You are receiving this new sletter as a member of the MSBA Consumer Litigation Section.
No longer interested? Unsubscribe. Having trouble view ing this email? View it in your browser.

Consumer Litigation Section

E-Newsletter

MSBA Sections

from the Minnesota State Bar Association

Vol. 1, No. 2

E-Newsletter Editorial Staff

Editor in Chief: Ellen B. Silverman, Esq.

Contributors: Jessica L. Klander and David M. Cialkowski

Welcome to our second issue of the Consumer Litigation E-Newsletter. We'd like to thank our contributors to the newsletter – Jessica L. Klander and David M. Cialkowski for taking time out from their practices to write thought provoking pieces on attorneys' fees and the Class Action Fairness Act.

The Consumer Litigation Section aims to elevate the practice of law – in both state and federal courts – regarding typical consumer transactions, credit cards, mortgages, loans, and the like, involving typical players, such as consumers, banks, title companies, lenders, brokers, and other businesses. Our section touches on individual consumer claims, as well as government enforcement actions and class action claims. We also aim to educate our members about current trends in consumer financial litigation.

We need your assistance to make this newsletter a success. Please help us by contributing an article. Article ideas and/or articles can be sent to: Ellen Silverman at esilverman@hinshawlaw.com.

Thank you all for your support of our section. Please feel free to contact us with any suggestions.

SCOTUS: A CAFA "Plaintiff" Means, Well, a Plaintiff

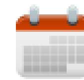
The U.S. Supreme Court's recent decision in *Mississippi v. AU Optronics* continues the Court's effort to resolve jurisdictional disputes through simple, text-based guideposts. Nothing punctuates that approach better than the unanimous vote supporting the Court's decision, which will impact not only state AG offices across the U.S., but also the defendants against whom they bring suit.

Mississippi's antitrust complaint—against AU Optronics and several other manufacturers accused of fixing the price of LCD screens—fomented a seemingly obscure jurisdictional issue but, behind the scenes, it brought to bear the fervent arguments and resources of 46 state attorneys general, pro-enforcement public interest groups, big pharma, big insurance, and the defense bar in an intractable war over forum in large-stakes cases. In the end, the Court did not touch on the politics or the acrimony, but instead followed its own charge that "simplicity is a virtue" in deciding jurisdictional matters. Although the Class Action Fairness Act (CAFA) is not

In This Issue

Scotus: A CAFA "Plaintiff" Means, Well, a Plaintiff, submitted by David M. Cialkowski

Courts Are Taking a Harder Look at Attorney-Fee Requests, submitted by Jessica L. Klander



Events & CLEs

March 25 CLE featuring Minnesota Attorney General Lori Swanson and Commissioner of Commerce Mike Rothman.

About

The Consumer Litigation Section E-Newsletter is a service for members of the Minnesota State Bar Association's Consumer Litigation Section. Feedback

Go to the Consumer Litigation Section website.

Contact

Sue Bores, Section Services Manager
Phone: (612) 278-6325

e-mail

a paragon of simplicity as a whole, the Court did the judiciary a favor by foreclosing entire lines of inquiry with respect to CAFA removal that had already gummed up threshold jurisdictional proceedings in numerous federal courts.

Congress passed CAFA in 2005 to make it easier to remove some interstate class actions to federal court. Although lengthy and convoluted,[1] essentially CAFA permits "class actions," as defined by Rule 23 or "similar rule" of procedure allowing representative actions,[2] to be removed under a "minimal diversity" standard.[3] As a backup, CAFA also makes "mass actions" removable as CAFA "class actions." Thus, if 100 people get together as plaintiffs and sue on the same complaint pursuing a common question of law or fact in a joint trial, but leave out any allegation of class representation, the case may be removable despite the absence of class allegations.

The Text of CAFA

Prior to the Court's *AU Optronics* decision, the mass action definition had become the center of gravity in the battleground over whether federal jurisdiction was appropriate in huge state enforcement cases. The statute provides that a "mass action" is

> any civil action . . . 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).[4]

Congress's use of the terms "persons" and "plaintiffs" in the definition set the stage upon which lawyers involved in state enforcement actions would strut and fret in high stakes cases.

An Early Interpretation of Mass Action: "Persons" are "Real Parties in Interest"

Any hope that the mass action provision would be interpreted according to its plain terms seemed dashed as soon as CAFA left the factory floor. In 2007, citing CAFA's "mass action" definition, a group of defendants filed a notice of removal in a Louisiana AG antitrust enforcement action challenging bid rigging and coordinated undervaluing of insurance claims in the wake of Hurricanes Katrina and Rita.[5] Buddy Caldwell, Louisiana's Attorney General, did not bring the case as a representative of any class,[6] but he did seek monetary relief on behalf of injured citizens, along with broad injunctive relief.[7] The defendants' theory supporting removal was that although the State of Louisiana was the only plaintiff in the case, the real persons in interest were the individual policyholders in Louisiana. Essentially, they argued, the State was the plaintiff in name only, and the presence of over 100 policyholders' antitrust claims in the action permitted removal.[8]

The district court agreed[9] and the Fifth Circuit affirmed, holding that the "mass" in mass action comprises not the named plaintiff(s), but rather the real parties in interest to any of the claims in the suit.[10] Because General Caldwell had sued under

the *private enforcement* provision of the Louisiana antitrust law'' seeking private damages, the Fifth Circuit held, the real parties in interest were the persons who held the right to those claims.[12] Despite the fact that the State had also asserted a claim for injunctive relief, which the court of appeals agreed belonged to the State and could be severed and remanded, the monetary relief portion of the case was still removable—whatever that meant.[13] This became known as the "claim-by-claim" approach, because even if one claim out of several involves unnamed real parties in interest, it would be removable. So district courts within the Fifth Circuit went dutifully about the business of piercing State AGs' enforcement actions to see if they had been "fraudulently"[14] pled to avoid removal.

State AGs' Perspective

There was another side to the story because, even if pleading piercing and real-party-in-interest testing were called for under CAFA, state attorneys general strongly believed that their *parens patriae* powers (exercised on behalf of the people), in conjunction with their quasi-sovereign interests in helping their citizens recover, in fact made the *State* the real party in interest, no matter whether other parties in interest may benefit from the relief sought.

After all, the Supreme Court had determined decades earlier that a State is the real party in interest in a *parens patriae* case as long as it invokes a sovereign or quasi-sovereign interest apart from private interests (such as (1) suing over the kind of issue likely to be addressed through lawmaking powers or (2) suing on behalf of a substantial segment of the population). *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex. rel. Barez*, 458 U.S. 592, 607 (1982) (citing 787 injured citizens out of 3 million as a segment sufficiently substantial to trigger the State's independent interest). Most *parens patriae* cases, and in particular antitrust enforcement actions, easily fit that bill. Attorneys general were understandably perplexed and frustrated.

The Ensuing Circuit Split

Defendants litigating in states outside the Fifth Circuit began removing state enforcement actions on the perceived strength of *Caldwell*'s back. They met with a brick wall. The adverse reaction to the *Caldwell* decision of three sister Circuit Courts of Appeals created a concrete circuit split—and a wall of authority barring federal jurisdiction over enforcement actions in 18 states.

The Seventh Circuit was the first to reject *Caldwell*'s conclusion and reasoning. In

Illinois's enforcement action against the same cadre of defendants redressing the same concerted conduct as in *Mississippi v. AU Optronics*, the court of appeals noted that the Fifth Circuit did not base its "claim-by-claim analysis" on any language in CAFA.[15] The Seventh Circuit thus provided the first clue as to how the Supreme Court would ultimately resolve the issue, focusing on CAFA's requirement that the 100 persons be "plaintiffs": "[O]nly the Illinois Attorney General makes a claim for damages (among other things), precisely as authorized by [Illinois's antitrust statute]. By the plain language of § 1332, this suit is not removable as a mass action."[16] Even if a real party in interest test were appropriate, the Seventh Circuit commented, "the traditional 'whole complaint' analysis" would need to be followed, which the district court had appropriately done in ordering remand of the State's

case.

The Ninth Circuit was the next to reject *Caldwell*'s claim-by-claim approach, and noted Nevada's "substantial state interest" in suing "to protect the hundreds of thousands of homeowners in the state allegedly deceived" by a bank's foreclosure processes, in holding that "Nevada—not the individual consumers—is the real party in interest."[17] The court specifically noted the Nevada AG's statutory authority to pursue the claims, and that the "essential nature and effect of the proceeding" demonstrated that the AG was properly pled as the sole plaintiff.[18] "That individual consumers may also benefit from this lawsuit does not negate Nevada's substantial interest in this case."[19]

The Fourth Circuit also rejected *Caldwell*'s claim-by-claim approach in the context of South Carolina's enforcement action against the LCD defendants. Agreeing with the Seventh and Ninth Circuits, the court held, "That the statutes authorizing these actions in the name of the State also permit a court to award restitution to injured citizens is incidental to the State's overriding interests and to the substance of these proceedings."[20]

The Fifth Circuit Expands CAFA Further

Despite companion circuits' allergic reaction to *Caldwell*, Mississippi witnessed the Fifth Circuit's expansion of the *Caldwell* holding in the context of Mississippi's enforcement action against the LCD defendants in *AU Optronics*. As noted above, critical to the *Caldwell* court's holding was the fact that Louisiana had acted under the private enforcement provision of Louisiana's antitrust law—or so Mississippi believed.

Mississippi, to the contrary, sued solely under the public, attorney general enforcement provisions, making the State the party with statutory authority to seek the relief requested, which included the State's proprietary losses, injunctive relief, civil penalties, and restitution based on harm to its citizens. The State, therefore, should have been considered the real party in interest for purposes of the remedies sought, regardless of who else may benefit.

The Fifth Circuit's *AU Optronics* decision, however, doubled down on *Caldwell*, expanding CAFA removal to such cases as well. Any case in which citizens could realize individual monetary benefits, regardless of whether those citizens could have brought suit under public action provision, would be considered a mass action because "the real parties in interest include not only the State, but also individual consumers residing in Mississippi."[21] No longer was the court concerned about whether the State had a sufficient interest over the case to sue in its own name. Instead, it determined that even if the State was "a" real party in interest, if any other party might get money as a result of the lawsuit, they were to be considered plaintiffs under CAFA's mass action provision.[22]

The Supreme Court Champions a Plain Text Approach

Lost in the in the rubble of the circuits' discussions of and disagreements over *parens patriae* powers, whole-case versus claim-by-claim approaches, and real party in interest tests, was the actual text of CAFA's mass action definition. Once the

Supreme Court granted Mississippi's petition,[23] the decision was made by Mississippi to unearth the text of CAFA that had been buried from the get-go by *Caldwell*. The State placed at the heart of its appeal a plain language interpretation of CAFA, arguing the legislature's use of the word "plaintiffs" to describe those bringing monetary claims in the statute meant just that, and the lower court's analysis of real parties in interest was in violation of that congressional limitation.

The Supreme Court agreed. First, the Court reasoned that "the statute says '100 or more persons,' not '100 or more named or unnamed real parties in interest."[24] CAFA's "class action" definition, by contrast, expressly included "unnamed" persons, and Congress intentionally left that word out of the mass action definition.[25]

Second, the Court reasoned that the word "persons" cannot mean anything other than "the very 'plaintiffs' referred to later in the sentence."[26] This was because Congress used similar language to describe the joinder procedure in the federal rules,[27] which requires actual lawsuit-filing plaintiffs,[28] and because it would make no sense that unnamed parties in interest could be considered to have proposed a joint trial on the basis that "some completely different group of named plaintiffs share common questions."[29]

Third, once the Court had determined that "persons" are the same people referred to in the mass action clause as "plaintiffs," it held that the LCD defendants' idea that they could include unnamed real parties in interest "stretches the meaning of 'plaintiff' beyond recognition," which means "a 'party who brings a civil suit in a court of law.'"[30]

Fourth, the Court pointed out that if "plaintiff" means unnamed parties in interest, then CAFA's "requirement that 'jurisdiction shall exist only over those plaintiffs whose claims [exceed $75,000]' becomes an administrative nightmare that Congress

could not possibly have intended."[31] How would district courts identify the unnamed persons? Even if they could be identified, what would happen to those holding small claims? Severance? Wouldn't most of the case then be returned to State court anyway?[32] "We think it unlikely that Congress intended that federal district courts engage in these unwieldy inquiries."[33]

Fifth, the Court determined that another provision of CAFA (and statutes must be read in context) provides that a mass action removed to federal court cannot be transferred to any other court without the consent of "a majority of the plaintiffs."[34] Acquiring such consent from unnamed consumers would result in further administrative nightmares Congress could not have intended to create.

Finally, the Court determined that CAFA displaced any potential real party in interest test because that test has traditionally been used to identify whose citizenship should be considered to determine diversity, not "to count up additional unnamed parties in order to satisfy" a numerosity provision.[35] Congress also displaced any such test by prohibiting defendants from joining unnamed individuals as a basis for removal and by repeatedly using the term "plaintiffs" to describe the 100 or more persons required by the statute.[36]

In the end, the Court decided that the text of the statute, and the context of its enactment, shows that the mass action definition serves as a "backstop" to ensure that "a suit that names a host of plaintiffs rather than using the class device" does not evade CAFA's compass. An attorney general's enforcement action where the State is the only plaintiff does not qualify.

Simplicity

Diversity jurisdiction has always been a rich canvass. It can combine lofty arguments regarding federalism and public policy with compelling practical considerations. These and everything in between were brought to bear in the *AU Optronics* case. Ultimately, however, the Court re-applied an observation it made in its previous term in another CAFA case, *Standard Fire v. Knowles*: "when judges must decide jurisdictional matters, simplicity is a virtue."[37] Although the LCD defendants had hoped the Court would expand upon *Knowles*'s warning not to "exalt form over substance,"[38] by arguing that CAFA endeavors to capture large cases of national importance like the LCD matter, the Court determined that the text of CAFA was not equal to the task. As Justice Scalia quipped at the oral argument, "Sometimes, Congress doesn't do it right, you know?"[39]

David M. Cialkowski practices complex and class litigation at Zimmerman Reed in Minneapolis. He represented the Mississippi Attorney General Office in AU Optronics *before the Fifth Circuit as arguing counsel and before the Supreme Court on brief. He can be reached at david.cialkowski@zimmreed.com.*

Submitted by David M. Cialkowski
David.Cialkowski@zimmreed.com
Zimmermcan Reed, PLLP
1100 IDS Center, 80 South 8th Street
Minneapolis, MN 55402
(612.341.0400)

[1] *See Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1198 (11th Cir. 2007) ("CAFA's mass action provisions present an opaque, baroque maze of interlocking cross-references that defy easy interpretation"); *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 682, 686 (9th Cir. 2006) (noting CAFA's "thorniest" provisions and that its mass action language is "bewildering").

[2] 28 U.S.C. § 1332(d)(1)(B).

[3] Minimal diversity differs from complete diversity in that the removing party need only show that *any* member of an alleged class has citizenship different from *any* defendant. *Id.* at § 1332 (d)(2).

[4] 28 U.S.C. § 1332(d)(11)(B)(i).

[5] *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 422-23 (5th Cir. 2008).

[6] This distinction has also been litigated to some extent. At least in the Fifth

Circuit, a state attorney general is not immune from removal under CAFA's "class action" provision if in fact the State proposes that the attorney general join other private plaintiffs as class representatives pursuant to a Rule 23-like rule of judicial procedure. *See In re Katrina Canal Litig. Breaches*, 524 F.3d 700 (5th Cir. 2008) (where state AG and private plaintiffs joined in suit including class allegations and seeking to be named class representatives, removal was proper under CAFA "class action" definition).

[7] *Id.* at 423.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 429-30.

[11] La. Rev. Stat. Ann. § 51:137.

[12] *Id.* at 429.

[13] No portion of *Caldwell* was ever remanded to state court, and the case was dismissed on the pleadings.

[14] *I.e.*, by not naming all the state's citizen purchasers as plaintiffs.

[15] *LG Display Co. v. Madigan*, 665 F.3d 768, 773 (7th Cir. 2011).

[16] *Id.* at 772.

[17] *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 670 (9th Cir. 2012).

[18] *Id.* at 670; *see also id.* at 672 ("The State of Nevada is the real party in interest, so the action falls 99 persons short of a 'mass action.'").

[19] *Id.* at 671 (internal quotations omitted).

[20] *AU Optronics v. South Carolina*, 699 F.3d 385, 394 (4th Cir. 2012).

[21] *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 800 (5th Cir. 2012), *rev'd and remanded*, 134 S. Ct. 736 (2014).

[22] *AU Optronics*, 701 F.3d at 802 ("[W]e hold that the real parties in interest in this suit include both the State and individual consumers of LCD products. Because it is undisputed that there are more than 100 consumers, we find that there are more than 100 claims at issue in this case.").

[23] *Mississippi ex rel. Hood v. AU Optronics Corp.*, 133 S. Ct. 2736 (2013).

[24] *Mississippi ex rel. Hood v. AU Optronics*, 134 S. Ct. 736, 742 (2014).

[25] *Id.*

[26] *Id.*

[27] Fed. R. Civ. P. 20.

[28] 134 S. Ct. at 742.

[29] *Id.*

[30] *Id.* at 743 (quoting Black's Law Dictionary 1267 (9th ed. 2009)).

[31] *Id.*

[32] *Cf. id.* at 73-44.

[33] *Id.* at 744.

[34] *Id.* at 744; 28 U.S.C. § 1332(d)(11)(C)(i).

[35] *Id.* at 745.

[36] *Id.* at 746.

[37] *Id.* at 744 (quoting *Standard Fire Ins. Co. v. Knowles*, 568 U.S. ---, 133 S. Ct. 1345, 1350 (2013)).

[38] *Knowles*, 133 S. Ct. at 1350.

[39] Hr'g Tr. at 46. Available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1036_hgcj.pdf

---

Courts Are Taking a Harder Look at Attorney-Fee Requests

Minnesota federal district courts are taking a harder look at attorney-fee requests. In two recent decisions, the district courts either denied or drastically reduced the attorney's fees sought, finding the requested amounts "unreasonable." Notably, both fee motions were unopposed and the courts acted *sua sponte* in reducing the awards.

Fouks v. Red Wing Hotel Corporation

Fouks v. Red Wing Hotel Corp., 2013 WL 6169209 (D. Minn. Nov. 21, 2013), involved class action claims arising out of the alleged failure to properly redact consumer debit and credit card numbers from receipts pursuant to the Fair and Accurate Credit Transaction Act ("FACTA"). The plaintiffs did not seek actual damages. The parties reached a settlement by which the class members would receive vouchers for discounts at the hotel, the class representatives would both receive $4,000, and a $20,000 cy pres donation would be made to an area nonprofit. The court preliminarily approved the settlement. The plaintiffs' counsel thereafter brought a motion for final approval of the settlement and for attorneys' fees and costs. The defendant did not oppose the plaintiffs' motion. The district court granted final

defendant did not oppose the plaintiffs' motion. The district court granted final approval of the settlement as modified but denied, without prejudice, the plaintiffs' motion for attorneys' fees and costs.

The district court found that the plaintiffs' request for $65,000 in attorneys' fees was "unreasonable" under the circumstances. The court expressed "grave concerns" with the 182 hours allegedly expended and the $400 hourly rate that was "far in excess of what would be reasonable" on the "short-lived, straight forward case". The court found the billable time unreasonable, in light of the fact that the parties began discussing settlement early, the case did not involve motion practice, and a "majority of counsel's written submissions" were "boilerplate."

The district court also determined that the billing entries were unreasonably lengthy, duplicative, and that the attorney's "exorbitant" $400 hourly rate was not in line with other Minnesota consumer litigation attorneys. The court concluded that

"[FACTA] cases are not complex. In 2003, Congress required electronically-generated debit and credit card receipts to contain no more than five digits. It takes no more than the fingers on one hand to determine statutory compliance; the hours that counsel claims to have spent here are entirely unreasonable."

Accordingly, the district court held that the fees motion was "purely speculative" and denied the motion without prejudice. The court also determined that the settlement would be approved but reduced the class representatives' awards and indicated it would only reconsider a fee motion after the redemption period for the vouchers ended.

<u>Zaun v. Al Vento Inc.</u>

Zaun v. Al Vento Inc., 2013 WL 268930 (D. Minn. Jan. 24, 2013), involved putative class action claims arising from the alleged failure of the defendant to redact the expiration date from its receipts under the Fair Credit Reporting Act ("FCRA") and FACTA. No actual damages were alleged and therefore the claimed relief was limited to only statutory awards. After the parties settled, the plaintiff moved for attorneys' fees and costs. The motion was not opposed by the defendant. The district court nonetheless denied, in part, the plaintiff's motion, reducing the total award from the $50,000 sought to just $12,500.

The plaintiff argued that $50,000 was reasonable because there had been "15 months of hard fought litigation" and a "fully briefed motion to dismiss". The district court rejected these arguments, noting that the motion to dismiss was only necessary because counsel failed to amend the complaint to correct a "glaring deficiency" and therefore "any attorney hours expended on the motion to dismiss were due to counsel's own lack of diligence and should not be fully compensated." The district court also disagreed with the plaintiff's characterization that the case was "hard-fought for 15 months", noting that settlement discussions began early, there was no dispute that a FACTA violation occurred, and the matter was fully-settled within eight months.

The district court also rejected the plaintiff's request for hourly attorney rates of $400-$450 and 152 allegedly logged hours because it was "egregiously inflated" given the "simple and straightforward" nature of the case. The district court noted that

the attorneys' billing statements did not reflect minimal work, included double-billing, and inconsistencies, even though the pleadings contained largely "boilerplate language" and were nearly identical to another case brought by the named-plaintiff.

The district court explained that while it did "not criticize the use of previous legal arguments in identically situated memoranda; the problem lies in attempting to recover full attorney time for drafting memoranda that so clearly were not drafted for this case. Counsel's billing practices do not inspire confidence in the remainder of the time billed to this matter." Based on these considerations, the plaintiff's attorney-fee award was significantly cut.

In addition to the attorneys' billing practices, the *Zaun* court cited public policy considerations in reducing the award, concluding that "this case, and cases like this one, do not serve the public interest in any way. They do not address any wrong or make anyone whole, because no consumer has or can suffer any actual damages from this particular violation of the statute. These cases exist only to generate attorneys' fees." The district court therefore ordered a 75% reduction of the amount requested.

Conclusion

These recent decisions illustrate that Minnesota courts are more closely scrutinizing attorney-fee requests to determine if they are "reasonable" under the circumstances. If a particular request is deemed "unreasonable", the court is free to act pursuant to its inherent authority to reduce the award. Attorneys cannot seek refuge in the fact that a motion is unopposed and must use caution to ensure that the amounts requested are adequately supported.

Jessica L. Klander
jklander@bassford.com
Bassford Remele, A Professional Association
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402-3707
(612.333.3000)