The Class Action Chronicle

Skadden

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This is the third edition of *The Class Action Chronicle*, a quarterly publication that provides an analysis of recent class action trends, along with a summary of class certification and Class Action Fairness Act rulings issued during each quarter. Our publication is designed to keep both practitioners and clients up to date on class action developments in antitrust, mass torts/products liability, consumer fraud and other areas of law.

The Spring 2014 edition focuses on rulings issued between November 15, 2013, and February 15, 2014, and begins with a short article regarding the potential impact of the U.S. Supreme Court's review of *Halliburton Co. v. Erica P. John Fund, Inc.* on consumer class actions. For a discussion of the Supreme Court's recent denial of certiorari in *Glazer v. Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013), and *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013), please see our recent alert, "Supreme Court Punts on Twin No-Injury Washing Machine Class Actions."

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4 Times Square | New York, NY 10036

THE DUE-PROCESS IMPLICATIONS OF THE PRESUMPTION OF RELIANCE IN CONSUMER FRAUD CLASS ACTIONS

This Term the Supreme Court is set to revisit the use of presumptions of reliance in the certification of class actions in *Halliburton Co. v. Erica P. John Fund, Inc.*[1] The case presents the questions whether courts should continue to entertain a presumption of reliance in some securities cases and, if so, whether defendants in such cases have a right to rebut the presumption with evidence at the class certification stage. Although the case arises in the context of securities litigation, the Court's answers to these questions could have profound implications for the litigation of consumer fraud cases, in which a presumption of reliance has been applied in some circumstances for many decades.

The focus of *Halliburton* is likely to be on the continued vitality of *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), a securities fraud case decided by a four-Justice majority 25 years ago. As the Supreme Court explained just last Term in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), *Basic*'s rationale was that "certain well developed markets are efficient processors of public information" and, in those markets, "the market price of shares will reflect all publicly available information." Based on this premise, the *Basic* Court held that, when "a market is shown to be efficient, courts may presume that investors who traded securities in that market relied on public, material misrepresentations regarding those securities." The presumption obviates the need to assess the individualized nature of reliance or causation, which would ordinarily defeat class certification, by treating these issues as capable of classwide resolution.

[1] The case is docketed as No. 13-317. Oral arguments were heard on March 5.

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Courts have applied similar presumptions of reliance outside the securities context as well — for example, in consumer fraud cases. Notably, these cases do not involve the sort of "efficient" markets that were deemed to exist in *Basic*. *See, e.g., McCrary v. Elations Co.*, No. 13-00242 JGB (OPx), 2014 U.S. Dist. LEXIS 8443, at *43 (C.D. Cal. Jan. 13, 2014) (certifying consumer fraud claims under California law and rejecting defendants' argument that "an inference of reliance is unwarranted … because no evidence supports it"); *Stanich v. Travelers Indem. Co.*, 249 F.R.D. 506, 518 (N.D. Ohio 2008) ("Where there are uniform presentations of allegedly misleading information, or common omissions throughout the entire class, especially through form documents, courts have found that the element of reliance may be presumed class-wide, thereby obviating the need for an individualized inquiry of each class member's reliance.").

Applying a presumption of reliance in this context is thus dubious at best — even if such presumptions were justified in the securities context — because the relative inefficiency of consumer markets means there is no reason to believe that information reaches all consumers. And even if total saturation of the market could be presumed, a presumption of uniform reliance would still rarely be justified because consumers do not react uniformly to most representations. Nevertheless, a number of courts have been willing to apply a presumption of reliance in consumer fraud cases where, for example, the defendant is accused of making identical misrepresentations to every member in the class. *See, e.g., Vasquez v. Superior Court*, 484 P.2d 964, 971-73 (Cal. 1971).

The problem with the manner in which the presumption has been applied is that courts almost never make any allowance for the defendant to contest causation or reliance once the presumption is determined to apply. As such, proof of the consumer fraud claim takes on a different character than it would in an individual case. Outside the class action context, individual plaintiffs asserting fraud-based causes of action must affirmatively prove the elements of reliance or causation.

This fundamental requirement does not change by dint of the class device. After all, under the Rules Enabling Act, the class action rule, as a rule of procedure, cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion) (class action rule is procedural and thus "leaves the parties' legal rights and duties intact and the rules of decision unchanged").

Instead, a presumption merely shifts the burden of proof to the defendant, turning the questions of reliance and causation into defenses rather than affirmative burdens for the plaintiff to prove. This is what the Supreme Court meant when it said recently that the securities fraud presumption of reliance is "just that" — a presumption — which can "be rebutted by appropriate evidence." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011). And because the presumption can be rebutted, shifting the burden of proving reliance or causation should not change the individualized nature of the issue.

Courts certifying consumer fraud class actions based on a presumption of reliance sometimes acknowledge this point, stating as a theoretical matter that "defendants may introduce evidence to rebut the inference of reliance." *E.g., Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658 (C.D. Cal. 2009). But few, if any, have given serious attention to the question of how it could be manageable to do so in a class setting. The reality is that courts certifying consumer fraud class actions have shown little interest in allowing meaningful rebuttal of the presumption of reliance. Once a court certifies a case for class treatment, it rarely allows discovery of absent class members — which would likely prevent a defendant from putting on individualized reliance or causation defenses. *See, e.g., Garden City Employees' Retirement Sys. v. Psychiatric Solutions, Inc.*, No. 3:09-882, 2012 U.S. Dist. LEXIS 145807, at *7-12 (M.D. Tenn. Oct. 10, 2012) (noting that absent class member discovery "is rarely permitted" and denying defendants leave to propound interrogatories on absent class members in order to determine whether they relied on allegedly material representations that were the basis of a presumption of reliance).

Lower courts' unwillingness to take individualized issues of reliance and causation seriously is inconsistent with the Supreme Court's recent trend in favor of more rigorous class certification standards. As the Court recently made clear, the mere fact that the individualized issues in a case are the defendant's burden to prove rather than the plaintiff's should not alter the certification analysis. "[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its … defenses to individual claims." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011). This holding has underpinnings in due process, which guarantees a defendant's right to present "every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks and citation omitted); *see also Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, Circuit J.) (citing *Normet* for a proposition similar to the one embraced in Dukes); *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues.") (citing *Dukes*, 131 S. Ct. at 2561). Thus, unless the proceeding envisioned by a class

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certification order can account for case-by-case defenses on the issues of reliance or causation, class treatment is improper as a matter of due process. [2]

In *Halliburton*, the Supreme Court has an opportunity to bring a long-overdue correction to this practice and to elaborate further on the role of defensive evidence in the class certification inquiry. The Court's ruling may be specific to securities litigation. But whether the Court decides to eliminate the presumption of reliance entirely, or to scale it back, or to clarify whether a presumption of reliance may be rebutted at the class certification stage, parties on all sides should be prepared to apply its ruling in a broad range of class certification contexts, including the consumer fraud context, in which the Court's *Basic* ruling has influenced the class certification decisions of many courts.

[2] Moreover, the effect of the lower courts' approach has effectively been to apply an irrebutable presumption of reliance, which likewise threatens the due process rights of defendants. *See, e.g., Vlandis v. Kline*, 412 U.S. 441, 446 (1973) (noting that the Supreme Court has repeatedly held that rules that "creat[e] a presumption which operates to deny a fair opportunity to rebut it violates the due process clause") (internal quotation marks and citation omitted).

CLASS CERTIFICATION DECISIONS

Decisions Denying Motions to Strike

***Knowles v. Standard Fire Insurance Co.*, No. 4:11-cv-04044, 2013 WL 6497097 (W.D. Ark. Dec. 11, 2013).**

Judge P.K. Holmes III of the U.S. District Court for the Western District of Arkansas denied the defendant's motion to strike class allegations in a putative class action alleging breach of contract due to the defendant's underpayment of claims for loss or damage to real property. The plaintiff contended that the defendant, an insurance company, failed to pay charges reasonably associated with retaining the services of a general contractor. The court first recognized that "in many cases, a motion to strike or dismiss a plaintiff's class allegations prior to discovery on class-related issues and prior to the submission of a motion for class certification would be premature." The court noted that it was unlikely that the plaintiff would prevail on a motion for class certification because the class allegations would seem to require an individualized inquiry into whether each class member is entitled to payment for general contractor services in connection with loss or damage to a dwelling. Ultimately, however, the court concluded that it could not determine on the pleadings whether the Rule 23 requirements had been met and, "[i]n an abundance of caution," allowed a brief period of discovery on the issue of class certification.

***McCabe v. Daimler AG*, No. 1:12-cv-2494-TCB, 2013 U.S. Dist. LEXIS 169204 (N.D. Ga. Dec. 2, 2013).**

Judge Timothy C. Batten of the U.S. District Court for the Northern District of Georgia denied a motion to strike class allegations in a suit brought on behalf of residents of Georgia, Texas, Virginia, Florida, Illinois and California based on alleged defects in the fuel systems of 2003-2009 W211 E-Class Mercedes-Benz vehicles. Defendant Mercedes-Benz, a subsidiary of Daimler, had previously moved to strike class allegations set forth in a prior class complaint. The court denied that motion as premature. After the plaintiffs filed an amended complaint, the defendants moved to strike the class allegations once again, arguing, *inter alia*, that the proposed class was overbroad because it included consumers who purchased or leased vehicles prior to 2008. In so doing, the defendants relied on a prior ruling from the court making clear that class members who purchased or leased vehicles before 2008 had no viable claims. However, the court explained that its "position ha[d] not changed since its earlier order denying [d]efendants' earlier request: '[the] motion is premature" because the plaintiffs had not yet moved for class certification. The court therefore denied the motion to strike the class allegations once again.

Decisions Rejecting/Denying Class Certification

***Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. Feb. 3, 2014).**

The U.S. Court of Appeals for the Ninth Circuit (Gould, Rawlinson and Lemelle, JJ.) affirmed the denial of certification of a class of consumers alleging that Home Depot did not notify customers renting tools that they could decline an optional damage waiver charge, in violation of California consumer protection statutes. After determining it had jurisdiction to hear the appeal in light of the plaintiff's voluntarily dismissal with prejudice, the Ninth Circuit concluded that because the plaintiff only engaged in one rental transaction, he could only represent the one subclass that involved the same rental agreement Home Depot was using at the time he rented a tool. The court also affirmed denial of certification on the ground that Rule 23(b)(3)'s predominance requirement was not met. The Ninth Circuit also held that the lower court did not abuse its discretion in finding that the plaintiff could not satisfy Rule 23(b)'s

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predominance requirement. As it explained, Home Depot conveyed information about the damage waiver charge via different contractual language, different in-store signs and different oral statements by in-store employees, making it impossible to identify any core uniform representation or omission to which all class members were exposed. This same infirmity doomed class treatment of each of the plaintiff's claims.

***Parko v. Shell Oil Co.*, 739 F.3d 1083 (7th Cir. 2014).**

A unanimous panel of the U.S. Court of Appeals for the Seventh Circuit (Wood, Posner and Sykes, JJ.) reversed the district court's order certifying a class in a suit brought by property owners against the owners and operators of an oil refinery in Roxana, Illinois. The plaintiffs claimed that the refinery leaked contaminants into the groundwater and lowered their property values. Judge Richard Posner, writing for the court, first rejected the defendants' argument that the numerosity requirement was not satisfied because some of the 150 putative class members did not suffer any injury. As the court explained, such an argument amounted to "put[ting] the cart before the horse," because "[h]ow many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified." The court ultimately concluded, however, that the predominance requirement was not satisfied, noting that putative class members "could well have experienced different levels of contamination, implying different damages, caused by different polluters." Indeed, the court pointed out that it was not even clear that the plaintiffs had identified a common issue, because there was no suggestion that the contaminants in the groundwater actually fed into the water supply and therefore caused a reduction in property values. Thus, the district court should not have treated predominance as a mere pleading requirement, but rather "should have investigated the realism of the plaintiffs' injury and damage model in light of the defendants' counterarguments." Because the plaintiffs had presented "no theory, let alone credible evidence, of a connection between the leaks and property values, or between specific defendants and the leaks and property values," the court concluded that class certification was unwarranted.

***Donaca v. Dish Network, LLC.*, No. 11-cv-02910-RBJ-KLM, 2014 WL 623396 (D. Colo. Feb. 18, 2014).**

Judge R. Brooke Jackson of the U.S. District Court for the District of Colorado denied certification of a class of people who received telemarketing calls made by certain entities on behalf of Dish Network, seeking injunctive and monetary relief for violations of the Telephone Consumer Protection Act (TCPA). The court initially denied class certification because the class representative, a self-described consumer rights advocate, had not received any calls from the entities named in the class definition and was thus not a member of the proposed class. After the plaintiff revised his class definition to include entities that also called him, the court concluded that the class was nonetheless not ascertainable because the plaintiff was unable to identify anyone other than himself who received a telemarketing call from those entities due to a loss of records, and, since the calls took place between 2007 and 2009, "it is very unlikely that people who received the same calls that Mr. Donaca received would have any evidence of that." Judge Jackson also found that the plaintiff's TCPA claims were not typical of the subclass of persons who received calls from a vendor not connected with Dish Network, or of people who received unsolicited live calls from one vendor despite being on the "Do Not Call" registry. Finally, the court concluded that a class action was not the superior method of adjudicating the controversy because the TCPA was drafted to provide aggrieved individuals a minimum $500 statutory remedy recoverable in small claims court, and not to permit private class actions for millions of dollars "to address what is, at most, a minor intrusion into an individual's daily life."

***Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2014 WL 580696 (N.D. Cal. Feb. 13, 2014).**

Judge Samuel Conti of the U.S. District Court for the Northern District of California denied certification of a class of nutrition bar purchasers alleging that the "all natural" labeling on the bars was misleading because they contained synthetic ingredients. The court found that the plaintiff had standing to pursue class certification, even though she had later purchased more expensive nutrition bars that were not all natural. Nonetheless, the court found that the class was not ascertainable because there was no accurate way to determine who had purchased the bars at issue.

***Murray v. Sears, Roebuck & Co.*, No. C 09-5744 CW, 2014 WL 563264 (N.D. Cal. Feb. 12, 2014), 23(f) pet. pending.**

The plaintiff sought to certify a class asserting claims for unjust enrichment, breach of contract and violations of California consumer protection laws against the manufacturers of his dryer, which he alleged had rusted. The action had been stayed since February 2010 pending a U.S. Court of Appeals for the Seventh Circuit appeal in a nearly identical case. The Seventh Circuit ultimately decertified the class and entered a permanent injunction to preclude other consumers from pursuing classwide relief. After the Supreme Court vacated that permanent injunction, Judge Claudia Wilken of the U.S. District Court for the Northern District of California lifted the stay in *Murray* and ultimately denied certification of the class. While noting that *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), held that federal courts are not bound to adopt other courts' prior class certification rulings, Judge Wilken nonetheless acknowledged that the Seventh Circuit's decision "provides strong guidance in deciding Murray's motion and must be afforded

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'respectful attention.'" Turning to the class certification requirements, Judge Wilken found that, like the plaintiff in the Seventh Circuit, Murray failed to demonstrate classwide representations about rust or to identify any other class members whose clothes were stained by rust, defeating Rule 23(a)'s commonality and typicality requirements. The court also found that the plaintiff was subject to unique fact-based and statute-of-limitations defenses, making him atypical of the proposed class members.

***Neal v. NaturalCare, Inc.*, No. 12-0531-DOC OPX, 2014 WL 346639 (C.D. Cal. Jan. 30, 2014).**

Judge David O. Carter of the U.S. District Court for the Central District of California granted the defendant's motion to decertify a class of purchasers of homeopathic treatments for tinnitus asserting claims for violations of California consumer protection statutes. The plaintiff had filed for Chapter 7 bankruptcy two months after filing her complaint but failed to list her claims on her petition, tell her attorneys or disclose her bankruptcy in discovery. After the defendant discovered the bankruptcy (nearly a year after the plaintiff had filed her petition, and months after the class was certified), the defendant filed a motion to decertify, arguing that the plaintiff did not have standing to pursue the case once she filed for bankruptcy. Judge Carter found that the plaintiff had Article III standing because she suffered an injury in fact from the false advertising at issue, but that the plaintiff lacked prudential standing "because the bankruptcy estate, not she, was entitled to assert her claim" as a result of her failure to schedule the suit on her bankruptcy petition. The court also found that class representatives could not be substituted because the class plaintiff had lost her standing prior to class certification.

***In re Skelaxin (Metaxalone) Antitrust Litigation*, No. 1:12-md-2343, 2014 WL 340903 (E.D. Tenn. Jan. 30, 2014).**

In this antitrust case about Skelaxin, a muscle relaxant, Judge Curtis L. Collier of the U.S. District Court for the Eastern District of Tennessee denied motions for class certification brought by end payers and indirect purchasers alleging that pharmaceutical companies conspired to delay introduction of a generic version of the drug, thus allegedly keeping prices high. The end-payor plaintiffs sought to certify a class of all parties who paid for the drug or reimbursed some portion of its purchase price when sold for consumption. The proposed class included both insurers and individual consumers, and these parties were connected by a web of complex contractual and financial arrangements that varied transaction by transaction; for example, in some transactions an insured might pay more for the brand name drug, and in others the insured might not pay more because of co-pays or deductibles. The court concluded that this heterogeneous proposed class failed Rule 23's ascertainability requirement because individualized fact-finding — for example, review of particular contracts — would be necessary to determine whether a given proposed class member actually paid money with respect to specific transactions. (If not, then it was not harmed by the allegedly noncompetitive price.) The court also held that (i) there was an impermissible conflict between the various class members because each class member would have an incentive to define the economic burden of overcharges differently to maximize its own recovery and (ii) the motion was without merit under *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), because the plaintiffs' expert's proposed damages model was not "consistent with their theory of liability," insofar as it included damages suffered by entities that the plaintiffs themselves conceded were excluded from the class definition.

***Holt v. Globalinx Pet LLC*, No. 13-0041 DOC, 2014 WL 347016 (C.D. Cal. Jan. 30, 2014).**

Judge David O. Carter of the U.S. District Court for the Central District of California denied certification of five nationwide classes of purchasers of contaminated dog treats, asserting claims under California law for fraud, negligence and breach of implied warranties, as well as claims for violations of Texas express-warranty, products-liability and consumer-protection laws. Discussing *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), at length, the court found that the proposed nationwide classes did not satisfy the predominance or superiority requirements of Rule 23(b)(3) because of material differences among the relevant state laws.

***Smith v. Microsoft Corp.*, No. 11-CV-1958 JLS (BGS), 2014 WL 323683 (S.D. Cal. Jan. 28, 2014), 23(f) pet. pending.**

Judge Janis L. Sammartino of the U.S. District Court for the Southern District of California denied the plaintiff's motion for certification of a class of individuals who received text messages promoting Microsoft's Xbox. Judge Sammartino found that Rule 23(b)(3)'s superiority requirement was dispositive, noting in particular "several significant qualms about the manageability" of the class action. First, the issue of express prior consent, a key element of a Telephone Consumer Protection Act claim, would be difficult if not impossible to resolve due to a loss of records by a third party. Second, determining which phone numbers were capable of receiving text messages, and actually received the Xbox text messages, would be inefficient as part of a class action. Third, since the plaintiff only identified phone numbers, rather than individuals, "it would be extraordinarily difficult to identify the class members, communicate to the proposed class members the required Rule 23(c)(2)(B) notices, and send the proposed class members their share of any recovery."

***Haskins v. First American Title Insurance*, No. 10-5044, 2014 WL 294654 (D.N.J. Jan. 27 2014).**

Judge Renee Bumb of the U.S. District Court for the District of New Jersey denied certification of a proposed class of New Jersey homeowners who had allegedly been defrauded by the defendant's alleged misrepresentations relating to the amounts owed for title insurance, which led to purported overcharges. The defendant argued that the class was not ascertainable, given that the databases would have to be cross-referenced with other sources to identify the class of plaintiffs who had been overcharged. The plaintiffs argued for a sampling methodology to identify class members from large databases, but defendants argued that this method failed to identify individual class members or the amount (if any) by which they were overcharged. Ultimately, the court held that ascertainability issues precluded class certification because identifying class members would require an individual file-by-file review, which the plaintiffs' own expert admitted was "economically impossible." Finally, the court noted that the class would fail to satisfy the commonality and predominance elements of Rule 23(b)(3), even if the plaintiffs had satisfied the requirements of ascertainability.

***Diaz v. Residential Credit Solutions*, Inc., No. 12-CV-3781 (ADS)(ETB), 2014 WL 279473 (E.D.N.Y. Jan. 23, 2014).**

In this Fair Debt Collection Practices Act (FDCPA) case, Judge Arthur Spatt of the U.S. District Court for the Eastern District of New York denied class certification with leave to renew upon submission of additional evidence concerning the plaintiff's adequacy as class representative. The defendant, a mortgage loan servicer, sent the plaintiff a notice seeking to collect alleged mortgage loan debt in excess of $370,000. The plaintiff alleged that the notice violated several aspects of the FDCPA and brought a putative class action. Judge Spatt found that the plaintiff satisfied Rule 23's requirements of numerosity, commonality and typicality, but that the plaintiff failed to satisfy the adequacy requirement. Specifically, the plaintiff satisfied Rule 23(a)(4)'s requirement that class counsel be qualified and experienced but failed to present any evidence, such as an affidavit or declaration, that the plaintiff had even basic knowledge of the lawsuit or would be able to make "intelligent decisions" based on the advice of counsel. The plaintiff also satisfied Rule 23(b)(3)'s superiority requirement even though the class consisted only of New York consumers. The court agreed with the plaintiff that the FDCPA does not require certification of a nationwide class. Judge Spatt thus permitted the plaintiff to renew the motion for class certification upon submission of proof that the plaintiff understands her role as class representative, is knowledgeable about the case and has no known conflicts of interest with other class members.

***Corder v. Ford Motor Co.*, No. 3:05-CV-00016-CRS, 2014 WL 199792 (W.D. Ky. Jan. 17, 2014).**

Judge Charles R. Simpson, III of the U.S. District Court for the Western District of Kentucky denied the plaintiff's third motion for class certification in an action claiming that Ford violated the Kentucky Consumer Protection Act (KCPA) by allegedly not disclosing to automobile purchasers that it continued to install engines from the 2003 model year, which had sparked consumer complaints, in its model year 2004 trucks. The court had previously denied the plaintiff's motion for certification of a class of all Kentucky residents who had purchased the model year 2004 trucks because the KCPA only applied to vehicles acquired "primarily for personal" use and some residents had purchased their trucks for commercial reasons, requiring individual inquiries as to each person's motivation for purchase. In response, the plaintiff excluded from the proposed class definition residents who registered their trucks as commercial vehicles under a separate statute calling for registration of certain vehicles. The court determined that this did not resolve the problem. According to the court, the registration statute dictates registration if the vehicle has certain "physical attributes" or is being used as a "for hire" vehicle, and therefore whether a vehicle is or is not registered under that statute says nothing dispositive about the owner's primary motivation for purchasing the vehicle. Consequently, individual inquiries into the reason that those individuals purchased their trucks would still be required, causing individual issues to predominate over common ones and precluding class certification.

***Webb v. Discovery Property & Casualty Insurance Co.*, No. 3:08 CV 01607, 2014 WL 105608 (M.D. Pa. Jan. 9, 2014).**

Judge Robert D. Mariani of the U.S. District Court for the Middle District of Pennsylvania denied a motion for class certification in a suit alleging violations of Pennsylvania law based on the alleged inadequacy of certain waiver forms supplied by an insurance company to policyholders when choosing to accept or reject underinsured motorist protection. The plaintiffs argued that the numerosity requirement was satisfied because defendant issued policies with invalid waivers "to a total of approximately 235 separate named individuals," and "since these are *all* commercial policies, there are *multiple* insured persons under *each* of the 235 named insureds' policies," yielding thousands of potential class members. The court rejected this basis for numerosity, however, emphasizing that the plaintiffs' own proposed class definition was limited to individuals with invalid waivers who had also been injured in motor vehicle accidents as a result of the negligence of an underinsured driver — which discovery had demonstrated was only five percent. The court also noted that the plaintiffs had failed to establish predominance because "each individual class

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member's entitlement to actually receive benefits will depend on a host of individualized considerations pertaining to the facts of each policyholder's accident[] and injuries."

***Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, 2014 WL 60097 (N.D. Cal. Jan. 7, 2014), 23(f) pet. pending.**

Judge Phyllis J. Hamilton of the U.S. District Court for the Northern District of California denied certification of a putative class of purchasers who alleged that Ben & Jerry's deceptively marketed ice cream products as "all natural," when they contained cocoa alkalized with a "synthetic" agent. While finding that the plaintiff had demonstrated standing to pursue her claims that she had paid a premium for "all natural" ice cream, the court found that the class was not sufficiently ascertainable because there was no means to identify whether the products potential class members purchased contained cocoa processed with "natural" or "synthetic" alkalis. Judge Hamilton also held that the predominance requirement was not satisfied because the plaintiff did not offer any expert testimony demonstrating that the market price of Ben & Jerry's ice cream with the "all natural" designation was higher than the market price of products without it.

***Bond v. Marriott International, Inc.*, No. 10-cv-1256-RWT, 2014 WL 53950 (D. Md. Jan. 7, 2014).**

Judge Roger W. Titus of the U.S. District Court for the District of Maryland declined to certify two proposed classes on the ground that the classes failed to meet the requirements of Rules 23(a) and 23(b). The plaintiffs, former employees who participated in defendant Marriott's deferred stock bonus program and who received retired deferred stock bonus awards (Retirement Awards), alleged that Marriott was failing to issue stock to Retirement Award recipients or was issuing less stock than was due under the Retirement Awards and the Employee Retirement Income Security Act. Judge Titus found that both proposed classes failed to meet the commonality, typicality and adequacy-of-representation requirements of Rule 23(a) because, *inter alia*, some of the proposed class members did not have viable causes of action in the case, and individual questions regarding the statute of limitations predominated over common issues.

***Cabbat v. Philip Morris USA, Inc.*, No. CIV. 10-00162 DKW, 2014 WL 32172 (D. Haw. Jan. 6, 2014), 23(f) pet. pending.**

The plaintiffs sought certification of a class of Hawaii smokers of Marlboro Lights who alleged that Marlboro Lights were deceptively marketed as "healthier" than regular cigarettes. The action was originally centralized by the MDL Panel but was remanded to the district court after the MDL judge denied class certification in related cases. Judge Derrick K. Watson of the U.S. District Court for the District of Hawaii held that the numerosity, typicality and adequacy requirements were satisfied and that the plaintiffs raised common questions of fact regarding the defendant's purported intentional misrepresentation of lower levels of nicotine and tar sufficient to show commonality. However, the court held that individual inquiries into whether each class member was in fact injured by the alleged misrepresentations precluded certification, in light of evidence that many Marlboro Lights smokers "never believed that they received lower levels of tar and nicotine" or "smoked Marlboro Lights for reasons unrelated to any health benefits" and that "idiosyncrasies of smoking behavior" also raised individualized issues as to injury. Judge Watson also held that the plaintiffs had not satisfied their obligation to provide a damages methodology under Rule 23(b)(3).

***Brown v. Wells Fargo & Co.*, No. 11-1362 (JRT/JJG), 2013 WL 6851068 (D. Minn. Dec. 30, 2013), 23(f) pet. pending.**

Judge John R. Tunheim of the U.S. District Court for the District of Minnesota denied class certification in a case alleging that Wells Fargo violated the Electronic Funds Transfer Act (EFTA) by failing to provide conspicuous notice on an ATM that a fee would be charged. The court concluded that a class action was not superior and that common questions did not predominate because the plaintiff's proposed class was difficult to identify and likely over-inclusive. Specifically, it would be difficult to identify the names and addresses of all customers who used the ATM at issue, especially because the proposed class included non-Wells Fargo customers. In addition, it would be difficult to separate business accounts from consumer accounts as required by the EFTA. The court also concluded that a class member's maximum recovery in a class action would likely be minimal as compared to an individual action, because the total recovery in a class action under the EFTA is capped at $500,000. Thus, "individual ATM users would receive higher damages plus attorneys' fees if they brought individual claims."

***Bruce v. Teleflora, LLC*, No. 2:13-CV-03279-ODW, 2013 WL 6709939 (C.D. Cal. Dec. 18, 2013).**

Judge Otis D. Wright II of the U.S. District Court for the Central District of California denied certification of a proposed consumer class of Teleflora customers bringing claims for breach of warranty and violations of California consumer protection laws arising from allegedly materially inferior or late or undelivered floral arrangements. Noting that Teleflora maintains a network of more than 18,000 local florists to fill customers' online orders chosen from more than 500 different representative floral arrangements, the court rejected the plaintiffs' contention that Rule 23's commonality and predominance requirements were satisfied. The court found numerous individualized issues would

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determine the putative class members' claims, including "how each arrangement looked, the quality and number of the flowers used, whether superior-quality flowers were substituted, and whether the arrangement was timely delivered." Judge Wright also found that the plaintiffs had failed to establish classwide damages because their survey evidence comparing actual arrangements with pictures on the Teleflora website "only comes into play once one assesses each putative class member's case on a singular basis." While acknowledging that the relatively small damages incurred by each class member would likely preclude individual suits, the court found that the superiority requirement was not satisfied. As the court explained, "Rule 23 is only a solution when the plaintiffs can establish how their putative class satisfies each of the Rule's requirements; there is no leeway to certify a class simply based on the difficulty of adjudicating individual claims."

***Bunch v. Nationwide Mutual Insurance Co.*, No. C12-1238JLR, 2013 WL 6632025 (W.D. Wash. Dec. 17, 2013).**

Judge James L. Robart of the U.S. District Court for the Western District of Washington denied a motion for class certification in a case alleging that a class of insurance policyholders were denied insurance benefits under an allegedly flawed interpretation of home insurance policies issued by defendant companies. The plaintiff sought to certify a class solely for the purpose of issuing a declaratory judgment on whether policyholders were unlawfully denied benefits by defendants. Relying on recent decisions by the U.S. Court of Appeals for the Ninth Circuit in *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir.2012), and *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1024 (9th Cir.2011), Judge Robart denied class certification on the ground that the proposed class encompassed members lacking Article III standing. In particular, the proposed class included "many potential members … for whom the declaratory relief sought would not or could not redress any injury," such as individuals whose claims were denied due to unpaid premiums or other unrelated exclusions that were not being challenged in the lawsuit.

***Gooden v. SunTrust Mortgage, Inc.*, No. 2:11-CV-02595-JAM, 2013 WL 6499250 (E.D. Cal. Dec. 11, 2013).**

Judge John A. Mendez of the U.S. District Court for the Eastern District of California denied certification of six classes and subclasses of mortgage holders bringing claims relating to force-placed hazard and flood insurance on refinanced properties that allegedly were already adequately insured. First, the court found that the plaintiffs' proposed "hybrid classes" seeking injunctive and monetary relief under both Rule 23(b)(2) and (b)(3) were inappropriate because "the monetary relief sought predominates over the injunctive relief being sought rather than being incidental to it, and therefore it is most appropriate to certify, if at all, under Rule 23(b)(3)." The court found the numerosity requirement was satisfied but that the plaintiffs could not satisfy Rule 23's ascertainability, commonality, predominance and superiority requirements because the plaintiffs proposed to calculate the replacement value of the homes based on the defendant's use of proxies to determine the amount of insurance required. According to the court, "these proxies [we]re essentially estimates that d[id] not take into consideration the many individual factors that might affect a particular home's replacement value." Judge Mendez further found that variations in state law meant that the plaintiffs could not satisfy the commonality and predominance requirements to certify nationwide classes seeking relief under the Truth in Lending Act, and that the named plaintiffs failed to introduce sufficient evidence that they were subject to force-placed hazard insurance, and thus failed to satisfy Rule 23's typicality and adequacy requirements.

***Bell v. Bimbo Foods Bakeries Distribution, Inc.*, No. 11 C 03343, 2013 WL 6253450 (N.D. Ill. Dec. 3, 2013).**

Judge Edmond E. Chang of the U.S. District Court for the Northern District of Illinois denied class certification in a case alleging that the defendant, Bimbo Foods Bakeries Distribution, violated the Illinois Wage Payment and Collection Act and the terms of the plaintiff's distributor agreements with Bimbo. The court concluded that the individualized details of each distributor agreement prevented the plaintiff from establishing commonality and predominance as required by Rule 23. Importantly, the court found that the plaintiff had "failed to meet his burden of showing that a substantial number of distributors have the same agreement." Thus, "[d]espite making a long list of common questions," the court concluded that "the dissimilarities in the proposed class's distributor agreements have the potential to impede the generation of common answers."

***Glover v. Udren*, No. 08-990, 2013 WL 6237990 (W.D. Pa. Dec. 3, 2013), 23(f) pet. denied.**

Judge Donetta W. Ambrose of the U.S. District Court for the Western District of Pennsylvania denied a motion for class certification in a suit against mortgagor Wells Fargo for breach of contract, unjust enrichment and violation of the Pennsylvania Loan Interest Protection Law and Unfair Trade Practice and Consumer Protection Law. There, the named plaintiff alleged that Wells Fargo had engaged in a variety of types of misconduct in connection with its mortgages, including overcharging, mishandling payments and assessing unauthorized fees. The court held that the typicality and predominance requirements were not met because "the claims presented by Plaintiff all require in depth individual investigations of each … class member's loan transaction history and the documents appurtenant

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thereto." According to the court, "if the class were to proceed, mini-hearings on each of the claims would be required before the class could proceed to trial," creating "insurmountable obstacles to certification."

***Hernandez v. Chipotle Mexican Grill, Inc.*, No. CV 12-5543 DSF JCX, 2013 WL 6332002 (C.D. Cal. Dec. 2, 2013).**

Judge Dale S. Fischer of the U.S. District Court for the Central District of California denied certification of a proposed class of consumers alleging fraud and state law misrepresentation claims arising from the defendant's alleged practice of advertising its use of "naturally raised" meats, even though it used conventionally raised meats at times when "naturally raised" meats were not available. Judge Fischer found that the plaintiff could not demonstrate predominance and superiority under Rule 23(b)(3) because the issues of when, where and which meat a class member ate at Chipotle, as well as whether he saw an advertisement regarding naturally raised meat at the time of purchase, are "not subject to class treatment." The court noted that neither the class members nor Chipotle would retain a record of or recall their purchases, which was "critical because certain stores were serving certain conventional meats only at certain times," and while Chipotle was entitled to a "mechanism for confirming or contesting" a class member's claims of the date, location, and particular meat purchased, "[t]hat kind of certainty in a class action that encompasses purchases of burritos (for example) between June 2008 — more than five years ago — and now is not practical." The court further held that, even if a classwide settlement was reached, the claimants would have to provide the same information as to when, where and what they ate and thus "[p]eople will either (1) lie, (2) attempt to fill out the claim form as best they can but be unable to do so accurately, or, most likely, (3) not bother" which meant "[m]oney would be given out basically at random to people who may or may not actually be entitled to restitution," a result "unfair both to legitimate class members and to Chipotle."

***Stalley v. ADS Alliance Data Systems, Inc.*, No. 8:11-cv-1652-T-33TBM, 2013 U.S. Dist. LEXIS 167156 (M.D. Fla. Nov. 25, 2013).**

Judge Virginia M. Hernandez Covington of the U.S. District Court for the Middle District of Florida denied the plaintiffs' motion for class certification in a suit alleging that the defendant credit card issuers violated the Florida Security of Communications Act by recording phone calls without the consent of the plaintiff callers. The plaintiffs sought certification under Rules 23(b)(2) and 23(b)(3). The court denied the motion for class certification, finding that the proposed class was not ascertainable because the court would have to examine each recorded call to determine if the caller consented to be recorded. In carrying out such an examination, the court reasoned, it would face challenges in determining the identity of the caller — *i.e.*, whose voice was actually recorded?

***Suchanek v. Sturm Foods, Inc.*, No. 11-565-GPM, 2013 WL 6096525 (S.D. Ill. Nov. 20, 2013).**

Judge G. Patrick Murphy of the U.S. District Court for the Southern District of Illinois denied the plaintiffs' motion to reconsider an order denying class certification in a case alleging violations of various consumer protection statutes based on alleged misrepresentations in the packaging for coffee cartridges. The plaintiffs argued that reconsideration was warranted pursuant to the U.S. Court of Appeals for the Seventh Circuit's decision in *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), which made clear that individualized questions related to the class members' damages do not preclude a finding of predominance. The court disagreed, noting that class certification had not been denied in that case based on a finding that proof of damages would be individualized. Instead, class certification was denied because the court concluded that proof of "reliance or causation — as required to establish liability — [would] require an investigation of each purchaser" and his or her decision to buy the product. Accordingly, the court held that *Butler* did not support reconsideration and denied the plaintiffs' motion.

***Mylan Pharmaceuticals, Inc. v. Warner Chilcott Public Limited Co.*, No. 12-3824, 2013 WL 6145117 (E.D. Pa. Nov. 20, 2013).**

Judge Paul Diamond of the U.S. District Court for the Eastern District of Pennsylvania denied a motion for class certification in a case involving indirect purchasers of the prescription drug Doryx alleging antitrust claims against brand name pharmaceutical companies for impermissibly thwarting generic competition. The court concluded that the plaintiffs had not established numerosity under Rule 23, reasoning that "although [p]laintiffs are not required to provide the Court with a precise number of the class members … , they must demonstrate by an evidentiary preponderance that numerosity is satisfied." The plaintiffs proposed statewide Nevada and Florida classes of individuals and entities who indirectly purchased or reimbursed others for branded Doryx from 2008 to the present, but the plaintiffs only presented evidence as to the number of Doryx prescriptions filled in one particular month. This was insufficient, the court determined, because the plaintiffs did not show how many Doryx prescriptions were filled during the entire relevant time period, how many prescriptions were actually covered by benefit plans or how many in the pool were not excluded by limitations proposed in the class definition.

***Curtis v. Extra Space Storage, Inc.*, No. C 13-00319 WHA, 2013 WL 6073448 (N.D. Cal. Nov. 18, 2013).**

Judge William Alsup of the U.S. District Court for the Northern District of California denied certification of a class of storage unit renters alleging that their property was improperly auctioned off by the storage facilities in violation of California's Self-Service Storage Facility Act, various state consumer protection laws and the Racketeer Influenced and Corrupt Organizations Act. The court concluded that individual issues predominated because the defendants were entitled to assert the affirmative defense of abandonment "on a case by case basis," requiring examination of individual renters' circumstances and intent to determine whether abandonment occurred. Further, Judge Alsup found that the plaintiffs failed to offer a workable "method that tethers their theory of liability to a methodology for determining the damages suffered by the class" because the plaintiffs' proposal would require the trier of fact "to determine the fair market value of each item put up for lien sale and then compare it to the sale price" as well as what would constitute "reasonable compensation for the time and money spent by the tenant in attempting to recover her property." These calculations could not be conducted on a classwide basis.

***Fields v. Mobile Messengers America, Inc.*, No. C 12-05160 WHA, 2013 WL 6073426 (N.D. Cal. Nov. 18, 2013).**

Consumers who were the alleged victims of "cramming," a "cell-phone scam" in which "unauthorized, misleading, or deceptive charges" are placed on a consumer's telephone bill, moved to certify two classes and one subclass under Rule 23(b)(3). Judge William Alsup of the U.S. District Court for the Northern District of California denied certification of all three proposed classes. The first putative class was a nationwide class of consumers who received and were charged for text messages without consent in violation of the Telephone Consumer Protection Act. Judge Alsup found that the predominance requirement was not satisfied where plaintiffs "failed to meet their burden to prove that the issue of consent can be addressed with class-wide proof" and that individualized issues of consent precluded certification of a nationwide text-receipt class. The plaintiffs also proposed a nationwide enrollment class of consumers who received a text message but did not receive a complete refund, alleging claims under California law for money had and received, conversion, unjust enrichment and negligence. The court found that because there was no evidence that the relevant text-messaging platforms were maintained in California, the plaintiffs failed to show that California has "significant contact or significant aggregation of contacts" and California law could not be applied nationwide. Finally, the plaintiffs sought to certify an enrollment subclass of California residents seeking relief under California's unfair competition law, which Judge Alsup denied because the plaintiffs admitted that the refund rate was as high as 98 percent of those enrolled and therefore failed to show that any putative subclass members resided in California at the time of their enrollment.

Decisions Permitting/Granting Class Certification

***In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014).**

A panel of the U.S. Court of Appeals for the Fifth Circuit (Davis, Dennis and Garza (dissenting), JJ.) affirmed certification of a class of persons injured as a result of the Deepwater Horizon explosion. The court held that the named plaintiffs had standing to pursue class certification and "every [absent] class member contemplated by the class definition can *allege* standing" because the class was limited to individuals who had potentially been damaged by the explosion. The court also held that the putative class satisfied Rule 23(a)(2)'s commonality requirement, as the class members have raised at least one contention central to the validity of each member's claims and have alleged the same incident of injurious conduct. The injuries sustained by the class members need not be the same. Moreover, the court held that it was not necessary to create subclasses to address alleged "intraclass conflict" between and among class members who suffered injuries and those who allegedly did not and class members from different states. Even though class members had "differently weighted interests," the court found no fundamental conflict. Finally, the court found that the class notice was not deficient merely because it omitted certain information that the objectors thought should be included, such as the likelihood that prospective claimants could include injured persons and entities.

***Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076 (7th Cir. 2013).**

A unanimous panel of the U.S. Court of Appeals for the Seventh Circuit (Posner, Rovner and Williams, JJ.) reversed the district court's denial of class certification in a case alleging that the defendant violated the Fair Debt Collection Practices Act by filing debt collection lawsuits after the statute of limitations had run. The class included 343 Illinois residents against whom debt collection lawsuits had been filed more than four years after the claims accrued. But because there was a dispute as to whether the statute of limitations was four or five years, and because it was undisputed that the plaintiff had been sued more than five years after the claim against her accrued, the district court concluded that the plaintiff did not have an incentive to litigate the statute of limitations issue, which would only affect class members who were subject to debt collection lawsuits more than four but less than five years after the accrual of the claim. Writing for the court, Judge Posner observed that "[t]o question [the

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plaintiff's] adequacy is to be unrealistic about the role of the class representative in a class action suit. The role is nominal." Judge Posner added that the plaintiff's "services to the class will be greater, and her incentive award likely therefore to be greater if the suit is successful, the more complex the class is. And it *will* be more complex if the class includes the four-year as well as the five-year debtors." Instead of refusing to certify a class at all, the court noted that the district court could have created a subclass consisting of the four-year debtors and directed class counsel to designate a representative for it. And in any event, the Seventh Circuit held that the district court should have ruled on whether the statute of limitations was four or five years. Resolving that issue itself, the Seventh Circuit held that the limitations period was four years. Thus, the court concluded that "all 343 Illinois residents appear to be proper class members, adequately represented.

***Montgomery County, Pennsylvania v. MERSCORP, Inc.*, No. 11-CV-6968, 2014 WL 550805 (E.D. Pa. Feb. 12, 2014).**

Judge J. Curtis Joyner of the U.S. District Court for the Eastern District of Pennsylvania granted a motion to certify a class consisting of all recorders of deeds in all 67 counties of Pennsylvania. The recorders of deeds brought suit against the defendants, who created a separate system of recording mortgage assignments in lieu of recording in the public recorders of deeds office. According to the recorders of deeds, the defendants' system compromised the accuracy of the public records and deprived the state of recording fees. The court concluded that the plaintiff satisfied the numerosity, commonality, typicality and adequate representation requirements and qualified for certification under Rule 23(b)(3) because the claims arose from the same course of conduct and a determination that the conduct violated Pennsylvania law would apply with equal force in all 67 counties. The court noted that these common questions of law and fact predominated over the only factual variance between the counties: the number of unrecorded assignments and fee schedule set by each.

***Chapman v. Wagener Equities, Inc.*, No. 09 C 07299, 2014 WL 540250 (N.D. Ill. Feb. 11, 2014).**

Judge John J. Tharp of the U.S. District Court for the Northern District of Illinois granted class certification in a case alleging that the defendants faxed unsolicited advertisements to thousands of individuals and entities in violation of the Telephone Consumer Protection Act (TCPA). The court rejected the defendants' argument that the class definition was deficient because it did not specify whether the recipients did or did not consent to receive faxes. The court noted that consent is an affirmative defense under the TCPA, and therefore "does not restrict the scope of the class itself." Moreover, there was no reason to believe that including the requirement of lack of consent in the class definition would materially reduce the scope of the class, because there was no evidence that any of the recipients actually consented to receiving the fax. The court also found that the predominance element was satisfied for the same reason, noting that "the absence of evidence suggesting that a substantial number of class members consented in some fashion to receipt of the defendants' fax … means that there is little reason to believe that such issues will overwhelm common questions going forward."

***C-Mart, Inc. v. Metropolitan Life Insurance Co.*, No. 13-80561-CIV, 2014 U.S. Dist. LEXIS 13717 (S.D. Fla. Feb 4, 2014), 23(f) pet. pending.**

Judge Donald M. Middlebrooks of the U.S. District Court for the Southern District of Florida granted the plaintiff's motion for class certification arising out of the defendants' alleged violation of the federal Telephone Consumer Protection Act (TCPA), as amended by the Junk Fax Protection Act of 2005. The plaintiff alleged that the defendants violated the TCPA by sending unsolicited life insurance advertisements via fax to roughly 35,000 Missouri residents during a one-month period in 2012. The defendants challenged class certification on multiple grounds, including ascertainability, arguing that it would be virtually impossible to determine class membership because many class members may have given out their phone numbers voluntarily or had prior business relations with the defendants. The court rejected this argument, however, on the ground that the plaintiffs expressly alleged that the TCPA's opt-out requirement had been violated. Because all of the faxes at issue did not include the mandatory opt-out language delineated by the TCPA, the court determined that issues of consent were essentially irrelevant and could not bar class certification.

***Stern v. DoCircle, Inc.*, No. SACV 12-2005 AG JPRX, 2014 WL 486262 (C.D. Cal. Jan. 29, 2014).**

Judge Andrew J. Guilford of the U.S. District Court for the Central District of California certified this Telephone Consumer Protection Act (TCPA) class action alleging receipt of unsolicited texts. The court found that the class was sufficiently numerous and ascertainable, and that common issues of law and fact, such as which party bears the burden of proof on consent and what steps the defendants took to comply with the TCPA, existed; furthermore, the predominance and superiority requirements were satisfied because neither party had introduced individualized evidence of consent, which meant that "[a]t this stage in the litigation, it appears that consent will be proved or disproved on evidence and theories applicable to the entire class."

***Baehr v. Creig Northrop Team, P.C.*, No. CIV. WDQ-13-0933, 2014 WL 346635 (D. Md. Jan. 29, 2014).**

Judge William D. Quarles Jr. of the U.S. District Court for the District of Maryland granted the plaintiffs' motion for class certification in a case alleging violations of the Real Estate Settlement Procedures Act (RESPA). The suit arose from an alleged scheme in which the defendant real estate agents exclusively referred the plaintiff homebuyers to a particular title insurance service in return for kickbacks over a 13-year period. Determining that the facts of the class representatives' claims were significantly different from those members of the class who purchased homes during an earlier time period, the court used its discretion to redefine the proposed class to include only those plaintiffs who purchased their home during a later, circumscribed time frame so that the requirements of Rule 23(a) were satisfied. Under Rule 23(b)(3), the court found that the alleged scheme under which the defendants operated applied uniformly to all members of the redefined class, satisfying the predominance requirement, and that a class action was the superior method of resolving what would otherwise be small individual claims.

***Oglala Sioux Tribe v. Van Hunnik*, No. 13-5020-JLV, 2014 WL 317693 (D.S.D. Jan. 28, 2014).**

Judge Jeffrey L. Viken of the U.S. District Court for the District of South Dakota granted class certification in a case alleging that the defendants' policies, practices and procedures relating to the removal of Native American children from their homes violated the Fourteenth Amendment's Due Process Clause and the Indian Child Welfare Act. As an initial matter, the court rejected the defendants' argument that class certification was improper because discovery had not yet occurred. The court concluded that the pleadings contained sufficient information to determine whether class certification was appropriate. Moreover, although the defendants suggested that additional discovery was necessary to the class certification inquiry, they did not identify what additional information was missing from the plaintiffs' motion. Turning to the substance of the class certification motion, the court concluded that the plaintiffs had established all requirements under Rule 23. The court held that whether the defendants' policies violated the plaintiffs' procedural rights was a "common legal question across the proposed class." Moreover, "[t]he fact [that] each member of the class would be affected differently by the defendants' policies [did] not preclude a finding of commonality." The court also concluded that the plaintiffs satisfied the adequacy-of-representation element of Rule 23, noting that it did not foresee any real possibility of conflicts between the named plaintiffs and proposed class members.

***K.M. v. Regence BlueShield*, No. C13-1214 RAJ, 2014 WL 280468 (W.D. Wash. Jan. 24, 2014).**

Judge Richard A. Jones of the U.S. District Court for the Western District of Washington certified a Rule 23(b)(1) class of beneficiaries who required neurodevelopmental therapy for the treatment of a qualified mental health condition. Judge Jones found commonality was satisfied based on a significant common question: "Does Regence's exclusion of neurodevelopmental therapies for the treatment of DSM mental conditions for its insureds over the age of six violate the Washington Mental Health Parity Act?" The court found that, as the fiduciary, the defendant is bound to follow the terms of the Plan, and thus "[i]f another court were to interpret the Plan differently, it would trap Defendants in the inescapable legal quagmire of not being able to comply with one such judgment without violating the terms of another, which is what (b)(1)(A) was enacted to remedy."

***Torres v. SGE Mgmt. LLC*, No. 4:09-CV-2056, 2014 WL 129793 (S.D. Tex. Jan. 13, 2014), 23(f) pet. granted.**

Judge Kenneth M. Hoyt of the U.S. District Court for the Southern District of Texas certified a class of former independent agents of a retail electrical and natural gas company. The putative class alleged that the defendants operated a pyramid scheme in violation of RICO and sought money damages and injunctive relief. The court granted class certification under Rule 23(b)(3) to the extent the putative class sought certification on a fraud-on-the-market theory and on the common sense inference that the agents were duped into joining a pyramid scheme. The district court, however, rejected class certification under Rule 23(b)(2) of the Federal Rules of Civil Procedure, which is available only when the party opposing class certification has acted or refused to act on grounds that apply generally to the class. The court found that injunctive relief was improper under Rule 23(b)(2) because there was no continued harm to the class or threat of repeated injury in the future. Thus, the court reasoned, a showing that the marketing program was a facially illegal pyramid scheme would provide the necessary proximate cause on a classwide basis.

***In re Celexa & Lexapro Marketing & Sales Practices Litigation*, No. 09-02067-NMG, 2014 WL 108197 (D. Mass. Jan. 10, 2014).**

Judge Nathaniel M. Gorton of the U.S. District Court for the District of Massachusetts certified a class of Missouri consumers but declined to certify classes of Illinois and New York consumers in an action alleging that a pharmaceutical manufacturer had misled consumers about the efficacy of Celexa and Lexapro, which were marketed as antidepressants for pediatric and adolescent patients. The court held that there would be no need to engage in individualized inquires about exposure to the alleged

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misrepresentations because the Missouri Merchandising Practices Act does not require proof of reliance or causation. The court further held that the plaintiffs' "informed choice" damages theory is supported by relevant Missouri precedent. But the court declined to certify classes of Illinois and New York consumers, holding that causation is an element of both states' consumer protection laws, and that the high court of each state has rejected the plaintiffs' "informed choice" theory as a theory of damages.

***In re Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litigation*, No. 12-ML-2048-C, 2014 WL 104964 (W.D. Okla. Jan. 9, 2014), 23(f) pet. pending.**

Judge Robin J. Cauthron of the U.S. District Court for the Western District of Oklahoma certified a class of Oklahoma City cable subscribers who alleged that the defendant violated the Sherman Act by illegally tying its premium cable service to rental of a set-top box. The court found that the class was ascertainable, rejecting the defendant's claim that the plaintiffs would have to present individualized proof of coercion in order to prove class membership. In addition to numerosity, typicality and adequacy, Judge Cauthron found the commonality requirement satisfied because "the alleged tie that Cox customers are required to rent a Cox STB to access Cox's Premium Cable programming … applied to all members of the class, regardless of what specific package they subscribed to." The court also found that there was sufficient classwide proof of market power and antitrust injury, including damages, and that the absence of a written contract did not require individualized proof to establish coercion because the defendant's internal policies stated that "rental of an STB is required in order to receive full access to all interactive digital features."

***A.F. ex rel. Legaard v. Providence Health Plan*, No. 3:13-CV-00776-SI, 2013 WL 6796095 (D. Or. Dec. 24, 2013).**

Judge Michael H. Simon of the U.S. District Court for the District of Oregon certified a Rule 23(b)(2) class of autistic children seeking declaratory and injunctive relief after their parents' group health plan allegedly denied coverage of an intensive behavior therapy under its developmental disability exclusion. The court found commonality, typicality and adequacy were satisfied based on the common question of the legality of the developmental disabilities exclusion and because all class members would benefit from the injunctive relief sought (enjoining the defendant from continuing to apply that exclusion). The court also held that the numerosity requirement was satisfied despite the fact that only 12 plan participants had actually been denied coverage for claims associated with an autism diagnosis. According to the court, because plaintiffs were seeking "injunctive relief under ERISA … no showing of individualized harm of class members is required to establish Article III standing." Thus, the court held that the class could properly include all 259 group plan members who had submitted a claim for benefits associated with a diagnosis of autism, regardless of whether the claim had been denied.

***Rainbow Business Solutions v. Merchant Services, Inc.*, No. C 10-1993 CW, 2013 WL 6734086 (N.D. Cal. Dec. 20, 2013), 23(f) pet. pending.**

Judge Claudia Wilken of the U.S. District Court for the Northern District of California granted in part and denied in part the plaintiffs' motion for certification of a variety of subclasses consisting of merchants who brought claims for fraud, negligent misrepresentation and violations of California's Unfair Competition Law and Racketeer Influenced and Corrupt Organizations Act (RICO) based on various types of alleged misconduct by credit card processing services. First, Judge Wilken certified a class of California plaintiffs alleging claims under the UCL based on the allegation that they were wrongly charged for purported taxes that were not actually due or paid to any taxing authority, finding that common questions related to the "propriety of [defendants' determination as to] whether taxes were due and whether class members' … agreements authorized the deductions after their leases had expired" predominated. Judge Wilken also certified classes seeking to pursue claims for breach of contract, breach of the duty of good faith and fair dealing and violations of the UCL based on the allegation that the plaintiffs were charged inflated property taxes. However, the court refused to certify UCL, RICO, fraud, breach of contract and other claims alleged by the remaining proposed classes for a variety of reasons. For example, the court noted that the proposed class members alleging RICO, RICO conspiracy and fraud claims would have to prove reliance on the defendant's alleged misconduct and therefore individualized issues would predominate. In addition, the court noted that the UCL claims alleged by some of the proposed classes would require proof that fees assessed to each class member were appropriate under the specific terms of its agreement with the defendants.

***City Select Auto Sales, Inc. v. David Randall Assoc., Inc.*, No. CIV. A. 11-2658 (JBS-KMW), 2013 WL 6726742 (D.N.J. Dec. 20, 2013).**

Chief Judge Jerome Simandle of the U.S. District Court for the District of New Jersey certified a class alleging that the defendant company sent junk facsimiles in violation of the Telephone Consumer Protection Act (TCPA). The plaintiffs initially moved for class certification, which was denied without prejudice pending limited discovery and additional briefing. The plaintiffs subsequently renewed their motion for class certification. The defendant argued that the question of whether each class member had consented to

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receipt of the facsimiles was too individualized to satisfy Rule 23's predominance requirement. The court disagreed, finding that common questions of fact prevailed in the absence of evidence that the defendant had any business relationships or permission from any of the plaintiffs. In reaching this conclusion, the court relied on caselaw holding that the use of a mass campaign to transmit faxes "tends to negate individualized issues that often arise in TCPA cases, such as whether any recipient consented to receive the fax." The court also rejected the defendant's argument that predominance was lacking given individualized questions as to whether each class member actually received a fax in the first place. According to the court, the plaintiffs submitted sufficient proof of common receipt across the class based on the numbers to which the fax logs indicate faxes were successfully sent. For these and other reasons, the court certified the class.

***Banks v. Nissan North America, Inc.*, No. C 11-2022 PJH, 2013 WL 6700299 (N.D. Cal. Dec. 19, 2013), 23(f) pet. pending.**

Judge Phyllis J. Hamilton of the U.S. District Court for the Northern District of California certified a class of California Nissan vehicle owners alleging a defect in a brake component and asserting causes of action under California state consumer protection laws. Relying on Ninth Circuit class certification decisions in *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005), and *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168 (9th Cir. 2010), the court found that common issues predominated as to the alleged design defects and Nissan's awareness of and duties to class members relating to those alleged defects, and that the plaintiffs satisfied Rule 23's typicality and adequacy requirements even though the plaintiffs no longer owned their vehicles and their vehicles' defects may have manifested in different ways. Judge Hamilton also rejected the defendant's argument that the class was overbroad because it included owners who had not experienced actual component failure; according to the court, "proof of the manifestation of a defect is not a prerequisite to class certification."

***Warren v. Town of Speedway*, No. 1:13-cv-1049-JMS-DKL, 2013 WL 6729655 (S.D. Ind. Dec. 19, 2013).**

Judge Jane Magnus-Stinson of the U.S. District Court for the Southern District of Indiana granted class certification in a case brought by taxi drivers whose licenses were seized by police officers on the day of the Indianapolis 500. The court found that the plaintiffs established the numerosity requirement, because it was undisputed that at least forty licenses were seized on race day. In addition, there were common questions of law and fact, "including the circumstances surrounding the seizure of [the plaintiffs'] operator licenses, and whether those seizures violated their rights and constituted conversion." The court also concluded that the fact that each class member may have suffered a different amount of damages was "not problematic for class certification purposes." Citing the U.S. Court of Appeals for the Seventh Circuit's recent decision in *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013) the court observed that damages of individual class members could be readily determined in individual hearings. Finally, the court found that a class action was superior to individual actions, "especially in light of the relatively small damages requested by each class member."

***Gregory v. Preferred Financial Solutions*, No. 5:11-CV-422(MTT), 2013 U.S. Dist. LEXIS 176896 (M.D. Ga. Dec. 17, 2013).**

Judge Marc T. Treadwell of the U.S. District Court for the Middle District of Georgia granted in part and denied in part the plaintiffs' motion for class certification in a suit alleging that the defendants violated Georgia's Debt Adjustment Act by collecting excess fees for debt adjustment services in violation of the law. The plaintiffs also asserted common-law claims for fraud, breach of fiduciary duty and negligent misrepresentation (common-law claims). The court granted class certification for violations of the Georgia Debt Adjustment Act, but denied class certification for the alternative common-law claims, finding that the plaintiffs' decision to jettison damages with respect to their common-law claims created a conflict of interest with the rest of the class, defeating class certification as to these claims.

***St. Louis Heart Center, Inc. v. Vein Centers for Excellence, Inc.*, No. 4:12 CV 174 CDP, 2013 WL 6498245 (E.D. Mo. Dec. 11, 2013), 23(f) pet. denied.**

Judge Catherine D. Perry of the U.S. District Court for the Eastern District of Missouri granted class certification in a case alleging that the defendant sent unsolicited fax advertisements in violation of the TCPA. The court held that the proposed class was ascertainable, even though it included individuals or entities who never received a fax, did not own the fax machine or whose fax machines did not automatically print messages. Moreover, the court found that the commonality requirement was satisfied because the content of each fax was virtually the same and the question whether the advertisements complied with the TCPA could be determined on a classwide basis. The court also concluded that the defendant engaged in a standardized course of conduct vis-à-vis the putative class members, making the plaintiff's claim typical of other putative class members' claims. Moreover, the court concluded that predominance was met because it had "no reason to believe that the resolution of any individual issues will consume more time or resources than the resolution

(continued on next page)

of common issues." Finally, the court found that a class action was superior to individual actions because the action involved "thousands of plaintiffs, each with a relatively small, nearly identical claim, who might not otherwise seek or obtain relief absent a class action."

***In re Nexium (Esomeprazole) Antitrust Litigation*, No. 12-md-02409-WGY, 2013 WL 6486917 (D. Mass. Dec. 11, 2013).**

Judge William G. Young of the U.S. District Court for the District of Massachusetts certified a class of wholesalers and retailers who purchased the drug Nexium directly from AstraZeneca (i.e., a "direct purchasers" class) in a case alleging violations of federal antitrust law. Even though the number of alleged class members was admittedly less than the "suggested threshold of forty members," the court concluded that Rule 23(a)'s numerosity requirement was satisfied and that joinder was impracticable. The court held that the class members were geographically dispersed throughout the country, making joinder "difficult, inconvenient, and costly"; that courts give favorable treatment to class actions seeking private enforcement of antitrust laws; and that certifying the class would promote judicial economy because the damages sought stemmed "from the same, identical transactions" between the defendants. The court also held that the class representatives who were proceeding as assignees of others' claims were adequate class representatives because the assignments were valid and there was no evidence that the assignees did not share the same interests as the rest of the class. As to Rule 23(b)(3)'s predominance requirement, the court held that although the variation in price paid among class members might ultimately preclude some class members from recovery, it was sufficient for the purpose of class certification that the plaintiffs offered a methodology to prove damages on a classwide basis through a single, classwide theory of harm.

***In re Evanston Northwestern Corp. Antitrust Litigation*, No. 07-cv-04446, 2013 WL 6490152 (N.D. Ill. Dec. 10, 2013).**

Judge Edmond E. Chang of the U.S. District Court for the Northern District of Illinois granted class certification in an antitrust suit against NorthShore University HealthSystem, alleging that it illegally monopolized the market and caused the plaintiff and the putative class to pay artificially inflated prices for healthcare services. NorthShore argued that a class action was not superior because certain putative class members, such as managed care organizations, were bound by arbitration provisions. The court concluded that this argument was premature, noting that the "sensible course" was to "decide whether to certify the class without considering the possibility of arbitration, bring the [managed care organizations] into the case, see what their position is on arbitration, and then decide who must arbitrate." The court also rejected NorthShore's argument that a certified class would be unmanageable, noting that the U.S. Court of Appeals for the Seventh Circuit had already rejected that argument. "By helping to answer the antitrust liability question in one fell swoop," the court explained, the methodology offered by the plaintiffs' expert "eliminates the need for hundreds of mini-trials on liability.

Other Class Certification Decisions

***Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 12-40088-TSH, 2014 WL 257430 (D. Mass. Jan. 22, 2014).**

Judge Timothy S. Hillman of the U.S. District Court for the District of Massachusetts granted the defendant's motion to certify for interlocutory appeal his decision that an unaccepted Rule 68 offer of judgment made before the plaintiff moves to certify a class does not moot the named plaintiff's claims, noting the lack of controlling authority in the U.S. Court of Appeals for the First Circuit and the split among other circuits. The plaintiff acknowledged the lack of controlling authority but opposed certification on the ground that there were alternative reasons to deny the motion to dismiss. The court disagreed, rejecting these reasons. First, the plaintiff argued that the offer for the full amount recoverable under the Telephone Consumer Protection Act (TCPA) and an analogous state statute left the amount of damages to be decided by the court, but the court disagreed, noting that the plaintiff elected to recover statutory rather than actual damages. Second, the plaintiff argued that it was entitled to damages on a per-violation basis rather than the per-fax basis offered by defendant, and that the defendant's offer was therefore insufficient to cover its claim, but the court concluded that both the TCPA and state law limited recovery to per-fax damages and did not allow recovery for multiple alleged violations within a single fax. Third, the plaintiff argued that the offer of an injunction against sending faxes to only the named plaintiff was insufficient because it did not cover the entire putative class; the court disagreed, holding that the plaintiff was not entitled to a classwide injunction because a class had not yet been certified. Fourth, the plaintiff argued that it had an interest in representing the class that survived, even if its individual claims were mooted by the offer of judgment; the court rejected this argument, holding that "[t]here can be no interest is representing a class that does not exist." Finally, the plaintiff argued that it had a continuing interest in recouping attorneys' fees and an incentive award. The court rejected this contention, holding that an interest in attorneys' fees does not save a claim for mootness, and that an incentive award is "of the same nature as attorney's fees and similarly does not revive a moot claim."

***March v. Medicredit, Inc.*, No. 4:13CV1210 TIA, 2013 WL 6265070 (E.D. Mo. Dec. 4, 2013).**

Magistrate Judge Terry I. Adelman of the U.S. District Court for the Eastern District of Missouri denied the defendant's motion to dismiss and granted the plaintiff's motion to strike an offer of judgment in a case alleging that the defendant violated the Fair Debt Collection Practices Act (FDCPA). Before a motion for class certification was filed, the defendant offered the plaintiff $2,000 plus attorneys' fees and costs, which amounted to complete relief under the FDCPA. The court noted that "[t]he Eighth Circuit has not ruled squarely on the issue of whether the tender and rejection of an offer of judgment prior to a request for class certification moots a class action suit" and that the circuit courts are divided on the issue. The court ultimately concluded that "concerns of 'picking off' putative class representative plaintiffs, as well as defendants racing to offer judgment to avoid a class action suit, weigh against dismissal." In the court's view, the defendant "should not be able to use offers of judgment to thwart class actions." "However, in future cases," the court observed, "putative class action plaintiffs would be wise to immediately file [class certification] motions to protect the class from similar motions to dismiss based on offers of judgment."

CLASS ACTION FAIRNESS ACT (CAFA) DECISIONS

Decisions Denying Motions to Remand/Reversing Remand Orders

***Rea v. Michaels Stores Inc.*, No. 14-55008, 2014 WL 607322 (9th Cir. Feb. 18, 2014).**

The U.S. Court of Appeals for the Ninth Circuit (Kleinfeld, Silverman and Hurwitz, JJ.) reversed a lower court's second remanding of an action brought on behalf of a putative class of store managers purportedly improperly classified as exempt from overtime. The defendant had first removed the case within 30 days of filing under CAFA, but the district court remanded the action for failure to satisfy the $5 million amount-in-controversy requirement in light of the plaintiffs' explicit waiver for any recovery over $4,999,999.99. The day after the Supreme Court's decision in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345, 1347 (2013) held that such attempted damages waivers are ineffective to defeat CAFA removal, the defendant removed again. The district court remanded again, finding that the removal was untimely and that the defendant had failed to demonstrate that the amount in controversy exceeded $5 million. The Ninth Circuit found that the fact that the state court had since certified the class was immaterial because "'post-filing developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of filing.'" The court further found that the removal was timely because the damage waiver was still valid and effective at the time the defendant received the initial complaint, and "the initial 30–day removal period was never triggered." In addition, the court found that the defendant had satisfied the amount-in-controversy requirement under the "preponderance of the evidence" test outlined in *Rodriguez v. AT & T Mobility Services, LLC*, 728 F.3d 975 (9th Cir. 2013).

***South Florida Wellness, Inc. v. Allstate Insurance Co.*, No. 14-10001, 2014 U.S. App. LEXIS 2787 (11th Cir. Feb. 14, 2014).**

A unanimous panel of the U.S. Court of Appeals for the Eleventh Circuit (Carnes, C.J., Marcus and Pryor, JJ.) reversed a lower court's ruling remanding a putative class action to state court, holding that CAFA's amount-in-controversy requirement can be satisfied where the plaintiff seeks only declaratory relief. The plaintiff brought a putative class action challenging the defendant company's insurance policy practices. While the plaintiff only sought declaratory relief, the defendant nonetheless removed the case to federal court under CAFA, arguing that, if the plaintiff obtained a declaratory judgment, it could then use the judgment to obtain monetary damages in excess of CAFA's $5 million amount-in-controversy requirement. The defendant estimated that the plaintiff could potentially recover $68 million. The U.S. District Court for the Southern District of Florida ruled that the defendant's damages estimate was too speculative and remanded the case to state court, but the Eleventh Circuit reversed, reasoning that even though the plaintiff may not ultimately recover $68 million, the mere possibility of recovering more than $5 million satisfies CAFA's amount-in-controversy requirement. In so reasoning, the Eleventh Circuit relied on an affidavit submitted by the defendant demonstrating that the declaratory judgment the plaintiff seeks will "determine whether Allstate made insufficient payments on more than 1.6 million 'bills for payment or reimbursement,' with the amount of the insufficiency exceeding $68 million, which it will owe the putative class members." "That is the amount in controversy," the appellate court declared, which "is far above the $5 million threshold set by CAFA."

***Brown v. Mortgage Electronic Registration Systems, Inc.*, 738 F.3d 926 (8th Cir. Dec. 31, 2013).**

A unanimous panel of the U.S. Court of Appeals for the Eighth Circuit (Murphy, Melloy and Shepherd, JJ.) affirmed the district court's decision that removal was proper under CAFA in a suit brought by the Circuit Clerk of Hot Spring County, Arkansas, against various lenders, alleging that the lenders used the Mortgage Electronic Registration System to avoid paying recording fees on mortgage assignments. Although the case was originally brought in Arkansas state court, the lenders removed the action to federal court under CAFA. The plaintiff argued that the district court's exercise of jurisdiction was erroneous because her proposed class included only the 75 Arkansas circuit clerks rather than all Arkansas taxpayers, and that the class therefore did not satisfy CAFA's requirement that the class contain at least 100 members. Reviewing the face of the complaint at the time of the action, however, the court determined that the plaintiff pled her claim as a class action composed of all Arkansas citizen-taxpayers. Thus, the district court had properly found that jurisdiction existed under CAFA.

***Kuns v. Ford Motor Company*, No. 13-3364, 2013 WL 6068459 (6th Cir. Nov. 19, 2013).**

A unanimous panel of the U.S. Court of Appeals for the Sixth Circuit (Cole, Clay and Bertelsman, JJ.) affirmed the district court's holding that CAFA provided it with subject-matter jurisdiction to hear the plaintiff's claims that Ford allegedly violated the federal Magnuson-Moss Warranty Act, notwithstanding the absence of facts satisfying the act's stated jurisdictional requirements. The Magnuson-Moss Warranty Act provides that class actions alleging its violation may not be brought in federal court unless there are at least one hundred named plaintiffs, but there was only one named plaintiff in the case. Nonetheless, the court ruled that because CAFA was passed later than the act and with the intent of expanding federal subject-matter jurisdiction over class actions, it "effectively supersedes" the act's "more stringent jurisdictional requirements." The court further ruled that the complaint satisfied CAFA's requirements of minimal diversity and a matter in controversy exceeding $5 million, and that the district court had properly exercised jurisdiction over the plaintiff's Magnuson-Moss Warranty Act claim.

***Atwell v. Boston Scientific Corp.*, 740 F.3d 1160 (8th Cir. 2013).**

A unanimous panel of the U.S. Court of Appeals for the Eighth Circuit (Wollman, Loken and Shepherd, JJ.) reversed the district court's order remanding three product-liability actions to state court, holding that the district court had jurisdiction over the actions under CAFA. The plaintiffs filed three separate lawsuits against Boston Scientific for alleged defects in transvaginal mesh medical devices, and Boston Scientific removed the cases to federal court. The court noted that state court plaintiffs with common claims against a common defendant may bring separate cases with fewer than 100 plaintiffs each to avoid federal jurisdiction under CAFA — unless their claims are "proposed to be tried jointly." The court observed that the plaintiffs in this case, "while disavowing a desire to consolidate cases for trial, nonetheless urged the state court to assign the claims of more than 100 plaintiffs to a single judge who could 'handle these cases for consistency of rulings, judicial economy, [and] administration of justice.'" The court concluded that, at the time the cases were removed, the motions for reassignment to a single judge, "combined with the plaintiffs' candid explanation of their objectives," constituted a proposal to try to try the cases jointly and therefore required denial of the motions to remand.

***Quicken Loans Inc. v. Alig*, 737 F.3d 960 (4th Cir. 2013).**

A panel of the U.S. Court of Appeals for the Fourth Circuit (Floyd, Niemeyer and Wynn, JJ.), vacated the district court's decision to remand a case to state court under the local-controversy exception. The plaintiffs brought suit on behalf of West Virginia consumers against Quicken Loans, an unnamed class of West Virginia appraisers and certain named West Virginia appraisers. The plaintiffs alleged that Quicken Loans created unlawful loans, and that the West Virginia real estate appraisers participated in a scheme to induce consumers to agree to the unlawful loans. The district court remanded the case to state court under the local-controversy exception. The defendants appealed the decision, arguing that the district court should have considered the defendants individually to determine whether each one met the "at least one defendant" element of the local-controversy exception, rather than considering the class of defendant appraisers in the aggregate. The "at least one defendant" element requires, *inter alia*, that at least one defendant be one from which the plaintiff seeks significant relief and one whose conduct "forms a significant basis" of the plaintiff's claims. The Fourth Circuit rejected the defendants' argument, resolving that the "at least one defendant" element can apply to an aggregated group of defendants. Nonetheless, the appellate court determined that the district court had improperly considered unnamed defendant appraisers in its analysis, because only named members of a proposed but uncertified class are considered parties to a suit. The Fourth Circuit therefore remanded the case to the district court for findings on whether the class of named defendant appraisers met the "at least one defendant" element of the local-controversy exception.

***Stalley v. ADS Alliance Data Systems, Inc.*, No. 8:11-cv-1652-T-33TBM, 2014 U.S. Dist. LEXIS 12123 (M.D. Fla. Jan. 31, 2014).**

Judge Virginia M. Hernandez Covington of the U.S. District Court for the Middle District of Florida previously denied the plaintiffs' motion for class certification in a suit alleging that the defendant credit card issuers violated the Florida Security of Communications Act by recording phone calls without the consent of the plaintiff callers. The court then *sua sponte* issued an additional order stating that it would retain jurisdiction even after it denied class certification. The court relied on *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009), which reversed the district court's grant of class certification, but held that the plaintiffs' claims could proceed individually. Applying *Vega*, Judge Covington ruled that the court would retain jurisdiction because "the Eleventh Circuit is giving district courts the green light to retain CAFA jurisdiction even after denial of class certification."

***Greco v. Jones*, No. 3:13-CV-1005-M, 2014 WL 177410 (N.D. Tex. Jan. 16, 2014).**

Judge Barbara M.G. Lynn of the U.S. District Court for the Northern District of Texas denied the plaintiffs' motion to remand for lack of subject matter jurisdiction under CAFA. The plaintiffs represented a putative class of Super Bowl ticket holders who were allegedly denied admission to the game, relocated, delayed in reaching their seats or directed to seats with obstructed views. The plaintiffs sought remand, arguing that the defendants must establish that each plaintiff pursues claims satisfying the minimum jurisdictional amount. The district court disagreed, holding that the defendants must only show that at least one plaintiff seeks in excess of $75,000 to properly remove under CAFA. The district court found that it was facially apparent from the complaint that the defendants had satisfied their burden. Further, the district court held that the plaintiffs did not demonstrate that CAFA's "event or occurrence" exception applied, because plaintiffs' claims, although all relating to the Super Bowl, were predicated on separate ticket purchases and numerous different seating problems.

***Walters v. Flag Credit Union*, No. 4:13cv241-RH/CAS, 2014 U.S. Dist. LEXIS 4545 (N.D. Fla. Jan. 13, 2014).**

Judge Robert L. Hinkle of the U.S. District Court for the Northern District of Florida denied a motion to remand a putative class action brought on behalf of "Florida consumers" charging defendants who allegedly engaged in unlawful credit and insurance practices. One of the defendants removed the action under CAFA, and the plaintiff moved to remand under the local-controversy exception. The court denied the motion to remand, determining that this exception did not apply. According to the court, even though the proposed class consisted of "Florida consumers" who purchased a specific type of vehicle insurance, the plaintiff failed to meet its burden of showing that more than two-thirds of the proposed class members were citizens of Florida. The court also found that the class members were not seeking "significant relief" from the defendant that was a citizen of Florida. As the court recognized, the class members sought to recover all the fees paid for guaranteed asset protection contracts obtained from either defendant. However, because the out-of-state defendant issued 128,012 such contracts, while the Florida defendant sold only 852 of them, the court concluded that the fees on contracts placed by the Florida defendant were "not significant in relative terms."

***Brannen v. Ethicon*, No. 4:13CV1251 JAR, 2013 WL 6858496 (E.D. Mo. Dec. 30, 2013).**

Judge John A. Ross of the U.S. District Court for the Eastern District of Missouri denied the plaintiffs' motion to remand and found that removal was proper under CAFA in a product liability case relating to the defendants' transvaginal tape mesh products. The case involved several state court lawsuits, which the plaintiffs requested to be assigned to the same trial judge. Citing the U.S. Court of Appeals for the Eighth Circuit's recent decision in *Atwell v. Boston Scientific Corp.* (see page 17), the court held that removal was timely because it was accomplished within 30 days from the date the plaintiffs requested assignment of the cases to the same trial judge. At that time, the court concluded, the plaintiffs' counsel indicated their intent to consolidate the cases in front of one judge for trial, and the cases therefore met CAFA's 100-class-member requirement.

***Johnson v. Bank of America, N.A.*, No. 1:13-CV-02323, 2013 WL 6634498 (N.D. Ohio Dec. 17, 2013).**

Judge James S. Gwin of the U.S. District Court for the Northern District of Ohio denied the plaintiffs' motion to remand to state court a putative class action against three banks in connection with mortgage foreclosures. To satisfy their burden of demonstrating that CAFA's threshold requirement of a matter in controversy exceeding $5 million was met, the defendants used the named plaintiffs' specified damages and average loan payment data to estimate the damages for the class. Because these calculations exceeded the $5 million threshold, before including punitive damages, the court found that the defendants had met their burden of satisfying the amount-in-controversy requirement. In denying the motion to remand, the court also rejected the plaintiffs' argument that the local-controversy exception applied, even though the class and subclasses were limited to Ohio citizens and one defendant was also an Ohio citizen. The court held that U.S. Bank, an Ohio citizen, was not a significant local defendant for the whole class because the relief sought from it was not significant as compared to the other defendants.

***Rivas v. Terminix International Co.*, No. C-13-4962 MMC, 2013 WL 6443381 (N.D. Cal. Dec. 9, 2013).**

The plaintiff originally brought a class action in state court asserting six causes of action, including a claim under the California Labor Code's Private Attorneys General Act (PAGA). After the defendants removed the initial complaint under CAFA, the plaintiff amended his complaint to plead only the PAGA claim on behalf of himself, eliminating the class allegations and sought remand. Noting that "a putative class action, once properly removed, stays removed," Judge Maxine Chesney of the U.S. District Court for the Northern District of California denied remand because, in seeking removal of the initial complaint, the defendants had shown that the parties are minimally diverse and the amount in controversy exceeded the sum of $5 million.

***Nolan v. Exxon Mobil Corp.*, No. 13-439-JJB, 2013 WL 6194621 (M.D. La Nov. 26, 2013).**

Judge James J. Brady of the U.S. District Court for the Middle District of Louisiana denied the plaintiffs' motion to remand the action for lack of jurisdiction under CAFA. The plaintiffs represented a putative class of persons injured by a chemical leak at Exxon, and the putative class sought an array of damages for personal injury, property damage and emotional distress. The district court held that federal court jurisdiction was proper because it was facially apparent from the petition that the $5 million aggregate jurisdictional amount had been satisfied. In particular, the fact that the class size could be as a great as 20,000 persons, combined with the alleged harm to person and property and the wide array of damages sought by plaintiffs, supported a finding that the defendants met their burden to prove the requisite jurisdictional amount. Additionally, for purposes of CAFA, the court found that Exxon was the only primary defendant named in the action — it faced the greatest liability exposure, and the claims against the named individuals were unlikely to be viable.

Decisions Granting Motion to Remand

***Hood v. JP Morgan Chase & Co.*, 737 F.3d 78 (5th Cir. 2013).**

A unanimous panel of the U.S. Court of Appeals for the Fifth Circuit (Owen, Elrod and Haynes, JJ.) reversed the district court's denial of the plaintiff's motion to remand the case to Mississippi state court under CAFA. The Mississippi attorney general filed complaints in state court alleging that six credit card companies violated the Mississippi Consumer Protection Act by charging consumers for unwanted or unnecessary products, such as services to protect customers from unauthorized charges or identity theft. The defendants removed the case to federal court based on, among other things, federal subject matter jurisdiction under CAFA's mass action provision. The AG moved to remand, contending that the defendants failed to satisfy the amount-in-controversy requirement and that this was not a mass action. The district court denied the motion to remand. The Fifth Circuit noted that CAFA's mass action provision has two amount-in-controversy requirements: (i) an individual amount-in-controversy requirement of $75,000 and (ii) an aggregate amount-in-controversy requirement of $5 million. The Fifth Circuit held that the defendants did not meet the individual amount-in-controversy requirement because they had not established that at least one plaintiff had sustained damages of at least $75,000. In particular, for each customer plaintiff, the amount in controversy equaled only the amount that customer paid in ancillary fees to the credit company; the defendants failed to provide evidence that any of the credit card holders paid fees of $75,000. The court also found that the state was not a mass action plaintiff that satisfies the amount-in-controversy requirement because the customers — not the state — were the real parties in interest. The court declined to resolve the issue of whether more than one plaintiff must satisfy the $75,000 amount-in-controversy requirement.

***Baker v. Equity Residential Management, LLC*, No. 13-12217-RBC, 2014 WL 554489 (D. Mass. Feb. 12, 2014).**

Judge Robert B. Collings of the U.S. District Court for the District of Massachusetts remanded a putative class action arising out of the failure of two apartment buildings to provide heat and hot water because the defendants had not pleaded facts with sufficient particularity to demonstrate a reasonable probability that the matter in controversy exceeded CAFA's $5 million threshold. The plaintiffs sought damages for violation of the implied covenant of quiet enjoyment, implied covenant of habitability and Massachusetts' consumer protection law. For both implied covenants, Massachusetts law allows tenants to recover either actual plus consequential damages or three times the rent, but if a plaintiff seeks the "treble-rent" recovery, he or she may not also recover under the consumer protection law's treble-damages provision. The court calculated that the potential treble-rent recovery would be $2.36 million, compared to actual damages of $608,000 (which, if trebled under the consumer protection law, would be $1.82 million). Although the plaintiffs also sought to recover attorney's fees, such fees would need to be more than $2.5 million to satisfy the $5 million threshold. The court assumed (without deciding) that the plaintiffs' attorney's fees request could be included in calculating the matter in controversy but concluded that the defendants had not alleged any facts to justify that such a large attorney's fees award would be granted. Therefore, the defendants had not proven a reasonable probability that the matter in controversy exceeded $5 million, and remand to state court was required.

***Vagle v. Archstone Communities, LLC,* No. CV 13-09044 RGK AJWX, 2014 WL 463532 (C.D. Cal. Feb. 5, 2014).**

Judge R. Gary Klausner of the U.S. District Court for the Central District of California remanded a putative class action that was brought on behalf of former tenants charged for cleaning, painting and carpet cleaning at the conclusion of their tenancy, regardless of the apartment unit's actual condition. The plaintiffs asserted claims for unjust enrichment and violations of California Civil Code § 1950.5 and California's unfair competition law against multiple defendant landlords. The court granted the plaintiffs' motion to remand on the ground that the removing defendant had not established CAFA's $5 million amount-in-controversy threshold by a preponderance of the evidence. The removing defendant had arrived at its amount in controversy by aggregating the security deposits of both its own tenants as well as the tenants of another landlord defendant. Judge Klausner found that this was inappropriate because there was "no factual basis on which to conclude that [the removing defendant] could be liable for damages owed to" tenants who did not live in its building. According to the court, "[w]hile CAFA permits aggregation of claims of separate plaintiffs … claims against multiple defendants can only be aggregated when the defendants are jointly liable[.]" Because there were no allegations capable of establishing a theory of joint liability, the court declined to aggregate the claims against the separate defendants for purposes of computing the amount in controversy under CAFA.

***California ex rel. Sherwin v. Office Depot, Inc.,* No. CV 12-9952 FMO (AJWx), 2014 WL 320156 (C.D. Cal. Jan. 29, 2014).**

A *qui tam* plaintiff filed a complaint against the defendant on behalf of the State of California and "all political subdivisions within the state that purchased goods and services from defendant pursuant to a contract with the U.S. Communities Government Purchasing Alliance." The first amended complaint identified at least 100 political subdivisions as real parties in interest, and nineteen of the political subdivisions intervened. The defendant removed the case, asserting that it qualified as a "mass action" under CAFA, which is defined as "any civil action in which the 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." Citing to the Supreme Court's recent decision in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 740 (2014), which held that a "mass action" must involve 100 named plaintiffs, Judge Fernando M. Olguin of the U.S. District Court for the Central District of California found that relator Sherwin, the state of California and the 19 intervenors "together fall far short of meeting the 100 named plaintiffs requirement" and thus the case did not qualify as a CAFA mass action.

***Gibson v. Clean Harbors Environmental Services, Inc.,* No. 1:13-cv-1040, 2014 WL 268277 (W.D. Ark. Jan. 24, 2014).**

Judge Susan O. Hickey of the U.S. District Court for the Western District of Arkansas held that a third-party defendant could not remove an action under CAFA, despite the act's language that a class action may be removed by "any" defendant. The court adopted the magistrate judge's report and recommendation concluding that CAFA's use of the word "any" does not include a third-party defendant "and does not authorize a third-party defendant to remove this action."

***Pham v. JPMorgan Chase Bank, N.A.,* No. C 13-04209 JSW, 2014 WL 231913 (N.D. Cal. Jan. 21, 2014).**

The plaintiffs brought claims for violations of the California Deferred Deposit Transaction Law (CDDTL), aiding and abetting violations of the CDDTL, violations of California's Unfair Competition Law and negligence based on conduct related to payday loans. In December 2012, several defendants filed a notice of removal pursuant to CAFA, but Judge Jeffrey S. White of the U.S. District Court for the Northern District of California "concluded Defendants did not meet their burden to show that the amount in controversy exceeded $5,000,000 and granted Plaintiffs' motion to remand." Back in state court, the plaintiffs added several new defendants. In September 2013, the new defendants filed their own notice of removal. In support of its assertion of CAFA jurisdiction, a new defendant argued that Judge White should revisit his earlier ruling because the new defendant "uses a more conservative estimate for the amount of the payday loans received by absent class members." Judge White declined to revisit his previous ruling, finding that the new estimates were still speculative. The new defendant also argued that potential punitive damages would exceed the CAFA jurisdictional minimum, relying only on the net worth of several defendants. Noting that the claims against those particular defendants would be resolved in arbitration, rendering their net worth irrelevant, Judge White found the new defendant had failed to meet its burden in showing CAFA jurisdiction.

***Farneth v. Wal-Mart Stores, Inc.*, No. 2:13-cv-01062, 2013 WL 6859013 (W.D. Pa. Dec. 30, 2013).**

The plaintiff in this putative class action alleged improper collection of state sales tax during "buy one, get one" consumer purchases. The plaintiff asserted claims for conversion and misappropriation, breach of constructive trust, unjust enrichment, and violation of the Pennsylvania Unfair Trade Practice and Consumer Protection Law. The defendant removed the case to federal court on the basis of CAFA diversity jurisdiction, and the plaintiff moved to remand to state court. Judge Mark R. Hornak of the U.S.

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District Court for the Western District of Pennsylvania granted the plaintiff's motion, ruling that the doctrine of comity required a federal court to defer to a state court where a federal decision would risk interference with state tax administration. The court pointed to a "confluence of factors" favoring a state court adjudication, including Pennsylvania courts' comparative advantage at interpreting the tax regulation regime, the absence of any federally protected fundamental right and the availability of a "plain, adequate, and complete remedy" in state court. In reaching this conclusion, the court relied on caselaw holding that the comity doctrine applies to CAFA removal cases.

***Lee v. Equifax Information Services, LLC,* No. CV 13-4302 SI, 2013 WL 6627755 (N.D. Cal. Dec. 16, 2013), pet. for permission to appeal pending.**

The plaintiff filed two separate class actions seeking relief for violations of California state laws governing consumer credit reports and unfair business practices. After the plaintiff consolidated the causes of action in a single amended class action complaint the following year, the defendant removed the action to federal court under CAFA. Judge Susan Illston of the U.S. District Court for the Northern District of California granted the plaintiff's motion to remand, finding the removal of the amended complaint was untimely because the plaintiff's first complaint was removable on its face, triggering the 30-day period for CAFA removal. Judge Illston found that the original complaint satisfied CAFA's diversity and numerosity requirements on its face, and sought statutory damages sufficient to satisfy the amount-in-controversy requirement. In so ruling, Judge Illston rejected the defendant's argument that it could not determine the amount in controversy from the original complaint. According to the court, the original complaint contained the same basic information relevant to the amount in controversy that was included in the amended complaint and on which the defendant ultimately based its removal notice.

***Perritt v. Westlake Vinyls Co., LP,* Nos. 3:12-cv-00253-BAJ-RLB et al., 2013 WL 6451774 (M.D. La. Dec. 9, 2013), pet. for permission to appeal granted.**

Chief Judge Brian A. Jackson of the U.S. District Court for the Middle District of Louisiana granted the plaintiffs' motion to remand because, *inter alia*, the district court did not have subject-matter jurisdiction to hear the dispute under CAFA. The plaintiffs represented a putative class of persons injured as a result of an explosion at the defendant's facility. The plaintiffs originally filed their cases in state court, and the defendant removed the case to federal court. The district court granted the plaintiffs' motion to remand because the defendant failed to prove that the aggregate of the plaintiffs' potential claims was greater than $5 million, as required by CAFA. According to the court, its "analysis is limited to the claims as they existed at the time of removal," and the plaintiffs' extremely "vague" allegations about the nature and extent of their alleged injuries "provide[d] no reliable metric for determining the nature and extent of their damages or potential fees." Thus, the court held that the defendant was unable to "prove by a preponderance of the evidence that the jurisdictional minimum is met." Moreover, there was no indication in the petitions that the plaintiff class included more than 99 members, as required by CAFA.

CONTRIBUTORS

The Class Action Chronicle is published by Skadden's Mass Torts, Insurance and Consumer Litigation Group. In recent years, we have represented major financial services companies, insurers, manufacturers and pharmaceutical companies, among others, on a broad range of class actions, including those alleging consumer fraud, antitrust and mass torts/products liability claims. Our team has significant experience in defending consumer class actions and other aggregate litigation. We have defended thousands of consumer class actions in federal and state courts throughout the country and have served as lead counsel in many cases that produced what are today cited as leading precedents.

Practice Leader

John H. Beisner
Partner | Washington, D.C.
202.371.7410
john.beisner@skadden.com

Contributing Partners

Lauren E. Aguiar
New York
212.735.2235
lauren.aguiar@skadden.com

David S. Clancy
Boston
617.573.4889
david.clancy@skadden.com

Anthony J. Dreyer
New York
212.735.3097
anthony.dreyer@skadden.com

Jessica D. Miller
Washington, D.C.
202.371.7850
jessica.miller@skadden.com

Steven F. Napolitano
New York
212.735.2187
steven.napolitano@skadden.com

Jason D. Russell
Los Angeles
213.687.5328
jason.russell@skadden.com

Charles W. Schwartz
Houston
713.655.5160
charles.schwartz@skadden.com

Michael Y. Scudder
Chicago
312.407.087
michael.scudder@skadden.com

Contributing Counsel

Geoffrey M. Wyatt
Washington, D.C.
202.371.7008
geoffrey.wyatt@skadden.com

Contributing Associates

Brian Baggetta
Senior Staff Associate | Washington, D.C.
202.371.7209
brian.baggetta@skadden.com

Matthew S. Barkan
New York
212.735.250
matthew.barkan@skadden.com

Catherine Fisher
Boston
617.573.4867
catherine.fisher@skadden.com

Kristen J. Greeley
Law Clerk | New York
212.735.3389
kristen.greeley@skadden.com

Hillary A. Hamilton
Los Angeles
213.687.5576
hillary.hamilton@skadden.com

Heather A. Lohman
Houston
713.655.5105
heather.lohman@skadden.com

Megan C. Manfred
Law Clerk | New York
212.735.3226
megan.manfred@skadden.com

Brittany D. Parling
Chicago
312.407.0547
brittany.parling@skadden.com

Nina R. Rose
Washington, D.C.
202.371.7105
nina.rose@skadden.com

Jordan M. Schwartz
Washington, D.C.
202.371.7036
jordan.schwartz@skadden.com

Matthew Stein
Boston
617.573.4892
matthew.stein@skadden.com

Jessica N. Walker
Los Angeles
213.687.5373
jessica.walker@skadden.com

Kamali Willett
New York
212.735.2728
kamali.willett@skadden.com