million settlement, Mississippi, California, Illinois, South Carolina and Washington opted to pursue *parens patriae* cases in their respective state courts instead. The defendants removed each of the cases, but each state successfully fought to have the cases sent back to state court.

In Mississippi's case, the district court ruled that the attorney general's suit was a mass action, but concluded that the case fell under an exception in the CAFA for suits brought on behalf of the general public, meaning the case should not have been removed from state court.

In November, the Fifth Circuit disagreed, determining that individual consumers, in addition to the state, are the real parties in interest, so the claims are not asserted on behalf of the general public. The ruling said Hood was essentially a class representative.

Hood asked the Supreme Court to review the case, saying it exacerbated the Fifth Circuit's split with several sister circuits over the issue of whether *parens patriae* cases count as mass actions under the federal law.

"This circuit conflict 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 [other circuits] but retained in the Fifth Circuit," the Feb. 19 high court petition said. "Absent review by this court, federal jurisdiction over that *parens patriae* lawsuits will continue to depend entirely on the location of the federal court to which the suit is removed."

In a somewhat unusual move, the defendants supported the bid for certiorari, saying the case offered the court with a good opportunity to resolve the circuit split — ideally in the LCD makers' favor.

"Notwithstanding Congress's purpose to achieve national uniformity, these conflicting approaches have led to an intractable circuit split regarding whether actions filed by state attorneys general seeking monetary relief claims on behalf of particular citizens of the state are removable to federal court under CAFA," the defendants told the high court in late April. "The circuit split has led to conflicting results even in cases arising out of the same conduct by the same defendants, namely cases alleging a global price-fixing conspiracy among manufacturers of liquid crystal display panels."

One concern for defendants is that with many states contracting *parens patriae* work out to outside law firms, allowing the suits to stay in state court might effectively circumvent the purpose of CAFA, according to Mayer Brown LLP's Andy Pincus.

"The whole premise of government enforcement is that you give these powerful tools to people [whose] motivation is to do justice," Pincus said. "If it's somebody who's litigating the case whose compensation depends on winning, that gives them a different view on how to make those decisions. The risk is they're going to make decisions based on maximizing returns to them versus doing justice."

Particularly in cases in which an outside firm is handling the litigation, it becomes difficult to argue that *parens patriae* cases are completely different from class actions and should be treated as such, Pincus said.

Moreover, allowing defendants to remove *parens patriae* cases to federal court saves the costs of duplicative litigation and puts larger, more complex cases before federal judges who are often more experienced with handling complicated discovery disputes, according to Pincus.

"One of the tactics for pressuring people to settle even if the claim is one that could be defeated is to make it cost more to win than it does to settle," Pincus said.

The key question, according to Hovekamp, is whether a *parens patriae* case is simply a case brought by the state or whether the state in those kinds of cases should really be viewed as the representative for a class of its citizens.

"It's an oddball case and it's going to be an issue for some of the conservative judges like [Justice Antonin] Scalia because, on the one hand, Scalia is traditionally a federalist and he likes to preserve states' prerogatives, but this is a statute that has the effect of preempting a state power in favor of removal to federal court," Hovenkamp said. "So it's kind of hard to predict what's going to happen on it."

Hood applauded the justices' decision to hear the case Tuesday, saying he expected that the vast majority of other states' attorneys general would support his efforts in an amicus brief.

"Corporations have abused federal jurisdiction by using the Class Action Fairness Act to remove consumer actions from state court to federal court," Hood said in an emailed statement. "During Senate debate on the Class Action Fairness Act, even the senators supporting the act stated on the record that it would not apply to actions brought by attorneys general."

Toshiba, which is leading the defense for the LCD makers in the appeal, declined to comment on the case through attorney Christopher Curran of White & Case LLP.

Mississippi is represented by the attorney general's office as well as attorneys from Massey & Gail LLP, Abraham & Rideout and Zimmerman Reed PLLP.

AUO is represented by Phelps Dunbar LLP and Nossaman LLP. Chi Mei Corp. is represented by Bradley Arant Boult Cummings LLP and Simpson Thacher & Bartlett LLP. HannStar Display Corp. is represented by Wyatt Tarrant & Combs LLP and K&L Gates LLP. Hitachi Ltd. is represented by Morgan Lewis & Bockius LLP and Forman Perry Watkins Krutz & Tardy LLP. LG Display Co. Ltd. is represented by Butler Snow O'Mara Stevens & Cannada PLLC and Paul Hastings LLP. Samsung Electronics Co. Ltd. is represented by Heidelberg Harmon PLLC and Covington & Burling LLP. Sharp Corp. is represented by Philip Williams Thomas PA and Pillsbury Winthrop Shaw Pittman LLP. Toshiba Corp. is represented by White & Case LLP and Wise Carter Child & Caraway PA.

The case is State of Mississippi v. AU Optronics Corp. et al., case No. 12-1036, in the U.S. Supreme Court.

--Additional reporting by Carolina Bolado and Bill Donahue. Editing by John Quinn and Chris Yates.

Correction: A previous version of this article incorrectly indicated that the DOJ charged Toshiba as part of its investigation. The error has been corrected.