State Attorneys General Served "home cooking" by the Supreme Court of the United States

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On January 14, 2014, in *Mississippi v. AU Optronics Corp*., the Supreme Court held that a *parens patriae* action (one brought by the state on behalf of its injured citizens) does not constitute a ?mass action? and cannot be removed to federal court. As a result of the ruling, Mississippi (not a class) may sue on behalf of its harmed constituents (potentially a class) and prevent removal to federal court under the Class Action Fairness Act of 2005 (?CAFA?). Although attorneys general have taken divergent positions on issues as wide-ranging as the Affordable Care Act, property rights and the 2nd Amendment, they mounted a united front in this case as 46 states filed an amicus brief in support of Mississippi. If there is one thing that can bring about bipartisanship among attorneys general, it?s in protecting the powers and duties of the office and in preserving their ability to bring enforcement actions on behalf of their constituents (aka voters).

Although the attorneys general were united in support of Mississippi, the questioning from some Justices indicated they were troubled by the state?s position. The Chief Justice openly lamented the prospect that ?there is nothing to prevent 50 attorneys general, 51, from saying, every time there is a successful class action as to which somebody in my State purchased one of the items, we are going to file a parens patriae action, the complaint is going to look an awful lot like the class action complaint, and we want our money?? Now, the Court apparently has allowed just that result.

Writing for the unanimous Court, Justice Sotomayor concluded that, where the plain language of CAFA defines a ?mass action? as a matter involving the monetary claims of 100 or more persons who propose to try those claims jointly, and a state attorney general files an action as the only named plaintiff, the matter may not be removed to federal court. Although consistent with a holding from the Fourth Circuit, this ruling puts the business community in the unenviable position of having to face serial lawsuits and the potential of paying damages to private plaintiffs in federal court and a separate recovery to the Attorney General. Federal courts are often considered friendlier toward defendants, so the prospect of appearing in state court and adhering to local rules looms large. Moreover, attorneys general have the

ability to bring their cases in virtually any locality in which a constituent lives or is harmed and will all but assuredly pick venues they deem to be most favorable.

In Virginia, Attorney General Mark Herring has been on the job less than a week, but he?s made it clear that he intends to be active in this area. He?s already changed a reference on his office?s official webpage from ?consumer protection? to ?consumer assistance? suggesting, perhaps, he?s going on offense. Though private class action cases are precluded under Virginia law, this ruling potentially allows the Virginia Attorney General and Governor to initiate similar suits on behalf of consumers and to prevent removal to federal court. The Virginia Code explicitly authorizes the Attorney General to act unilaterally to enforce the Virginia Antitrust Act. What this means for the business community is that the functional equivalent of class actions may be resurrected in Virginia where state court procedure limits a defendant?s ability to resolve cases early and without additional expense.

Whether a company makes LCD televisions and manipulates pricing as AU Optronics Corporation did, markets over-the-counter dietary supplements with exaggerated health benefits or otherwise makes a material misrepresentation about its product or service, consumers and their attorneys general have a powerful tool at their disposal. Not only could businesses face a class of several hundred allegedly aggrieved consumers, they may have whistle-blowers, relators and their state?s Chief Law Enforcement Officer and his Consumer Protection Section with them. In Virginia, the civil defense bar may have to litigate more cases in state court. And when the facts warrant settling antitrust or consumer protection class actions, clients must have counsel with the requisite experience, knowledge of multi-state investigations and ability to negotiate and draft careful settlements that ensure damages paid to consumers do not duplicate the fees that might be paid in a related *parens patriae* action in state court.

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