CLIENT UPDATE

HANDLING STATE AG *PARENS PATRIAE* ACTIONS AFTER THE SUPREME COURT'S REJECTION OF FEDERAL COURT REMOVAL

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The Supreme Court ruled unanimously last week, in *Mississippi v. AU Optronics Corp.*, No. 12-1036 (2014), that state attorney general lawsuits seeking restitution for damaged consumers cannot be removed to federal court as "mass actions" under the Class Action Fairness Act ("CAFA"). This decision is likely to encourage more of these "*parens patriae*" quasi-class actions, and even companies that think they stopped the class action train with mandatory arbitration agreements may see the same kinds of claims asserted by state AGs on their residents' behalf. With federal removal unavailable, companies must find alternate ways to manage these cases.

Federal courts may still have a role to play. A federal judge evaluating a class action settlement has the power to order parallel state *parens patriae* actions stayed during the approval process, and then to release those claims, even over the AG's objections, if they approve the settlement. *AU Optronics* did not disturb precedent for this. Thus, while a defendant ideally would negotiate a global settlement with all claimants at the same table, if that proves not to be feasible, the defendant may be able to settle directly with a state AG's constituents as putative class members in a federal case and thereby end the AG's ability to prosecute a separate *parens patriae* action in state court. Even defendants that could compel private cases into arbitration may wish to keep this option in mind.

AU Optronics held that when a state AG sues on behalf of state residents, even though those residents are the real parties in interest

because money is being sought for their personal benefit, those residents do not count toward CAFA's "mass action" requirement that an action is removable to federal court only if claims of "100 or more persons" are proposed for a joint trial. The Supreme Court thus determined that in a *parens patriae* price-fixing case brought by Mississippi's AG against liquid crystal display makers, the AG was the only "person" bringing the case, and it had to be remanded. The upshot is that companies may more often face both class actions in federal court and unremovable state AG lawsuits in state courts, asserting similar claims on behalf of overlapping classes (or quasi-classes).

Should this occur, a class action settlement in federal court can end the state AG actions, too. In *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985), a group of broker-dealers proposed to settle federal claims brought by deferred annuity holders. When the parties to the class action moved the federal court to preliminarily approve the settlement, the defendants also asked the court to enjoin several state AGs from prosecuting *parens patriae* actions against them in state court. The judge granted the injunction, and the Second Circuit affirmed, holding that under the All-Writs Act, 28 U.S.C. § 1651, a federal court can enjoin *parens patriae* suits, although only when that court is considering a class action settlement, not while the two cases are being actively *litigated* in parallel. The state AG could raise any objections to the settlement before the federal court, but if that court approves the settlement and the approval is upheld on appeal, there would be no further basis for a *parens patriae* suit.

The Second Circuit has reaffirmed the core holding of *Baldwin-United* repeatedly, most recently in *United States v. Schurkman*, 728 F.3d 129 (2d Cir. 2013). Courts in other federal circuits, expressly relying on *Baldwin-United*, have blocked state proceedings in arguably analogous circumstances.

The power of federal courts to enjoin state *parens patriae* proceedings is not necessarily a reason for a defendant to consider settlement of claims it considers meritless and prefers to defend, even on multiple fronts. Defendants seeking to enforce arbitration clauses, moreover, may not want to let a federal class action proceed for any reason, even if it could be used as a vehicle to resolve multifaceted problems more efficiently. Defendants should be aware of *Baldwin-United*, however, and consider employing it in appropriate circumstances.

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Please do not hesitate to call us with any questions.

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