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THE SUPREME COURT, CAFA, AND *PARENS PATRIAE* ACTIONS: WILL IT BE PRINCIPLES OR BIASES?*

DONALD G. GIFFORD** AND WILLIAM L. REYNOLDS***

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INTRODUCTION

The Supreme Court’s decision to grant certiorari in *Mississippi ex rel. Hood v. AU Optronics Corp.*¹ provides a unique opportunity to test whether the individual Justices will follow their previously articulated principles of statutory interpretation or instead will ignore these principles in order to reach a result reflecting their respective pro-business or pro-consumer biases. The issue before the Court in *Hood* is whether the defendant manufacturers can remove a *parens patriae* action² alleging price-fixing

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1. 701 F.3d 796 (5th Cir. 2012), *cert. granted*, 133 S. Ct. 2736 (2013).

2. *Parens patriae*, a Latin phrase, is roughly translated as “parent of the country.” Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592, 600 (1982). It now describes a type of standing given to a state government to sue to protect the health and welfare of its citizens. *Id.* at 607; *see also infra* notes 11–12 and accompanying text.

brought by the State of Mississippi to federal court on diversity grounds under the provisions of the Class Action Fairness Act (“CAFA”).³

On one hand, Justices Scalia and Thomas are consistent proponents of a textualist or plain meaning approach to statutory interpretation.⁴ Usually their fellow conservatives on the Court, Chief Justice Roberts and Justices Alito and Kennedy, follow their lead on issues of statutory interpretation.⁵ At the same time, these five Justices all rank within the ten most pro-business Justices (among thirty-six ranked Justices) since 1946, with Justice Alito ranking as the most pro-business Justice and Chief Justice Roberts coming in second.⁶ On the other hand, Justice Breyer is the strongest proponent now on the Court of a competing approach to statutory interpretation known here as the “purposive” approach,⁷ a method of interpretation that focuses on the purpose the legislature sought to achieve when it passed the law.⁸ Justice Breyer, along with Justices Ginsburg and Sotomayor, are also the Justices most likely to rule against corporations and in favor of plaintiffs such as consumers or employees.⁹

So here lies the rub. An honest and logical application of textualism in *Hood* by Justice Scalia and his conservative colleagues will lead to a pro-consumer outcome. On the other hand, a genuine application of the purposive approach by Justice Breyer will probably lead to a pro-business and anti-consumer outcome, although the outcome here is somewhat less predictable than it is for the conservatives.¹⁰ So for both the conservatives and the more progressive members of the Court, which shall it be? A

3. *Hood*, 701 F.3d 796; see 28 U.S.C. § 1332(d) (2006) (providing the requirements for a class action lawsuit and how the case can be removed). CAFA permits removal of a defined “class action” to federal court; it also permits removal of a defined “mass action” to federal court even if the latter is not a “class action.” *Hood*, 701 F. 3d at 799. Congress adopted CAFA in large part due to a fear that state courts had become too friendly to plaintiffs in mass tort actions. See Willy E. Rice, *Allegedly “Biased,” “Intimidating,” and “Incompetent” State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly “Impartial” and “Competent” Federal Courts*, 3 WM. & MARY BUS. L. REV. 419, 427 (2012).

4. Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court’s First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 250–51 tbl.2 (2010).

5. See *id.*

6. Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1450–51 tbl.7 (2013).

7. See *infra* notes 47–48 and accompanying text. See also Krishnakumar, *supra* note 4, at 250–51 tbl.2.

8. Or to borrow the terminology used more than four centuries ago in Heydon’s Case, 76 Eng. Rep. 637 (1584), what was the “mischief” that the legislation sought to cure?

9. All three rank in the bottom half of the Justices ranked in the review by Epstein and his colleagues. See Epstein et. al., *supra* note 6. Justice Kagan was not ranked by the authors because of the small number of business cases decided since her recent addition to the Court.

10. A major reason why CAFA was adopted was to get mass actions out of state court. See Rice, *supra* note 3.

principled application of their preferred approach to statutory interpretation? Or a result consistent with their ideological preferences?

This Article first examines the increasing importance of *parens patriae* litigation and its relation to class actions. Next, it discusses the *Hood* decision along with conflicting decisions in other circuits. The Article then examines the competing methods of statutory interpretation, purposive and textualist, before concluding with an analysis of CAFA and the facts of *Hood* under each approach.

I. THE BURGEONING IMPORTANCE OF *PARENS PATRIAE* STANDING

Courts have long recognized the standing of a state as *parens patriae* to sue for harms to its “quasi-sovereign” interest “in the well-being of its populace.”¹¹ A state has the right to sue and protect such interests so long as the state itself is more than a nominal party and is able to articulate “an interest apart from the interests of particular private parties.”¹²

At least since the mid-1990s, plaintiffs’ attorneys in mass actions involving many plaintiffs have sought to use *parens patriae* lawsuits—actions which are both more exotic and less well understood than more traditional forms of mass actions, such as class actions—as a convenient way to circumvent inconvenient requirements of the law, requirements which would make mass litigation more demanding and often impossible. The pending Supreme Court case presents one example of such an issue. A *parens patriae* action is filed by the state attorney general, but often with the assistance of private plaintiffs’ counsel specializing in mass tort actions.¹³ *Parens patriae* actions, like class actions, seek recovery for aggregated individual harms in a collective action. Will the use of *parens patriae* standing by mass plaintiffs’ attorneys, in cooperation with the state attorney general, enable them to avoid the removal provisions of CAFA? Another example occurs when mass torts attorneys couple the state’s standing as *parens patriae* with substantive claims, such as public nuisance, that regard the harm as a collective one in order to circumvent the traditional tort causation requirement that the plaintiff prove that her harm is caused by a particular defendant.¹⁴

11. Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592, 602 (1982).

12. *Id.* at 607.

13. See Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 964–65 (2008) [hereinafter *Impersonating the Legislature*] (describing typical collaboration between state attorneys general and private counsel).

14. See DONALD G. GIFFORD, *SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES* 5 (2010) (describing tobacco and childhood lead poisoning as examples). For instance, consider Rhode Island’s lawsuit against lead pigment manufacturers seeking the costs of abating a public nuisance consisting of the presence of lead-based paint on the walls of hundreds of thousands of

Because of the role now played by *parens patriae* litigation in circumventing the obstacles to class actions—the more traditional form of mass actions—it should come as no surprise that mass litigation plaintiffs’ attorneys often partner with state attorneys general in initiating and trying *parens patriae* litigation.¹⁵ Plaintiffs’ attorneys heavily lobby state attorneys general to file these actions, both in the several state capitals and at nationwide gatherings of attorneys general.¹⁶ In the current round of federal cases in which states claim that CAFA does not apply to *parens patriae* actions, private plaintiffs’ firms, usually with extensive mass litigation experience, generally act as co-counsel with the attorney general.¹⁷

II. HOOD V. AU OPTRONICS: THE CASE BELOW

In *Hood*, the Mississippi Attorney General sued manufacturers and distributors of LCD panels, asserting they had engaged in price-fixing.¹⁸ The lawsuit alleged violations of two state statutes and requested various remedies including injunctive relief, statutory civil penalties, and restitution for the harms suffered by state residents. The defendants removed the action to federal court under CAFA on the grounds that the state’s action was either a “class action” or a “mass action” as defined by the statute. However, the federal district court remanded the case to state court, finding that the action was a state *parens patriae* action, designed to protect the state’s “quasi-sovereign interest” in its economy and its citizens’ economic well-being, and that the suit was neither a “class action” nor a “mass

houses throughout the state that cause childhood lead poisoning. *See* *State v. Lead Indus. Ass’n*, 951 A.2d 428 (R.I. 2008) (holding that public nuisance claims do not afford a cause of action against lead pigment manufacturers). Because of the fungible nature of lead pigment, individual homeowners would be unsuccessful if they sued the manufacturers, because each one would be unable to identify the specific manufacturer that produced the pigment covering the walls of her particular house. *See* GIFFORD, *supra*, at 124. However, in *Lead Industrial Ass’n*, the state sued to collect the costs of abating the lead-based paint hazards in all older houses containing lead pigment throughout the state. The lawsuit, combining the state’s standing as *parens patriae* with the collective tort of nuisance, unsuccessfully sought to circumvent the requirement of an individualized causal connection between tortfeasor and victim. The Rhode Island Supreme Court reversed the trial court’s judgment in favor of the state and held that the requirements of public nuisance had not been established, thereby preventing the state’s attempt to use its standing as *parens patriae* to get around the inability to prove causation. *See* *Lead Indus. Ass’n*, 951 A.2d at 452–53.

15. GIFFORD, *supra* note 14, at 210–13.

16. *See* Gifford, *Impersonating the Legislature*, *supra* note 13, at 964–65, 967.

17. *See, e.g.*, *AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 385 (4th Cir. 2012) (listing the Attorney General of South Carolina and private attorneys as co-counsel).

18. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 797 (5th Cir. 2012).

action.”¹⁹ The Court of Appeals for the Fifth Circuit reversed and remanded the case back to the federal district court.²⁰

Whether *parens patriae* actions may be heard in the federal courts turns on the interpretation of several provisions of CAFA. First, do such actions qualify as either “class actions” or “mass actions”? The Fifth Circuit “quickly” agreed with all other circuits that *parens patriae* actions are not class actions.²¹ CAFA defines a class action as “any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or a similar State statute or rule of judicial procedure authorizing an action to be brought by [one] or more representative persons as a class action.”²² The court noted that the state did not bring the lawsuit as a class action and, in fact, Mississippi law “explicitly prohibits class actions” both generally,²³ and specifically in the context of the Mississippi Consumer Protection Act. Violations of the latter constituted one of the Attorney General’s claims.²⁴

The Fifth Circuit stated that the more difficult question was whether the state action constituted a “mass action,”²⁵ defined by CAFA as “any civil action” involving the “claims of 100 or more persons” that are to be tried jointly.²⁶ The Fifth Circuit held that the *parens patriae* action was a mass action because the state sought to recover for both general harm on behalf of the state and individual harms suffered by its residents; therefore, both the state and its residents (more than 100 of whom were plaintiffs) were real parties in interest.²⁷

The Fifth Circuit’s holding in *Hood* conflicts with the holding of every other federal circuit court of appeals that has addressed the issue.²⁸ The

19. Mississippi *ex rel.* Hood v. AU Optronics Corp., 876 F. Supp. 2d 758, 774–75 (S.D. Miss. 2012).

20. *Hood*, 701 F.3d at 803.

21. *Id.* at 799; *See, e.g.*, AU Optronics Corp. v. South Carolina, 699 F.3d 385, 394 (4th Cir. 2012) (holding that South Carolina is the “real party in interest” and CAFA’s diversity requirement is not met); LG Display Co., Ltd. v. Madigan, 665 F.3d 768, 774 (7th Cir. 2011) (holding that a *parens patriae* claim “is not a class action or mass action under CAFA”); Washington v. Chimei Innolux Corp., 659 F.3d 842, 847 (9th Cir. 2011) (“[*P*]arens patriae suits filed by state Attorneys General may not be removed to federal court because the suits are not ‘class actions’ within the plain meaning of CAFA.”).

22. 28 U.S.C. § 1332(d)(1)(B) (2006).

23. *Hood*, 701 F.3d at 799 (citing *Am. Bankers Ins. Co. of Fla. v. Booth*, 830 So. 2d 1205, 1214 (Miss. 2002)).

24. *Id.* (citing Miss. Code Ann. § 75-24-15(4) (2009)).

25. *Id.*

26. 28 U.S.C. § 1332(d)(11)(B)(i).

27. *Hood*, 701 F.3d at 801.

28. *See, e.g.*, Nevada v. Bank of America, 672 F.3d 661, 672 (9th Cir. 2012) (finding that a *parens patriae* suit is not a “mass action” under CAFA); AU Optronics Corp. v. South Carolina, 699 F.3d 385, 394 (4th Cir. 2012) (holding that a *parens patriae* suit is not removable as either a “class action” or a “mass action” under CAFA); LG Display Co., Ltd. v. Madigan, 665 F.3d 768,

Fourth Circuit, for example, in an action against many of the same defendants as those in *Hood*, reasoned,

The State, in these *parens patriae* actions, is enforcing its own statutes in seeking to protect its citizens against price-fixing conspiracies. 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. Those citizens are not named plaintiffs here, and they need not be considered in the diversity analysis of the State's claims.²⁹

The Fourth Circuit held, therefore, that "a claim for restitution, when tacked onto other claims being properly pursued by the State, alters neither the State's quasi-sovereign interest in enforcing its own laws nor the nature and effect of the proceedings."³⁰

The Fifth Circuit rejected that position, however. In the concluding section of its *Hood* opinion, the Fifth Circuit perhaps more openly revealed what lay behind its holding:

At its core, this case practically can be characterized as a kind of class action in which the State of Mississippi is the class representative. By proceeding the way it has, the plaintiff class and its attorneys seek to avoid the rigors associated with class actions (and avoid removal to federal court).³¹

In other words, although the court admitted that it cannot fit the state's *parens patriae* action within the "plain meaning" of the words "class action," the court was nonetheless confident that *parens patriae* actions should be removable under the statute. Interpreting "mass action" to include *parens patriae* actions, after all, furthered the purposes of CAFA by encompassing novel forms of litigation that seem designed to circumvent its provisions.

Finally, the Fifth Circuit construed CAFA's "general public" exception to lawsuits otherwise qualifying as "mass actions."³² The exception provides that a suit is not a "mass action" and therefore not removable, if "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such

772 (7th Cir. 2011) (holding same); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011) (holding that a *parens patriae* suit is not a "class action").

29. *AU Optronics Corp.*, 699 F.3d at 394.

30. *Id.*

31. *Hood*, 701 F.3d at 803.

32. *Id.* at 802.

action.”³³ Because the court construed the possibility of restitution to harmed consumers within the state as “claims” for these ultimate beneficiaries, it concluded that “there is no way that ‘all of the claims’ are ‘asserted on behalf of the general public.’ ”³⁴

III. COMPETING APPROACHES TO STATUTORY INTERPRETATION

When the Supreme Court considers the statutory interpretation problem posed by *Hood*, each Justice will employ one of two contrasting approaches to statutory interpretation: either “textualism” (often referred to as the “plain meaning rule”) or the “purposive” approach. Under a textualist approach, the meaning of a statute can be revealed through a simple examination of the statutory language itself.³⁵ Textualism is most often associated with the more conservative Justices. As Judge Posner noted extrajudicially,

It is not an accident that most “loose constructionists” are political liberals and most “strict constructionists” are political conservatives. The former think that modern legislation does not go far enough, the latter that it goes too far. Each school has developed interpretive techniques appropriate to its political ends.³⁶

In contrast, Justice Breyer and other more liberal Justices often seek to interpret the statutory text in a manner consistent with the purpose of the legislation.³⁷ To uncover Congressional goals in passing the legislation, liberal Justices look beyond the text to legislative history.³⁸

A. Textualism

In their recent book, *Reading Law: The Interpretation of Legal Texts*, Justice Scalia and his co-author Bryan Garner endorse a variant of textualism that they call “fair reading,” which emphasizes “determining the application of a governing text to given facts on the basis of how a reasonable reader . . . would have understood the text at the time it was

33. 28 U.S.C. § 1332(d)(11)(B)(ii)(III) (2006).

34. *Hood*, 701 F.3d at 802 (quoting 28 U.S.C. § 1332(d)(11)(B)(ii)(III)).

35. See 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:1 (7th ed. 2007).

36. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 822 (1983).

37. Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161, 169 (1996).

38. See, e.g., James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 120 & n.6 (2008); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1659 (2010).

issued.”³⁹ They flatly assert that it is a “false notion that the spirit of the statute should prevail over its letter.”⁴⁰ They admit that the “purpose of the text” is relevant to the interpretative enterprise but argue that purpose must be gleaned from the text itself and “not from extrinsic sources such as legislative history or an assumption about the legal drafter’s desires.”⁴¹

Textualists claim that their approach furthers the democratic process. Unlike legislative history, which is *not* law, the statutory text becomes law through the proper constitutional processes. According to textualists, therefore, the only instrument entitled to constitutional deference is the actual statutory language. The text, according to Justice Scalia, is the only *true* unified voice of Congress because

[c]ommittee reports, floor speeches, and even colloquies between Congressmen are frail substitutes for bicameral vote upon the text of a law and its presentment to the President. It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions.⁴²

Finally, textualists assert that the use of legislative history promotes unbridled judicial subjectivity.⁴³ As law and economics scholar Judge Easterbrook once warned, the expansive legislative record allows a “court [to] manipulate the meaning of a law by choosing which snippets to emphasize”⁴⁴

Consistent with this textualist approach, one of the canons of construction endorsed by Justice Scalia is that “[n]othing is to be added to what the text states or *reasonably* implies (*casus omissus pro omisso habendus est*).”⁴⁵ The judge is not to fill in gaps or speculate as to what the legislature would have wanted or what it would have done if it had thought about the issue requiring the interpretation of the statute.⁴⁶

39. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 33 (2012).

40. *Id.* at 343.

41. *Id.* at 56.

42. *Thompson v. Thompson*, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring) (citation omitted).

43. See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1885 (1998).

44. *Matter of Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989). Perhaps the most notorious use of textualism in recent years is Justice Scalia’s opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which he used extended textual analysis, including contemporary usages, to hold a law unconstitutional. Before the recent revival of textualism, perhaps its most famous use was Justice Black’s dissenting opinion in *Katz v. United States*, 389 U.S. 347, 364–74 (1967) (using textual analysis to argue that the Fourth Amendment does not protect against wiretapping because the Framers were only concerned with “tangible” searches and seizures).

45. SCALIA & GARNER, *supra* note 39, at 93 (emphasis added).

46. *Id.* at 95, 349.

B. *The Purposive Approach*

On the opposite side of the interpretive spectrum are the liberal Justices, led by Justice Breyer, who advocate an approach to statutory interpretation that focuses on the legislature's purpose in adopting the legislation. In 1992, while serving as the Chief Judge of the Court of Appeals for the First Circuit, Justice Breyer published his well-known law review article entitled *On the Uses of Legislative History in Interpreting Statutes*,⁴⁷ in which he promoted the use of legislative history as an aid to uncovering congressional purpose. Justice Breyer asserted that “[a] court often needs to know the purpose a particular statutory word or phrase serves within the broader context of a statutory scheme in order to decide properly whether a particular circumstance falls within the scope of that word or phrase.”⁴⁸ Thus, Breyer and the other purposivists consider extrinsic sources useful in ascertaining legislative purpose, a key consideration to them when interpreting a statute.

IV. INTERPRETING THE CLASS ACTION FAIRNESS ACT

Hood lays out the basic analysis under CAFA which permits removal of either a “class action” or a “mass action” to federal court. In addition, as stated previously, a “mass action” cannot be removed under CAFA if it falls within the “general public exception.” This Part explores those terms in the context of the facts of *Hood*. It does so by looking at the problem from both a textualist and purposivist approach.

A. *Textual Analysis*

1. “Class Action”

Each of the federal courts of appeals that has considered whether a *parens patriae* action qualifies for removal to the federal courts because it is a “class action” has agreed that it does not qualify.⁴⁹ Most of these courts explicitly used the plain meaning rule to reach this result.⁵⁰ For example, in *Purdue Pharma, L.P. v. Kentucky*,⁵¹ the Second Circuit concluded that a “*parens patriae* action is not a ‘class action’ within the plain meaning of CAFA,” thus ending the inquiry.⁵² The court noted that the statutes under which the attorney general proceeded neither authorized suit “as a class

47. 65 S. CAL. L. REV. 845 (1992).

48. *Id.* at 853.

49. *See supra* note 21.

50. *See id.*

51. 704 F.3d 208 (2d Cir. 2013).

52. *Id.* at 220.

action” nor shared “any of the familiar hallmarks of Rule 23 class actions.”⁵³ The court quoted from an earlier federal district court opinion:

Congress chose to define ‘class action’ not in terms of joinder of individual claims or by representative relief in general, but in terms of the statute or rule the case is filed under If this is a formalistic outcome, it is a formalism dictated by Congress.⁵⁴

As previously mentioned, even the Fifth Circuit in *Hood* held that a *parens patriae* action does not satisfy CAFA’s definition of a class action, and in doing so, it relied largely on a textual analysis.⁵⁵

2. “Mass Action”

The various federal courts of appeals also purport to use a textual approach in interpreting the CAFA provision defining “mass action.”⁵⁶ However, while the other courts interpreting the provision concluded that a *parens patriae* action is not a “mass action,”⁵⁷ the Fifth Circuit reached the opposite result in *Hood*.⁵⁸ Apparently the “plain meaning” lies in the eyes of the beholder.

If an action qualifies as a “mass action,” it can be removed to the federal courts provided that the other requirements of CAFA are met.⁵⁹ The issue then becomes whether a *parens patriae* action that requests restitution for members of the general public, along with other remedies, satisfies the first portion of the definition of a “mass action” as “any civil action . . . in which monetary relief claims of 100 or more persons” are involved.⁶⁰ In other words, does such a *parens patriae* action comprise a single claim on behalf of the state, or many claims, including the claims of state residents on whose behalf the state seeks restitution?

Most courts understand this dispute as a choice between viewing the *parens patriae* litigation under a “claim-by-claim” approach or under a “whole-case” approach. Under the former approach, each consumer whose losses underlie the state’s action seeking restitution is seen as a real party in

53. *Id.* at 216.

54. *Id.* (quoting *In re Vioxx Prods. Liab. Litig.*, 843 F. Supp. 2d 654, 664 (E.D. La. 2012)).

55. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 799 (5th Cir. 2012). The court stated that whether the *parens patriae* action qualified as a class action “can be answered quickly in the negative,” because the state did not file the action under Rule 23 of the Rules of Civil Procedure or a similar procedural rule. *Id.* Further, reported the court, “Mississippi state law explicitly prohibits class actions” *Id.*

56. *See, e.g.*, *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 773 (7th Cir. 2011).

57. *See, e.g., id.* at 772; *Nevada v. Bank of America*, 672 F.3d 661, 672 (9th Cir. 2012), *AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 391 (4th Cir. 2012).

58. *Hood*, 701 F.3d at 802.

59. 28 U.S.C. § 1332(d)(11)(A) (2006).

60. *Id.* § 1332(d)(11)(B)(i).

interest and therefore possesses a separate “claim.”⁶¹ Under the “whole-case” approach, the complaint is viewed in its entirety and the claim belongs only to the state.⁶²

Regardless of whether the courts of appeals other than the Fifth Circuit have followed a “claim-by-claim” or a “whole-case” approach, they have employed an essentially textual analysis when interpreting the “mass action” provision. The Fourth Circuit’s opinion in *AU Optronics Corp. v. South Carolina*⁶³ provides an example of the “whole-case” approach:

South Carolina is the real party in interest, a fact that is unencumbered by the restitution claims. . . . [A] claim for restitution, when tacked onto other claims being properly pursued by the State, alters neither the State’s quasi-sovereign interest in enforcing its own laws, nor the nature and effect of the proceedings. . . . Those citizens are not named plaintiffs here, and they need not be considered in the diversity analysis of the State’s claims.⁶⁴

In *Nevada v. Bank of America Corp.*,⁶⁵ the Ninth Circuit reached a similar result by categorizing the restitutionary payments to the state’s citizens as “fundamentally law enforcement actions designed to protect the public.”⁶⁶

The whole-case approach appears to be correct under textualism. Justice Scalia and Garner admonish courts to give statutory words their ordinary meaning⁶⁷ and advise that dictionaries be used in interpreting language.⁶⁸ *Black’s Law Dictionary* defines a claim as “[t]he assertion of an existing right”⁶⁹ It is the state, acting through its attorney general, that asserts its rights in a *parens patriae* action. Injured consumers ultimately may benefit, but they never assert claims.

Furthermore, what does the “general public” exception to the “mass action” definition suggest about interpreting “mass action”? In *LG Display Co., Ltd. v. Madigan*,⁷⁰ the Seventh Circuit held that a *parens patriae*

61. See *AU Optronics*, 699 F.3d at 392 (discussing the “claim-by-claim” approach used in *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 429–30 (5th Cir. 2008)).

62. See, e.g., *AU Optronics*, 699 F.3d at 392 (discussing the “whole-case” approach used in *Bank of America*, 672 F.3d at 670).

63. *Id.*

64. *Id.* at 394; see, e.g., *Bank of America*, 672 F.3d at 672; *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 772 (7th Cir. 2011).

65. 672 F.3d 661 (9th Cir. 2012).

66. *Id.* at 671 (citation omitted).

67. SCALIA & GARNER, *supra* note 39, at 69.

68. *Id.* at 70.

69. BLACK’S LAW DICTIONARY 281 (Bryan A. Garner ed.) (9th ed. 2009); see also BALLENTINE’S LAW DICTIONARY (William S. Anderson ed.) (3d ed. 1969) (defining “claim” as “a demand for money . . . ; the assertion of a demand . . .”).

70. 665 F.3d 768 (7th Cir. 2011).

action presents a *single* claim on behalf of the state.⁷¹ The court reasoned that the “general public” exception buttressed its conclusion because that provision provides that the case does not qualify as a mass action if all the attorney general’s claims are asserted on behalf of the general public. To the court, this was a straightforward application of the “plain language of that provision.”⁷²

In contrast, both the majority and concurring opinions in *Hood* twisted themselves into knots applying the general public exception in very different ways to the mass action definition. The *Hood* majority began its reasoning by positing that a court errs when it takes a “whole-case” approach and determines that “the case is not a mass action because the State is the sole party in interest.”⁷³ Under this approach, continued the majority, the general public exception necessarily applies to all mass actions.⁷⁴ However, the court then cited the textualist “surplusage canon” for the proposition that statutes presumptively are to be construed in a way that gives effect to each provision and does not render it mere surplusage.⁷⁵ The majority argued that if a *parens patriae* action does not qualify as a “mass action” the general public exception would have no effect.⁷⁶ Therefore, the court concluded that the only way to avoid this undesirable result is to view *parens patriae* actions from a “claim-by-claim” approach and to hold that they *do* qualify in the first instance as mass actions, thus giving effect to the “general public” exception.⁷⁷ However, the majority then ultimately decided that the general public exception did not apply in *Hood* because under its “claim-by-claim” approach there were more than one-hundred individual claims, and the requirement that all of the claims be asserted on behalf of the general public was not met.⁷⁸

What the court obviously missed in its application of the surplusage canon is that not all “mass actions” are ones involving the state as *parens patriae*. The term “mass action” typically refers to the consolidation of numerous claims brought by private parties or sometimes claims filed by both the attorney general and private parties.⁷⁹ Most often in such mass actions, the “general public” exception would not apply. However, it would

71. *Id.* at 772.

72. *Id.*

73. Mississippi *ex rel.* Hood v. AU Optronics Corp., 701 F.3d 796, 802 n.1 (5th Cir. 2012).

74. *Id.*

75. *Id.* at 802 (citing SCALIA & GARNER, *supra* note 39, at 174).

76. *Id.* at 802.

77. *Id.*

78. *Id.* at 802–03.

79. See H.R. REP. NO. 108-144, at 93–94 (2003) (reporting CAFA legislative history describing mass joinder proceedings in Mississippi and West Virginia state courts that consolidated as many as 8,000 individual actions on behalf of private parties).

apply in a few instances. Examples include situations when all the private parties sue as “private attorneys general” under state or federal statutes,⁸⁰ or when both the attorney general and private individuals who sustained special damages sue to abate a public nuisance.⁸¹ In those cases, therefore, the general public exception would not be redundant. Because the provision is redundant only in a subset of cases, the surplusage canon does not apply and has no role in construing the statutory provision defining “mass action.”

B. Implicit Purposivism Prevails (Surprisingly) in Hood

In reaching a conclusion contrary to that of the other circuits, the Fifth Circuit held in *Hood* that a *parens patriae* action that includes requests for restitution on behalf of state residents who have been harmed involves the separate claims of “100 or more persons,” and, therefore, CAFA allows removal of such a “mass action” to federal court.⁸² The opinion provides little textual analysis—the court does not appear to rely on a textual analysis of the word “claim.”

Instead, the court’s analysis implicitly evinces a purposive approach to statutory interpretation. Thus, the Fifth Circuit concluded that Congress intended CAFA to permit removal of any actions that involve aggregated damages allegedly suffered by more than 100 persons, even if the lawsuit does not appear to meet the *textual* definition of either “class action” or “mass action.” The court held that “Mississippi is acting, not in its *parens patriae* capacity, but essentially as a class representative.”⁸³ Remember that the court itself found that the lawsuit was not a class action.⁸⁴ The proper role of the court, according to the Fifth Circuit, is “to pierce the pleadings and look at the real nature of a state’s claims.”⁸⁵ Accordingly, it applied the statutory definition to *parens patriae* actions in a manner that it evidently believed would accomplish the congressional purpose.

C. Examining CAFA’s Purpose and Legislative History

While textualists regard the use of purpose evinced within the text as appropriate to construing statutory provisions,⁸⁶ they consider legislative

80. See Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 590, 599–607 (2005) (describing private attorney general statutes).

81. See RESTATEMENT (SECOND) OF TORTS § 821C (1979) (allowing both attorneys general and individuals sustaining special damages to sue to abate public nuisances).

82. *Hood*, 701 F.3d at 804.

83. *Id.* at 801.

84. See *supra* text accompanying notes 21–24.

85. *Hood*, 701 F.3d at 799.

86. SCALIA & GARNER, *supra* note 39, at 20.

history to be an entirely inappropriate vehicle for determining statutory intent.⁸⁷ For purposivists, on the other hand, legislative history is a key tool in construing a statute.⁸⁸

As Justice Scalia points out, deciding how broadly to interpret legislative purpose is often outcome determinative. Purposivists, he contends, “purport to give effect to what the legislature desired—the broader purpose it had in mind”⁸⁹ Textualists, on the other hand, believe that “purpose must be defined precisely” and “as concretely as possible.”⁹⁰

If Justice Breyer employs a purposive approach in *Hood*, he will examine CAFA’s broad-based purposes as revealed in its legislative history. The Senate Committee Report notes that CAFA “is to be interpreted liberally. . . . Generally speaking, lawsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions.”⁹¹ According to the legislative history, the primary goals of Congress in enacting CAFA included protecting corporate defendants from plaintiffs’ lawyers.⁹² A purposivist would argue that the statute should be construed in a manner that makes it impossible for attorneys making mass claims to thwart CAFA by partnering with state attorneys general in the prosecution of *parens patriae* actions. The complaint in the *Hood* litigation is a “carbon copy” of complaints filed in other courts in class actions against the same defendants.⁹³ Purposivists would find, as did the Fifth Circuit in *Hood*,⁹⁴ that the action is precisely the type of litigation against many defendants, with worldwide implications but with little connection to Mississippi, which CAFA anticipated should be heard in the federal courts.⁹⁵

In fact, it turns out that there is legislative history on the specific issue of whether CAFA was intended to cover *parens patriae* actions. During its consideration of CAFA, the Senate considered an amendment that would have explicitly provided that the term “class action” does “not include any

87. *Id.* at 56–57.

88. Breyer, *supra* note 47, at 853–60.

89. SCALIA & GARNER, *supra* note 39, at 22.

90. *Id.* at 56–57.

91. S. REP. NO. 109-14, at 35 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 34. It should be noted that the Senate committee report was not issued until after CAFA was enacted, so some courts have given it very little weight. *See, e.g.*, *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006).

92. S. REP. NO. 109-14, at 4–5.

93. Brief for Respondents at 8, Petition for Writ of Certiorari, *Mississippi ex rel. Hood v. AU Optronics, Inc.*, ___ U.S. ___ (2013) (No. 12-1036), 2013 WL 1770862, at *8.

94. *See supra* text accompanying notes 28 and 83–85.

95. Brief for Respondents, *supra* note 93, at 7.

civil action brought by, or on behalf of, any attorney general.”⁹⁶ The bill sponsors opposed the amendment, stating that it was “unnecessary” because “*parens patriae* cases . . . are not class actions.”⁹⁷ Although a textualist would observe that this specific legislative history is ambiguous and can be interpreted in contradictory ways, the most plausible reading of that history suggests that the act does not apply to *parens patriae* actions. Therefore, whether Justice Breyer and his colleagues following a purposive approach decide that CAFA covers *parens patriae* actions will depend on whether they focus on the broad-based remedial approach of the statute, as their own approach suggests they should; or whether they focus on the specific legislative history regarding *parens patriae* litigation under CAFA which can be interpreted with some difficulty to reach a contrary result. The former choice will favor business, which prefers mass tort cases to be heard in federal court;⁹⁸ the latter will not. That is the temptation that the purposivists will face: Stay true to your principles and what you regard as an undesirable result, or jettison your principles and reach a result that you like.

Justice Scalia and the other textualists face a starker dilemma. Because textualism leads to what they regard as an undesirable, anti-business result, will they yield to temptation and examine specific portions of the legislative history recited above that can be read to fit *parens patriae* actions within CAFA’s removal provisions?⁹⁹

CONCLUSION

If Justice Scalia and his conservative colleagues apply a textual approach in *Hood* in a principled way, in keeping with the model employed by the Fourth, Ninth, and other circuits, it will result in a decision that business interests will not like. Conversely, if Justice Breyer leads his more progressive colleagues on the Court in a purposive approach to statutory interpretation, their opinion possibly, but with less certainty, will hold that the case should be removed to the federal courts, a result that business interests will cheer.

Hood is not an anomaly. In the typical case, following textualist principles likely will yield a result that parallels Justice Scalia’s predisposition in favor of limited government because most statutes regulate private conduct. CAFA, however, does not regulate private business, but instead restricts state courts that in turn regulate private

96. 151 CONG. REC. 1,865 (2005).

97. *Id.* at 1,811 (statement of Sen. Orrin Hatch).

98. *See supra* note 3.

99. SCALIA & GARNER, *supra* note 40, at 388.

businesses through judicial action. As a result, textualism in *Hood* leads to a pro-regulatory and anti-business result. Thus, the pending case promises an unusual test of whether the Justices will follow their own preferred principles of statutory interpretation or their pro- or anti- business biases.