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High Court's CAFA Ruling Paves Way For More AG Suits

By **Melissa Lipman**

Law360, New York (January 14, 2014, 8:07 PM ET) -- The U.S. Supreme Court ruled Tuesday that defendants can't force state attorney general suits into federal court, a unanimous decision that attorneys say will spark a jump in attorney general suits and may even spur plaintiffs attorneys to bring more cases to state law enforcers in hopes of inking contingency fee deals.

In a rare unanimous opinion dealing with class actions, the justices ruled that a price-fixing case Mississippi's attorney general had brought against several liquid crystal display makers couldn't be removed to federal court under the Class Action Fairness Act.

AU Optronics Corp., LG Display Co. Ltd. and the other defendants had argued that the suit should qualify as a "mass action" under the law because it represented the interests of more than 100 Mississippi citizens. But the court found that under the letter of the law, the state was the only plaintiff and the suit therefore couldn't be treated like a class action.

That ruling will doubtless encourage more attorneys general to pursue parens patriae cases to recover damages on behalf of their citizens, likely in partnership with private plaintiffs firms, as was the case in the Mississippi suit, attorneys said.

"What will likely happen is that there will be some state attorneys general who will be filing more of these actions now. They'll be doing it in tandem with contingency fee counsel, I think, in most instances," Skadden Arps Slate Meagher & Flom LLP's John Beisner said. "And my guess is there will now be fair amount of contingency fee counsel who will say, 'Let us file this kind of action or that kind of action on a parens patriae basis.'"

Tuesday's decision resolved a split among the circuit courts over whether CAFA — which allows defendants to remove to federal court class and so-called mass actions joining the claims of at least 100 people — applies to suits brought by state attorneys general to recover damages on behalf of consumers.

Though most of the circuit courts had said no, the Fifth Circuit said yes in the current case, reasoning that Mississippi Attorney General Jim Hood was suing on behalf of more than 100 real parties in interest.

The justices eliminated that ambiguity, ruling that the term "persons" used in the mass action definition clearly meant the same thing as "plaintiffs" elsewhere in the statute. Moreover, if Congress had wanted the definition of mass action to include plaintiffs or real parties in interest, "it easily could have drafted

language to that effect," Justice Sonia Sotomayor wrote for the court.

Though these types of attorney general actions in antitrust and other consumer litigation contexts are hardly rare, the decision will almost certainly yield more of them, attorneys said.

"I have trouble believing that a 9-0 decision from the Supreme Court authorizing these kinds of cases will not have the effect of causing more of them," Debevoise & Plimpton LLP partner Jeffrey Jacobson said.

And with most state attorneys general facing tight budgets, attorneys said they expected more and more cases to be run by private plaintiffs counsel hired by the state enforcers.

"You're starting to see ... plaintiffs counsel going out and reaching out to attorneys general," said Amy Brown, who heads Squire Sanders' class action group. "The defense bar is concerned about situations where private plaintiffs team up with state attorneys general and have the attorney general file the lawsuit and avoid removal under CAFA."

The ruling could also offer a work-around to other recent Supreme Court decisions allowing companies to enforce class action waivers in contracts, such as the American Express Co. v. Italian Colors Restaurant case. Those rulings do not apply to state attorneys general, who can pursue many of the same types of claims on behalf of their citizens, Jacobson said.

"Now that state attorneys general have been given the green light to bring claims on behalf of consumers in state court, might they start using that ability more aggressively as an end around to deal with mandatory consumer arbitration provisions?" Jacobson wondered. "This is a way that state attorneys general can prosecute Italian Colors-style claims, even if the merchants themselves cannot do it because they're agreed to contracts with individual arbitration requirements."

Of course, the decision also poses another set of problems for defendants in a cases where, as in the LCD price-fixing suit, private plaintiffs are pursuing their own class actions in federal court and state attorneys general have filed separate actions in state court.

"There's a big question about whether if there's a settlement in a private class action [and] the claims of class members are released, whether that then prevents the state from double-dipping and recovering for those injuries," said Archis Parasharami, who co-chairs Mayer Brown LLP's consumer litigation and class action practice.

The worry for many defendants — and several justices at oral arguments in the case — is that parallel litigation could leave a company having to pay out twice for what is essentially the same claim.

"I think we're going to see more litigation over that question in the future," Parasharami said.

There is already some case law — including a 1985 decision from the Second Circuit — holding that federal judges evaluating settlements in that type of situation can bar state attorneys general from prosecuting their own cases once the court has preliminarily approved a settlement resolving the same claims, according to Jacobson.

"Nothing in this decision upends that case law," Jacobson said. "In other words, I believe that a defendant still has the ability to stop state AG parens patriae claims by proposing a settlement of the

same claims in a federal class action."

--Editing by Kat Laskowski and Chris Yates.
