4TH CIRCUIT ADOPTS "WHOLE-CASE APPROACH" IN UPHOLDING CAFA REMAND

By Jack Pringle

On October 25, 2012, in *AU Optronics Corporation and LG Display Co. v. State of South Carolina*, the 4th Circuit Court of Appeals considered for the first time the issue of whether a state's lawsuit pursuing claims that may benefit some of its citizens is a "mass action" under the Class Action Fairness Act of 2005 ("CAFA").

BACKGROUND

The State of South Carolina brought separate actions against Defendants AU Optronics and LG Display (citizens of states other than South Carolina) in state court (Richland County) under the S.C. Antitrust Act and the SC Unfair Trade Practices Act (SCUTPA) and alleging a price-fixing conspiracy involving LCD panels. The suits sought civil forfeitures, statutory penalties, and restitution for those South Carolina individuals who had purchased products utilizing these panels.

Defendants removed the actions to the District of South Carolina, alleging that the cases satisfied the "minimal diversity" standards of CAFA as "class actions" and "mass actions," and the "complete diversity" standard of 28 U.S.C. Section 1332. Defendants' theory of removal was that even though the State is the only *named* plaintiff, the "real parties in interest" to the restitution claims are the citizens of South Carolina who purchased LCD panel products. And if these citizens are parties, the cases satisfy both minimal diversity (any plaintiff is a citizen of a State different from any defendant), as well as complete diversity (all plaintiffs are citizens of a State different from all defendants).

District Judge Joseph F. Anderson, Jr. remanded the cases because 1) South Carolina was the only "real party in interest" in these *parens patriae* ("parent of the country") lawsuits wherein the state asserted a quasi-sovereign interest rather than the private interests of South Carolina citizens; and 2) South Carolina is not a "citizen" for purposes of diversity jurisdiction.

The Defendants then petitioned the 4th Circuit Court of Appeals for permission to appeal under CAFA per 28 U.S.C. § 1453(c)(1) — an exception to the general rule in 28 U.S.C. §1447(d) that a district court's remand order is not appealable. The sole issue on appeal was whether the cases qualified as a "mass action" under 28 U.S.C. § 1332(d)(11)(B)(i).

THE COURT'S ANALYSIS

Defendants argued that a "claim-by-claim approach" (followed by the 5th Circuit in *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*) made South Carolina merely a "nominal or formal party only," because the restitution sought by the State under S.C. Ann. Section 39-5-50(b) made the beneficiaries of that relief "real parties in interest." South Carolina and the district court (consistent with the 7th and 9th Circuits) took the "whole-case approach," emphasizing the "interest the state possesses in the lawsuit as a whole," and reasoning that South Carolina "seeks substantial relief that is available to it alone."

In particular, the Plaintiff pled statutory causes of action (S.C. Code § 39-3-180, S.C. Ann. Section 39-5-50, and S.C. Code § 39-5-110) that must be brought by the Attorney General in the name of the state. As a result, the availability of restitution "is incidental to the State's overriding interest and to the substance of these proceedings."

OBSERVATIONS

You may be asking yourself why Defendants appealed only the "mass action" remand determination, and abandoned their contention that the case belonged in federal court as a "class action."

As a general proposition, the prospect of undergoing a Rule 23 class certification process with an unwilling Plaintiff may be too much to wrap one's head around, much less implement. I would be interested to know how that process would proceed. Would the state be required to find a class representative?

Also, the South Carolina Unfair Trade Practices Act prohibits class actions. S.C. Code Ann. § 39-5-140 provides that an injured person may "bring an action individually, but not in a representative capacity". The South Carolina Supreme Court has confirmed that a "class action" is a "representative action" forbidden by this statutory provision. *Dema v. TenetPhysician Services-Hilton Head, Inc.*

A "mass action," however, is at least arguably not a "representative action." *In re DirectTV Early Cancellation Litigation* ("In other words, a class action is a representative action where a named plaintiff or plaintiffs represents a large number of similarly situated people who are not a part of the lawsuit, while a mass action is not representative because every plaintiff is named in the case.")

While South Carolina sued Defendants pursuant to S.C. Code Ann. § 39-5-110 and § 39-5-50 of the SCUTPA, and not S.C. § 39-5-140, the public policy prohibiting class actions in the latter clearly wouldn't have helped the Defendants' arguments that the suits should remain in federal court as "class actions." Characterizing the cases as "mass actions" avoided the ruling in *Dema*.