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CLASS ACTION FAIRNESS ACT

Although the Class Action Fairness Act does not directly address whether a *parens patriae* suit on behalf of a state attorney general belongs in state or federal court, removing such actions to federal court is consistent with CAFA's legislative purpose, expanding jurisdiction over important interstate matters and preventing jurisdictional gaming and forum shopping, say attorneys Michael P. Daly and Andrew P. Reeve in this BNA Insight.

Suing Like a Duck: Attorney General Actions and the Class Action Fairness Act

BY MICHAEL P. DALY AND ANDREW P. REEVE

Ever since the U.S. Supreme Court[1] held that federal law preempts state laws that had invalidated class action waivers in arbitration agreements, plaintiffs have been looking for ways to distinguish their inventory of traditional class actions, for example, by challenging the decision's applicability in state courts, to employment contracts, and to different agreements. But as those issues wend their way through the courts, more expedient efforts may gain favor. Indeed, many have sidestepped the issue altogether by targeting food, clothing, and other inexpensive consumer goods that are sold without arbitration agreements.

Perhaps not content with such a limited scope, others have filed *parens patriae* suits on behalf of attorneys general, the idea being that attorney generals may not be bound by such agreements in their official capacities. Putting aside whether such actions should be unaffected by consumers' arbitration agreements,[2] an important threshold question is whether they belong in state or federal court. Unfortunately, nothing in the Class Action Fairness Act (CAFA)[3] directly speaks to that issue; the one provision that indirectly speaks to it is circular at best; CAFA's legislative history is susceptible to multiple meanings; and the courts have yet to reach a consensus. As we explain below, removing such actions to federal court is more consistent with CAFA's legislative purpose, namely expanding jurisdiction over interstate matters and preventing jurisdictional gaming and forum shopping.

[1] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

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[2] *Cf. Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489 (2011) (finding that *Concepcion* did not require enforcement of waiver of the right to bring representative action under the Private Attorney General Act, which citizens bring "as the proxy or agent of the state").

[3] Pub. L. No. 109-2, 119 Stat. 4 (2005).

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A *Parens Patriae* Primer

The *parens patriae* doctrine allows a sovereign to bring suit as the ''parent of the country,''[4] historically on behalf of children and others who lacked the legal capacity to bring suit on their own behalf.[5] Although the doctrine has been expanded, it is moderated by the requirement that plaintiffs—including states—have standing to file suit. Specifically, states only have standing if they are a real party in interest rather than a nominal party, meaning they are asserting a sovereign or ''quasi-sovereign'' interest separate and apart from those of the residents on whose behalf they filed suit.[6]

''Quasi-sovereign'' interests include the protection of ''the health and well-being—both physical and economic—of its residents in general.''[7] That standard is broad, but is not without limits. One important limit is that the interest be one of residents ''in general'' as opposed to identifiable groups of individuals. Although there is no hard and fast rule, ''one helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.''[8] Despite that limitation, State Attorneys General have begun asserting their ''quasi-sovereign'' interests in all manner of high profile cases against manufacturers—oftentimes out-of-state ones—of cigarettes, automobiles, pharmaceuticals, and other consumer products, arguably displacing carefully calibrated regulatory regimes with their own policy preferences.[9]

CAFA's Language and Legislative History

CAFA was a response to ''abuses of the class action device,'' among them efforts aimed at ''keeping cases of national importance out of Federal court,'' that had ''undermined public respect for our judicial system.''[10] Congress intended to remedy that by ''providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction,''[11] specifically by creating jurisdiction over any qualifying interstate ''class action,'' which it defined as ''any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.''[12] Although defining a ''class action'' as a ''class action'' is less than helpful,[13] CAFA's Senate Report explains that ''lawsuits that resemble a purported class action should be considered class action[s] for the purpose of applying these provisions.''[14]

Do *parens patriae* suits ''resemble'' class actions such that they should be treated as such ''for purposes of applying'' CAFA? The resemblances are hard to ignore: Both are representative in nature; both often involve large amounts of people with small amounts of damage; and neither necessarily requires notice or opt-out rights.[15]

Most Attorneys General thought CAFA could be read as applying to *parens patriae* actions.[16] For their part, so did many in Congress:

> [CAFA] makes it impossible for States to pursue actions against defendants who have caused harm to the State's citizens. State attorneys general often pursue these claims under State consumer protections statutes, antitrust laws, often with the attorney general acting as the class representative for the consumer of the State.
>
> Under this bill, would we want these cases to be thrown into Federal court and severely impede the State's ability to enforce its own laws for its own citizens? That is what will happen. That is what will take place.[17]

In fact, some proposed creating a ''carve-out'' for Attorney General actions. That amendment would have made it clear that ''cases brought by State attorneys general are excluded from the provisions of the class action bill and would not be forced into Federal court.''[18]

CAFA's proponents offered two arguments against that amendment, the first being that it was unnecessary because *parens patriae* actions were substantively different than class actions:

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[4] Black's Law Dictionary at 1114 (6th ed. 1990).

[5] *See Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972).

[6] *See Alfred L. Snapp & Son v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 602, 607 (1982).

[7] *Id.* at 607.

[8] *Id.*

[9] *See, e.g.*, Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 Tul. L. Rev. 1859 (2000); Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 Boston College Law Review 913 (2008).

[10] Pub. L. No. 109-2, 119 Stat. 4, §§ 2(a)(2), 2(a)(4)(A), 2(a)(2)(C) (2005).

[11] *Id.* § 2(b)(2); *see also* S. Rep. No. 109-14, at 43 (2005) (stating that Congress intended to ''expand substantially federal court jurisdiction over class actions.'').

[12] 28 U.S.C. § 1332(d)(1)(B).

[13] *See, e.g.*, *West Virginia ex rel. McGraw v. CVS Pharm., Inc.*, 646 F.3d 169, 174 (4th Cir. 2011) (''the statutory definition is, to some degree, circular. . . .''); *id.* at 179 (Gilman, J., *dissenting*) (''The primary difficulty in this case, as I *see* it, is that CAFA does not actually define a class action.'').

[14] S. Rep. No. 109-14, at 35. Although some courts have ignored CAFA's Senate Report because it was printed after CAFA's enactment, others have noted that it was submitted before CAFA's enactment. *Compare Blockbuster Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006), *with Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1206 n.50 (11th Cir. 2007), *and* 151 Cong. Rec. S978 (daily ed. Feb. 3, 2005).

[15] Some commentators have argued that class actions are inherently different because they require notice and opt out rights, which ignores that classes certified under Rule 23(b)(1) and (b)(2) require neither of those things. *Cf.* Alexander Lemann, Note, *Sheep In Wolves' Clothing: Removing Parens Patriae Suits Under The Class Action Fairness Act*, 111 Colum. L. Rev. 121, 133 (Jan. 2011); Dwight R. Carswell, Comment, *CAFA and Parens Patriae Actions*, 78 U. Chi. L. Rev. 345, 362 (Winter 2011).

[16] 151 Cong. Rec. S1157-02, 1158-59 (daily ed. Feb. 9, 2005) (letter to Sens. Frist and Reid); 151 Cong. Rec. H723-01, 740 (daily ed. Feb. 17, 2005) (letter to Sens. Frist and Reid); S. Rep. No. 109-14, at 80 (statement of Sen. Leahy) (''This class action legislation has also been criticized by nearly all of the state Attorneys General in this country. . . .'').

[17] 151 Cong. Rec. H723-01 at 738 (statement of Rep. Conyers).

[18] *Id.* at 746 (statement of Rep. Conyers); *see also id.* at 741 (statement of Rep. Udall); *id.* at 749 (statement of Rep. Nadler).

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> State attorneys general have authority under the laws of every State in this country to bring enforcement actions to protect their citizens. These suits, known commonly as *parens patriae* cases, are similar to class actions to the extent that the attorney general represents a large group of people.
>
> But let me be perfectly clear that they are not class actions.
>
> There is no certification process, there are no representative class members named in the complaint, and plaintiffs' attorneys who stand to gain millions of dollars in fees. Rather, they are unique lawsuits authorized under State constitutions or State statutes that are brought on behalf of the citizenry of a particular State. . . . As such, [CAFA] in no way affects these lawsuits.[19]

Alternatively, they opposed the amendment because it would have allowed plaintiffs' lawyers to continue litigating in state court so long as they enlisted a state Attorney General as a plaintiff:

> [This amendment] will create a loophole that some enterprising plaintiffs' lawyers will surely manipulate in order to keep their lucrative class action lawsuits in State court . . . .
>
> . . . .
>
> If this legislation enables State attorneys general to keep all class actions in State court, it will not take long for plaintiffs' lawyers to figure out that all they need to do to avoid the impact of [CAFA] is to persuade a State attorney general to simply lend the name of his or her office to a private class action.[20]

CAFA passed without amendment; its plain language neither exempts nor includes Attorney General actions, and its legislative history consists of conflicting floor statements and a Senate Report that is silent on the issue.

To Remove . . .

Surprisingly, only four Courts of Appeals have addressed this issue to date. The Fifth Circuit was the first to do so. In *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*,[21] it found, in a divided opinion, that attorney general actions be removed under CAFA in some instances.

The Courts of Appeals that have addressed this issue more recently, specifically the Fourth Circuit in a divided opinion in *West Virginia ex rel. McGraw v. CVS Pharmacies, Inc.*,[22] the Seventh Circuit in *LG Display Co. v. Madigan*,[23] and the Ninth Circuit in *Washington ex rel. Harris v. Chimei Innolux*,[24] have found the opposite.[25] For the most part, the decisions turn on whether the ''essence'' of class actions and the claims asserted were sufficiently ''similar'' to justify removal.[26]

Courts that have permitted removal of purported *parens patriae* actions have generally focused on whether the state is the sole or primary beneficiary of the requested relief. For example, the Fifth Circuit found that the treble damages requested in *Allstate* would inure entirely to the benefit of the policyholders on whose behalf the case was filed, making the policyholders, not the Attorney General, the real parties in interest. It reasoned that the statutory entitlement to treble damages ''makes clear that individuals have the right to enforce this provision''; that the very purpose of the treble damages provision is ''to encourage private lawsuits by aggrieved individuals''; and that the Attorney General's own complaint ''makes clear that it is seeking to recover damages suffered by *individual policyholders*.''[27]

It acknowledged that the case for remand would have been ''much more compelling'' if the complaint had sought only injunctive relief on behalf of the State, but concluded (albeit implicitly) that the request for treble damages predominated, making the Attorney General at most a nominal party.[28] As for the meaning of the word ''similar'' in CAFA's definition of ''class action,''

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[19] 151 Cong. Rec. S1157-02, 1163-64 (statement of Sen. Hatch); *see also id.* at 1160 (statement of Sen. Specter); *id.* at 1162 (statement of Sen. Cornyn); *id.* at 1163 (statement of Sen. Grassley); 151 Cong. Rec. H723-01, 746 (statement of Rep. Sensenbrenner).

[20] 151 Cong. Rec. S1149 at 1163-64 (statement of Sen. Hatch); *see also id.* at 1161 (statement of Sen. Cornyn) (''[T]his amendment as worded . . . would create a potential loophole big enough to drive a truck through, that could cause substantial mischief that is intended to be prevented by this very bill.''); *id.* (statement of Sen. Specter) (''[T]here would be latitude for the attorney general to deputize private attorneys to bring their class actions and to find an exclusion, which is a pretty broad exclusion, not to use pejorative terms, but a pretty broad loophole.''); *id.* at 1163 (statement of Sen. Grassley) (''We should not risk creating a situation where State attorneys general can be used as pawns so that crafty class action lawyers can avoid the jurisdictional provisions of this bill.''). *But see id.* at 1159 (statement of Sen. Pryor) (''The notion is incorrect and, quite frankly, it is offensive. . . . State attorneys general would not expend the resources or their reputations to take up a class action they did not believe was worthy of protecting their citizens.'').

[21] 536 F.3d 418 (5th Cir. 2008); *see also West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 449 (E.D. Pa. 2010).

[22] 646 F.3d 169 (4th Cir. 2011).

[23] 665 F.3d 768 (7th Cir. 2011).

[24] 659 F.3d 842 (9th Cir. 2011).

[25] District courts in the other circuits have also tended to favor remand. *See, e.g.*, *Kentucky ex rel. Conway v. Purdue Pharma, L.P.*, 821 F. Supp. 2d 591 (S.D.N.Y. 2011) (finding that Kentucky was real party in interest in Medicaid fraud action seeking recovery of state funds); *Kentucky ex rel. Conway v. Daymar Learning, Inc.*, No. 4:11CV-00103-JHM, 2012 BL 68557 (W.D. Ky. Mar. 22, 2012) (holding that request for restitution for consumers did not convert action into class action); *Missouri ex rel. Koster v. Portfolio Recovery Assocs.*, 686 F. Supp. 2d 942 (E.D. Mo. 2010) (concluding that CAFA did not apply because the Attorney General could proceed under the Missouri Merchandising Practices Act without a class being certified); *Hood v. F. Hoffman-Laroche, Ltd.*, 639 F. Supp. 2d 25 (D.D.C. 2009) (finding that consumers were real parties in interest under the Mississippi Antitrust Act, but remanding because diversity was destroyed by Mississippi's presence as a party).

[26] *See, e.g.*, *West Virginia ex rel. McGraw v. CVS Pharm., Inc.*, 646 F.3d at 174 (citation omitted) (''A state statute or rule is 'similar' to Federal Rule of Civil Procedure 23 if it closely resembles Rule 23 or is like Rule 23 in substance or in essentials. . . . While the statutory definition is, to some degree, circular, Congress undoubtedly intended to define 'class actions' in terms of its similarity and close resemblance to Rule 23.'').

[27] *Louisiana ex rel. Caldwell*, 536 F.3d at 429-30 (emphasis in original).

[28] *Id.* at 430. One court has explained that this sort of claim by claim analysis is appropriate because it prevents the blurring of ''the lines between those claims for which a state has a well-recognized interest, and those claims for which a state's interest is negligible.'' *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d at 449.

the court offered little, likely because it found that the case qualified as a ''mass action'' instead.[29]

Judge Gilman's dissenting opinion in *CVS* offered a textual argument in favor of removal.[30] For that he turned to *Black's Law Dictionary*, which defines a ''class action'' as ''a lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group. . . .''[31] Acknowledging that none of the hallmarks of a class action had been pleaded, he dismissed those as ''subsidiary factors that do not detract from the essence of the action,'' in other words, '' 'bells and whistles' whose absence in the pleadings do not prevent the Attorney General's suit from being considered a class action under CAFA.''[32]

Like the Fifth Circuit, Gilman found that claims for damages were the primary claim and that the state's additional claims for injunctive relief (which was discretionary on the part of the court) and civil penalties (which required additional proofs on the part of the state) were subsidiary claims that did not change the fact that the case was, in essence, a disguised class action. He reasoned that, ''if something looks like a duck, walks like a duck, and quacks like a duck, it is probably a duck. To my mind this case 'quacks' much more like a CAFA class action than a *parens patriae* case.''[33]

. . . Or Not to Remove

Recent decisions have rejected Judge Gilman's textual analysis. They have reasoned that the term ''class action'' cannot have been intended to sweep in all representative actions, but instead extends only to representative actions that have the traditional hallmarks of a class action, that is, representation by a member of the class, satisfaction (or at least attempted satisfaction) of the prerequisites for certification of the class, and notice to the class.[34] In these courts' views, it is those hallmarks that are the ''essence'' of a class action.

For example, the Seventh Circuit denied a petition for permission to appeal in *Madigan*, finding that the action was not a ''class action,'' and that CAFA only extended appellate jurisdiction to appeals from orders remanding a ''class action.'' It explained:

> A class action must be brought by a 'representative person.' This case was brought by the Attorney General, not by a representative of a class. A class action must be brought *as a class action*. This case was brought as a *parens patriae* suit under the [Illinois Antitrust Act], which does not impose any of the familiar Rule 23 constraints. The IAA does not impose, for example, requirements for adequacy, numerosity, commonality, or typicality. . . . So, this case is not a class action.[35]

The court acknowledged that the damages claim did not inure to the Attorney General's benefit, but found that it must review the complaint ''as a whole'' rather than on a ''claim by claim'' basis as the Fifth Circuit had done.[36] It did not, however, articulate an analytical framework for deciding which claims predominated. Nor, for that matter, has any appellate court.

Conclusion

Neither the Seventh Circuit's ''wholesale'' approach nor the Fifth Circuit's ''claim by claim'' approach is perfect; whereas the former seemingly allows plaintiffs to avoid removal whenever there is a claim for equitable relief, the latter seemingly allows defendants to employ removal whenever there is a claim for compensatory relief.[37]

While the latter approach is more consistent with CAFA's legislative purpose, it may be that there is a way to identify disguised class actions without also encouraging jurisdictional gaming. On way would be to import the predominance test in determining whether to certify a class under Rule 23(b)(2), reserved for claims that are predominantly equitable in nature, or (b)(3), reserved for claims that are predominantly compensatory in nature.[38] Such an approach would make sense in light of the striking similarities between (b)(2) actions and traditional *parens patriae* actions, most notably the fact that both seek ''broad declaratory or injunctive relief'' on behalf of an often ''amorphous class of persons,''[39] and that both can be prosecuted without giving notice to the represented parties or allowing them to opt out. It would also give courts the flexibility they need to identify and prevent jurisdictional gaming and, by drawing on an existing body of law, would do so with-

[29] *Louisiana ex rel. Caldwell*, 536 F.3d at 430.

[30] *West Virginia ex rel. McGraw*, 646 F.3d at 179 (Gilman, J., *dissenting*).

[31] *Id.* (Gilman, J., *dissenting*) (citing *Black's Law Dictionary* 284 (9th ed. 2009)).

[32] *Id.* at (Gilman, J., *dissenting*).

[33] *Id.* at 185 (Gilman, J., *dissenting*).

[34] *See, e.g.*, *Washington ex rel. Harris v. Chimei Innolux*, 659 F.3d at 848-49 (''[C]lass actions are always representative actions, but representative actions are not necessarily class actions. . . . Had Congress intended CAFA to apply to any representative actions demonstrating sufficient similarity to class actions under Rule 23, it would not have also included an explicit requirement that the suit be brought 'as a class action.' '').

[35] *LG Display Co.*, 665 F.3d at 772 (emphasis in original); *see also Washington ex rel. Harris v. Chimei Innolux*, 659 F.3d at 848-50 (''None of the state statutes contain the typical class action requirements of showing numerosity, commonality, typicality, or adequacy of representation. . . . Even under an expansive definition, CAFA would not cover *parens patriae* suits. . . . *Parens patriae* suits lack the defining attributes of true class actions.''); *West Virginia ex rel. McGraw v. CVS Pharm., Inc.*, 646 F.3d at 174-76 (''At its essence, Rule 23'' requires that ''the criteria for numerosity, commonality, typicality, and adequacy of representation are satisfied. . . . A class action is an action filed by an individual *as a member of a class* and whose claim is typical of the class members' claims. . . . [I]n representing the citizens, the State acts more in the capacity of [a] trustee representing beneficiaries or a lawyer representing clients. . . .'') (emphasis in original).

[36] *LG Display Co.*, 665 F.3d at 773.

[37] *See*, Lemann, *supra*, at 140 (noting that courts have ''fail[ed] to articulate a test that performs any meaningful line-drawing'').

[38] *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 131 S. Ct. 2541, 2557-61 (2011) (''[C]laims for monetary relief'' may not be certified where ''the monetary relief is not incidental to the injunctive or declaratory relief,'' for example ''when each class member would be entitled to an individualized award of monetary damages.''); *see also* Fed. R. Civ. P. 23(b)(2), Advisory Committee Note (noting that (b)(2) ''does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.'').

[39] *See Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142 (3d Cir. 1998).

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out sacrificing all of the predictability of the bright-line rules that have been applied to date.

For the time being, though, the appellate decisions on this issue are conflicting and often divided. In the absence of controlling authority, and any indication that Congress or the Supreme Court intends to clarify CAFA's scope, defendants would be well advised to consult qualified counsel about removing actions in which the Attorney General is arguably a nominal party and pursuing their position on appeal if necessary.