Skadden

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This is the ninth 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 fall 2015 edition focuses on rulings issued between May 15, 2015, and August 15, 2015, and begins with a preview of upcoming Supreme Court cases related to class actions.

The Supreme Court's Next Class Action Cases

In the past few years, the Supreme Court has rendered several important decisions in cases guiding class action procedure, including *Wal-Mart Stores Inc. v. Dukes*, *Comcast Corp. v. Behrend*, and *Halliburton Co. v. Erica P. John Fund, Inc.,* among others. This trend looks set to continue this term, with two cases pending before the Court that could clarify the contours of the injury requirement for bringing and obtaining certification in class action lawsuits. There also is a significant possibility that the Court will grant review in a case raising questions about the requirement that a class be ascertainable. In advance of these rulings, we offer a preview of these three cases.

***Spokeo, Inc. v. Robins,* No. 13-1339** — *Spokeo* presents the question whether a plaintiff can satisfy the causation and injury requirements of the Article III standing inquiry "based on a bare violation of a federal statute" that permits the recovery of statutory damages even without proof that the plaintiff has suffered a concrete injury in fact. *Spokeo* arises in the context of a claim under the Fair Credit Reporting Act. The petitioner, Spokeo, operates a "people search engine" that aggregates publicly available information about people, including, in some instances, information relating to a person's "wealth." The respondent brought suit against Spokeo, arguing that Spokeo's disclosure of wealth information made it a "consumer reporting agency" that issues "consumer reports" in violation of the FCRA. The district court dismissed the suit on Article III grounds, concluding that the plaintiff had failed to identify any actual or imminent concrete injury from Spokeo's alleged disclosure of information about his financial status. But the U.S. Court of Appeals for the Ninth Circuit reversed, concluding that the FCRA's provision for statutory damages in cases involving willful violations of the statute meant that the plaintiff was injured in the constitutional sense solely by virtue of Spokeo's alleged violation of the statute. Spokeo petitioned for Supreme Court

review, noting that the federal courts of appeals have divided over this question — whether violation of a statute by itself suffices to establish constitutional standing, or whether the plaintiff also must show that he or she was injured in some tangible sense. The Supreme Court granted the petition.

The question presented has practical implications for class action practice in a number of areas. As Spokeo's briefing to the Supreme Court has explained, a rule under which mere violation of the statute automatically establishes injury can have the effect of lowering the bar to class treatment because some courts applying that rule have certified classes based solely on a showing of uniform violations, without having to address the individualized nature of any resulting injury. "The implication is drastic and absurd: the lesser the injury, the easier the path to class certification, the broader the class, the greater the damages exposure and — inevitably — the larger the settlement." And this problem extends well beyond the FCRA context, as there are a number of federal and state statutes that provide for statutory penalties for alleged statutory violations, particularly where actual damages are small or difficult to ascertain. Thus, a holding by the Supreme Court that a plaintiff (and, presumably, absent class members) would have to show concrete injury to maintain or participate in a class action would go a long way toward reining in bloated settlements and exposure to liability based on allegations of technical violations of the law that have caused no actual harm to anyone.

***Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146** — *Tyson Foods* examines the injury issue from a different angle: What (if anything) must a plaintiff prove to establish that all absent class members were injured? In *Tyson Foods*, the plaintiffs asserted that they were not sufficiently compensated for time spent donning and doffing work-related attire and equipment and sought to represent co-workers in both a collective action under the federal Fair Labor Standards Act and as a class under an Iowa state wage law. The district court allowed both claims to proceed on an aggregate basis over objections by Tyson that the evidence established that injury (if any) varied widely within the class. It was satisfied that the opinions of plaintiffs' experts — who determined an "average" injury allegedly sustained by each class member based on a sampling of alleged uncompensated overtime worked by certain class members — sufficed to remove individualized issues from the case. On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed but was strongly divided over the injury issue. Dissenting from the panel decision, Judge Beam concluded that collective and class treatment was improper because the evidence established that hundreds of employees — indeed, more than half of those covered by the plaintiffs' claims — had no injury at all, and thus the judgment would compel Tyson to pay additional compensation to many employees who already were fully compensated. Tyson petitioned for *en banc* review, which was denied by a vote of 6 to 5. Tyson then petitioned for Supreme Court review, arguing that the plaintiffs' approach of proving classwide injury on the basis of an "average" of alleged overtime hours by a small sample of the entire class violated the Supreme Court's prohibition on "Trial By Formula" in *Wal-Mart Stores, Inc. v. Dukes* and noting the division in the courts of appeals over the propriety of proceeding with class definitions that clearly include uninjured individuals. The Supreme Court granted this petition as well.

Tyson Foods presents the Court with an opportunity to address the vexing problem of "no-injury" class actions that has been analyzed in prior editions of the *Class Action Chronicle*. As these analyses have explained, certain federal appellate and district courts have endorsed the certification of classes, particularly in the consumer context, that consist largely of individuals who have not encountered the problems alleged by the named plaintiffs. Although the courts approving certification in these cases have justified class treatment in some cases by insisting that the injured and uninjured plaintiffs can be identified and separated at some later point, *Tyson Foods* illustrates that pragmatic and pecuniary considerations drive plaintiffs toward models of recovery that simply lump all class members together, in the hopes that a court will allow them to bypass the tedious task of proving that individual class members were injured and to obtain recoveries that far exceed the scope of any actual injury to the class. The Supreme Court appeared to be in a position to tackle this issue a few terms ago when it granted *certiorari* in two cases involving front-loading washing machines, but instead it remanded the cases for further review by the appellate courts and decided not to revisit them after class certification was reaffirmed in both cases. Now the issue is squarely before the Court, albeit in a different context, and presents the Court with the opportunity to clarify the law in this important area.

Mullins v. Direct Digital — The Supreme Court will also have the opportunity to decide whether to consider a third class action case, decided by the U.S. Court of Appeals for the Seventh Circuit just a month ago, which raises important questions regarding the ascertainability requirement of Rule 23. As we discussed in detail in the Winter 2013 edition of the *Class Action Chronicle*, the U.S. Court of Appeals for the Third Circuit agreed with the defendant in *Carrera v. Bayer Corp.* that a class is not ascertainable unless class membership can be easily determined using objective criteria. As the Third Circuit explained, this rule has due-process underpinnings in light of a defendant's right to assert any available defense, including, as might commonly be argued in individual suits, that there is no proof that the plaintiff actually purchased the product. Since the *Carrera* decision, other federal courts have divided over this view of ascertainability.

Some have agreed with the Third Circuit's approach, but others have held that a class is ascertainable as long as it is not ambiguous and not defined in terms of success on the merits.

Last month, in *Mullins v. Direct Digital*, the Seventh Circuit described this division in the courts as a disagreement between the Third Circuit's "strong" version of the ascertainability requirement and the "weak" version followed by other courts, and placed itself squarely against the Third Circuit, holding that only a "weak" version of the ascertainability requirement needs to be satisfied to justify class treatment. The court wrote at some length in defense of its decision to establish a square circuit split on the issue, but it set forth its animating concern at the outset of that analysis: "[S]ome courts have used this ['strong' ascertainability] requirement to erect a nearly insurmountable hurdle at the class certification stage in situations where a class action is the only viable way to pursue valid but small individual claims." As such, *Mullins* represents the latest decision in a series of cases to express the Seventh Circuit's policy preference for certification of consumer class actions. Given the square split created by the Seventh Circuit's decision — and particularly in light of the Supreme Court's admonition in *American Express Co. v. Italian Colors Restaurant* that the class action rule is a neutral procedural rule that is not to be weakened in the name of "guarantee[ing] an affordable procedural path to the vindication of every claim" — the decision in *Mullins* would appear to set the stage for Supreme Court review of this important issue. Direct Digital's petition, which the company has not yet filed but has stated it intends to do so, will likely be resolved this term (though, in the event it decides to grant the petition, the Court might not address the merits until next term).

Class Certification Decisions

In this issue of the *Class Action Chronicle*, we cover 3 decisions granting motions to strike/dismiss class claims, 3 decisions denying such motions, 33 decisions denying class certification or reversing grants of class certification, 19 decisions granting or upholding class certification, 15 decisions denying motions to remand or reversing remand orders pursuant to the Class Action Fairness Act, and 15 decisions granting motions to remand or finding no jurisdiction under CAFA that were issued during the three-month period covered by this edition.

Decisions Granting Motions to Strike/Dismiss Class Claims

***Pelino v. Ward Manufacturing, LLC*, No. RDB-14-02771, 2015 WL 4528141 (D. Md. July 27, 2015), appeal pending.**

Judge Richard D. Bennett of the U.S. District Court for the District of Maryland granted the manufacturer's motion to strike the class allegations brought by owners of residential and commercial structures equipped with allegedly defective pipes against the piping manufacturer. The court noted that two virtually identical class actions had previously been dismissed based on the economic-loss rule. The plaintiffs in *Pelino* argued that their claims differed from those in the earlier actions in that they alleged "actual injury" because their piping was punctured during a lightning storm and actually malfunctioned. The court held that these allegations demonstrated that the named plaintiffs were neither typical of the proposed class members, whose pipes had not failed, nor shared common questions with them. The court also held that it retained jurisdiction over the named plaintiffs' claims despite striking the class allegations. Judge Bennett held that although the plaintiffs' alleged damages, alone, did not satisfy the amount-in-controversy requirement for traditional diversity jurisdiction, the court still retained jurisdiction because: (1) federal jurisdiction under CAFA attaches prior to certification and (2) public policy interests weighed against divesting jurisdiction following decertification.

***Equal Rights Center v. Kohl's Corp.*, No. 14 C 8259, 2015 WL 3505179 (N.D. Ill. June 3, 2015).**

Judge Ronald A. Guzman of the U.S. District Court for the Northern District of Illinois granted defendant Kohl's motion to strike the plaintiffs' class allegations in an action alleging violations of the Americans with Disabilities Act and the New York Human Rights law. The suit was brought on behalf of "[a]ll people with mobility disabilities ... who were denied the full and equal enjoyment of the goods, services, [or] facilities ... of any Kohl's Department Store in the United States on the basis of disability[.]" The court rejected Kohl's arguments that the proposed class could not satisfy Rule 23's numerosity and commonality prerequisites but agreed that the plaintiffs had failed to demonstrate that the class was ascertainable. In particular, the court noted that the plaintiffs' proposed class did not include a time frame and thus was not sufficiently definite. In addition, the court found that class membership could not be determined based on objective criteria because the plaintiffs nowhere indicated "how they w[ould] identif[y] members of a nationwide class of mobility-impaired individuals who were, at some point, denied the full and equal enjoyment of the foods ... or accommodations of any Kohl's Department Store because of the presence of access barriers."

***World, L.L.C. v. Atlas Choice Corp.*, No. 1:15 CV 24, 2015 WL 2381624 (N.D. Ohio May 18, 2015).**

On the defendant's motion, Judge Patricia A. Gaughan of the U.S. District Court for the Northern District of Ohio struck class allegations from a putative class action alleging fraud in connection with a rental car transaction. The first named plaintiff,

an individual, also sought to be class counsel, but he conceded that he could not be both and withdrew as a plaintiff. However, the court explained that the second named plaintiff, an LLC, was inadequate as well because it was wholly owned by the first plaintiff, was an assignee of the first plaintiff's claim, and had no independent knowledge separate from the first plaintiff. The court therefore struck the class allegations from the complaint.

Decisions Denying Motions to Strike/Dismiss Class Claims

***Golan v. Veritas Entertainment, LLC*, 788 F.3d 814 (8th Cir. 2015).**

The plaintiffs filed a putative class action suit asserting that the defendants had violated the Telephone Consumer Protection Act (TCPA) and the Missouri Do Not Call Law by initiating phone calls as part of a telemarketing campaign to promote a film, "Last Ounce of Courage." The district court dismissed the complaint with prejudice, concluding that the named plaintiffs did not have standing to bring their claims because none of the messages they had received contained an advertisement, telemarketing message or telephone solicitation. The court also found that the plaintiffs were inadequate class representatives because, unlike most putative class members who had heard the full script of the call, they had heard only the brief message on their answering machine and thus were subject to a unique defense. A panel of the U.S. Court of Appeals for the Eighth Circuit (Murphy and Shepherd, JJ., and Brooks, district judge sitting by designation) reversed and remanded. The court first determined that the named plaintiffs did have standing under the TCPA because they had alleged the elements of injury, causation and redressibility. Turning next to the question of whether the named plaintiffs were adequate class representatives, the court found that because the purpose of the alleged calls was the critical issue in this case, the named plaintiffs did not suffer a different injury than other class members merely because they did not hear the entire message. What would matter for all class members, including the named plaintiffs, was whether each call was initiated for the purpose of promoting "Last Ounce of Courage." Accordingly, the court ruled that the district court had erred as a matter of law in concluding that the named plaintiffs were inadequate class representatives.

***Rawlings v. ADS Alliance Data Systems, Inc.*, No. 2:15-cv-04051-NKL, 2015 WL 3866885 (W.D. Mo. June 23, 2015).**

Judge Nanette K. Laughrey of the U.S. District Court for the Western District of Missouri denied the defendants' motion to strike class allegations in a putative class action brought under the Fair Credit Reporting Act (FCRA). The named plaintiff claimed that she was improperly denied a job with the defendant based on a credit report without being given a fair opportunity to contest the validity of the information contained in the report. The plaintiff proposed a class consisting of "[a]ll employees or prospective employees of Defendant in the United States that suffered an adverse employment action on or after February 10, 2013, that was based, in whole or in part, on information contained in a consumer report, and who were not provided a copy of such report, a reasonable notice period in which to challenge any inaccuracy in the consumer report, and/or a written description of their rights in accordance with the FCRA in advance of said adverse employment action." The defendant argued that the proposed class was an improper "fail-safe class." As the court explained, "A fail-safe class is one in which a person's membership depends on the person having a valid claim." The court noted that currently there is debate among federal courts as to whether fail-safe classes are inherently problematic, and the Eighth Circuit has not yet weighed in on the debate. Nonetheless, the court held that even if the proposed class were a fail-safe class, it may be possible to redefine the class at the class certification stage, after class discovery had been conducted, to correct the problem. Accordingly, the court denied the motion to strike the class allegations.

***Giesmann v. American Homepatient, Inc.*, No. 4:14CV1538 RLW, 2015 WL 3548803 (E.D. Mo. June 8, 2015).**

Judge Ronnie L. White of the U.S. District Court for the Eastern District of Missouri denied the defendant's motion to strike the plaintiff's class allegations in a suit asserting violations of the Telephone Consumer Protection Act (TCPA) and the Missouri Consumer Fraud and Deceptive Business Practices Act (MPA). The named plaintiff contended that it received an unsolicited advertisement facsimile sent by the defendant and that the defendant sent other similar fax advertisements to many other individuals. The plaintiff's complaint included claims on behalf of "[a]ll persons who (1) on or after four years prior to the filing of this action, (2) were sent by or on behalf of Defendant any telephone facsimile transmissions of material making known the commercial existence of, or making qualitative statements regarding any property, goods or services (3) with respect to whom Defendant[] cannot provide evidence of prior express permission or invitation for the sending of such faxes, (4) with whom Defendant[] [did] not have an established business relationship[] or (5) which did not display a proper opt out notice." The defendant moved to strike the class allegations, contending that the alleged class was unable to satisfy the commonality and typicality requirements under Rules 23(a)(2) and 23(a)(3) because proof of a violation under the TCPA and MPA would require individualized inquiries into whether the fax each individual received was unsolicited, thereby making the

proposed class an impermissible fail-safe class. The court did not reject this argument outright but found that a determination that the class allegations were insufficient on their face would be premature at this stage of the proceedings. As the defendant itself had acknowledged, the Eighth Circuit has not yet ruled on the propriety of a fail-safe class definition. The court therefore declined to hold that the existence of a proposed fail-safe class, alone, was sufficient to preclude class certification.

Decisions Rejecting/Denying Class Certification

***Ewing Industries Corp. v. Bob Wines Nursery, Inc.*, No. 14-13842, 2015 WL 4605234 (11th Cir. Aug. 3, 2015).**

A unanimous panel of the U.S. Court of Appeals for the Eleventh Circuit (Tjoflat and Cox, JJ., and Sentelle, U.S. Court of Appeals for the District of Columbia Circuit judge sitting by designation) affirmed the district court's denial of the plaintiff's motion for class certification on the grounds that the claim was time-barred. The Eleventh Circuit reaffirmed the rule announced in *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994), that the pendency of a previous class claim does not toll the statute of limitations. Here, the plaintiff filed a class action in federal court in August 2013, based on the allegation that the defendant had sent out unsolicited faxes in violation of the Telephone Consumer Protection Act. A class action based on the same faxes had already been filed in June 2013 in Florida state court. That state court granted summary judgment in favor of the defendant because the plaintiff did not have standing; the court never reached the issue of class certification. In the successive class action filed in the U.S. District Court for the Middle District of Florida, the district court held that under *Griffin*, the purported class action in state court did not toll the statute of limitations for the later class action. The court, therefore, struck the class allegations as time barred and denied the motion for class certification with prejudice. On appeal, the plaintiff argued that *Griffin* was distinguishable because there a class action had been certified and overturned, whereas the initial lawsuit here never reached the issue of class certification. The Eleventh Circuit rejected that argument, finding that *Griffin* "was concerned about the very issue we confront here: the potential for multiple rounds of litigation as the class seeks an adequate class representative." The court, therefore, held that *Griffin* governed, the statute of limitations was not tolled during the pendency of the prior class action, and the district court properly denied the motion for class certification as time barred.

***DeBrew v. Atwood*, 792 F.3d 118 (D.C. Cir. 2015).**

The U.S. Court of Appeals for the District of Columbia Circuit (Ginsburg, Rogers and Griffith, JJ.) affirmed the district court's denial of a federal inmate's putative class action against the Bureau of Prisons. It held that the district court did not abuse its discretion in denying class certification because the inmate was not an adequate representative of the class he sought to represent. It explained that "a *pro se* litigant who is not trained as a lawyer is simply not an adequate class representative."

***Cabral v. Supple LLC*, 608 F. App'x 482 (9th Cir. 2015).**

The U.S. Court of Appeals for the Ninth Circuit (Fernandez and Bea, JJ., and Marquez, district judge sitting by designation) vacated the district court's certification of a class of consumers alleging misrepresentations about the effectiveness of a dietary supplement in violation of California consumer protection laws. The Ninth Circuit rejected the lower court's finding that the common issue of whether the defendant misrepresented that the product was "clinically proven effective in treating joint pain" predominated, concluding that the record did not show that all the class members saw or otherwise received the misrepresentation. According to the court, "In a case of this nature, one based upon alleged misrepresentations in advertising and the like, it is critical that the misrepresentation in question be made to all of the class members." But the record indicated that only some of the defendant's advertisements included the alleged misrepresentation about joint pain that was at issue. Thus, the court held that certification was improper and vacated the class certification order.

***Karhu v. Vital Pharmaceuticals, Inc.*, No. 14-11648, 2015 WL 3560722 (11th Cir. June 9, 2015).**

In a false advertising lawsuit, a panel of the U.S. Court of Appeals for the Eleventh Circuit (Fay, J., Goldberg, U.S. Court of International Trade judge sitting by designation, Martin, J. (concurring)) affirmed the U.S. District Court for the Southern District of Florida's decision to deny the plaintiff's motion to certify a class of purchasers of a dietary supplement. The plaintiff argued that the district court had erred in holding that the proposed class failed to satisfy Rule 23's implicit ascertainability requirement. The appellate court disagreed. The court found that the plaintiff's proposal to use the company's sales data was insufficient because the defendant sold primarily to distributors and retailers and as a result the records would not identify class members. The majority opinion also held that "a plaintiff cannot satisfy the ascertainability requirement by proposing that class members self-identify (such as through affidavits) without first establishing that self-identification is administratively feasible and not otherwise problematic" as to defendants' due-process rights. The majority opinion rejected plaintiff's argument that "defendants have no due-process right against unverified

self-identification when total liability will be established at trial, and will not change depending on the number of claims actually made." The majority found this reasoning unpersuasive because "a defendant's due-process right against unverified self-identification ... is also about ensuring finality of judgment."

***Perras v. H&R Block*, 789 F.3d 914 (8th Cir. 2015).**

A panel of the U.S. Court of Appeals for the Eighth Circuit (Murphy, Colloton and Kelly, JJ.) affirmed the denial of the plaintiff's class certification motion in a putative class action against H&R Block alleging violations of the Missouri Merchandising Practices Act (MMPA). The named plaintiff alleged that H&R collected "compliance fees" from those who paid for the company's tax-return services, purportedly to cover the cost of complying with recently initiated IRS regulations. The plaintiff alleged that the amount collected from the compliance fee exceeded H&R's actual costs of complying with the new regulations and that the fee therefore was deceptive under the MMPA. The district court found that the proposed class had satisfied the prerequisites to class certification under Rule 23(a) but failed to satisfy the predominance requirement under Rule 23(b)(3) because, under the Due Process and Full Faith and Credit Clause of the U.S. Constitution, each potential class member's claim would be governed not by the laws of Missouri but by the laws of the class member's home state, where the compliance fee was paid and where the class member would expect to file a claim. On appeal, the Eighth Circuit found it best to avoid application of constitutional principles and instead chose to address the predominance question based on the scope of the MMPA. Based on the facts of the plaintiff's case, the court surmised that the Missouri Supreme Court would conclude that the MMPA did not cover the out-of-state transactions in this case and thus would have to apply the consumer protection statute of each out-of-state class member's claim to determine his ability to recover. Accordingly, the court determined that questions of law common to the class members did not predominate over any individual questions of law.

***In re NJOY, Inc. Consumer Class Action Litigation*, No. CV 14-00428 MMM (JEMx), 2015 WL 4881091 (C.D. Cal. Aug. 14, 2015).**

Judge Margaret M. Morrow of the U.S. District Court for the Central District of California refused to certify two classes of California and Florida plaintiffs alleging violations of California and Florida consumer protection laws against e-cigarette manufacturer NJOY, after the plaintiffs failed to proffer a damages calculation method that was tied to their theory of liability. The plaintiffs alleged that NJOY's advertising and packaging purportedly contained false and/or misleading messages as to safety, omitted certain harmful ingredients and failed to warn of the harmful effects of such ingredients. The court found that the class of purchasers was ascertainable and satisfied Rule 23(a)'s requirements. In evaluating predominance, however, the court held that the plaintiffs failed to establish sufficiently pervasive advertising to presume that all members of the California class were exposed to the material misrepresentations and omissions to establish materiality on a classwide basis. Further, the court held that the predominance requirement was not satisfied because damages could not be sufficiently proven on a classwide basis. According to the court, the plaintiffs' experts' proposed methods for establishing damages depended on consumers' subjective valuations of the products, which the court held was not an "adequate indicator" of the "true market price" of the e-cigarettes absent the alleged misrepresentations.

***Backhaut v. Apple Inc.*, No. 14-CV-02285-LHK, 2015 WL 4776427 (N.D. Cal. Aug. 13, 2015).**

The plaintiffs unsuccessfully sought to certify a nationwide class bringing claims under the federal Wiretap Act and California's Unfair Competition Law (UCL), alleging that Apple's iMessage application intercepted and did not deliver text messages sent by current Apple device users to former Apple device users. Judge Lucy H. Koh of the U.S. District Court for the Northern District of California found that the plaintiffs had Article III standing because they established that they failed to receive text messages sent by third parties using iMessage and "allegations of a Wiretap Act violation are sufficient to establish standing." However, the plaintiffs lacked standing under the UCL because they did not identify any economic injury caused by undelivered text messages or prove that they "overpaid" for their devices. The plaintiffs also lacked standing to pursue injunctive relief under the Wiretap Act because their problems with receiving text messages were resolved. With respect to the plaintiffs' claims seeking damages under the Wiretap Act, the court concluded that ascertainability was lacking because there was no objectively identifiable way to determine which proposed class members did not receive text messages. In addition, predominance was lacking because resolving the plaintiffs' claims would require numerous individualized factual inquiries, including whether each proposed class member consented to the alleged interception of his or her text messages.

***Tasion Communications, Inc. v. Ubiquiti Networks, Inc.*, No. C-13-1803 EMC, 2015 WL 4734935 (N.D. Cal. Aug. 10, 2015).**

Judge Edward M. Chen of the U.S. District Court for the Northern District of California denied the plaintiffs' motion to certify nationwide classes and subclasses of purchasers of TOUGHCable, which the plaintiffs alleged was not suitable

for outdoor use as advertised. The court concluded that Rule 23(b)(3)'s predominance and superiority requirements were not satisfied because California's warranty laws did not apply to the class as a whole under California's choice-of-law principles. The court also rejected the plaintiffs' proposal to certify issue classes under Rule 23(c)(4) for the fraudulent inducement and express warranty claims. According to the court, plaintiffs were essentially asking to certify each of the individual elements of these claims as a "common question." The court noted, however, that plaintiffs were unable to cite any precedent "in which a court has allowed a comprehensive division of multiple issues for certification under Rule 23(c)(4) where the aggregation of those issues would otherwise not be certifiable under Rule 23(b)(3)." In addition, the court held that several of the allegedly "common" issues — including reliance, benefit of the bargain and damages — were not common at all and would instead require "individualized inquiries" as to each proposed class member.

***Ault v. J.M. Smucker Co., No. 13 Civ. 3409(PAC),* 2015 WL 4692454 (S.D.N.Y. Aug. 6, 2015).**

Judge Paul A. Crotty of the U.S. District Court for the Southern District of New York denied certification of a class asserting that the defendant breached an express warranty by labelling certain cooking oils as "All Natural." The plaintiff claimed that the label was misleading and in violation of New York General Business Law because the oils were made using genetically modified organism crops. The court denied class certification because the plaintiff failed to demonstrate that the proposed class was ascertainable or that classwide issues predominated. The court held that the proposed class was not ascertainable because only certain products produced by the defendant during the class period contained the allegedly misleading labels. In addition, the class period was defined differently for different cooking oil products, thus adding to the potential confusion. These factors therefore rendered accurate self-identification infeasible. Nevertheless, because failure to certify a class on the sole ground of failure to demonstrate ascertainability is disfavored, the court considered other Rule 23 requirements. The court held that the plaintiff failed to meet the predominance requirement of Rule 23(b) because the plaintiff did not demonstrate that injury to class members was subject to common proof. As a result, class certification was denied.

***Moore v. Apple Inc.*, No. 14-CV-02269-LHK, 2015 WL 4638293 (N.D. Cal. Aug. 4, 2015).**

The plaintiff sought to certify a nationwide class of former iPhone users complaining that Apple failed to disclose that use of its text messaging service iMessage would result in undelivered text messages if an iPhone user switched to a non-Apple device, asserting claims for tortious interference with contract and unfair competition predicated on the tortious interference claim. Judge Lucy H. Koh of the U.S. District Court for the Northern District of California denied the motion. Judge Koh found that the plaintiff had sufficiently established injury-in-fact and causation to have standing with evidentiary proof that she had failed to receive text messages. However, Judge Koh found the proposed class of all former iPhone owners who switched over to be overbroad because it included uninjured consumers who experienced no disruption or who failed to receive text messages because of restrictions in their wireless contracts, which also meant individual issues predominated due to "material variations in wireless service agreements" with regard to class members' text messaging services. To determine liability, breach and causation "would require individualized inquiries into the circumstances under which the individual class member failed to receive a particular message," including "assessing the particularities of the terms of an individual's wireless service agreement, ... whether an individual experienced any disruption in text messaging services, and whether that disruption was caused by iMessage rather than network error, user action, or operating system issues."

***Alhassid v. Bank of America, N.A.*, No. 14-CIV-20484, 2015 WL 4606760 (S.D. Fla. July 31, 2015).**

Judge Beth Bloom of the U.S. District Court for the Southern District of Florida denied the plaintiffs' motion for class certification in a lawsuit alleging that the defendant had undertaken default-related procedures and charged borrowers fees for those procedures in violation of HUD guidelines and its own internal policies. The court held that the nine class definitions proposed by the plaintiffs were impermissibly fail safe because membership in the class would depend on whether the company violated HUD guidelines or the company's internal policies. Furthermore, even if the proposed class definitions were curable, the court also found that the plaintiffs failed to satisfy all of Rule 23's requirements. In particular, the court expressed concern over a conflict of interest issue presented by the fact that one plaintiff's daughter and son-in-law were the proposed class counsel. The court held that the adequacy-of-representation requirement was not met because the plaintiffs had demonstrated "only the bare minimum of knowledge and sophistication regarding the issues in this case; Plaintiffs' counsel [were] inexperienced in class action litigation; and Plaintiffs [had] provided the Court with no assurances of a lack of financial interdependence between [the one plaintiff] and her children/counsel."

***Lightbourne v. Printroom Inc.*, No. SACV 13-876-JLS (RNBx), 2015 WL 4604804 (C.D. Cal. July 30, 2015).**

The plaintiff sought certification of a Rule 23(b)(3) nationwide class of current or former NCAA student-athletes bringing right-of-publicity claims against a website that had contracted with various NCAA institutions to sell photographs of the players provided by the schools' athletic departments. Judge Josephine L. Staton of the U.S. District Court for the Central District of California denied the motion. Rejecting the plaintiff's attempt to apply California's right of publicity statute to a nationwide class, Judge Staton found that the states' right of publicity laws varied significantly, each state had an interest in applying its own intellectual property laws to its residents, and California's interest in applying its laws to other states' residents was "attenuated." The court also found that individual issues predominated, because establishing express and implied consent would require "an institution-by-institution analysis" to determine whether the athletes had signed consent forms or objected to their photographs being sold. Moreover, the differences in the 50 states' laws would require individualized review of more than 600,000 photos of over 1.1 million players for liability and damages purposes under each applicable state law, "render[ing] this litigation totally unmanageable." For this reason, the superiority requirement also was not met. Further, the plaintiff was not typical because he expressly and/or impliedly consented to the sale of his photographs. Judge Staton also expressed doubt that the plaintiff would adequately represent class members bringing claims under the law of states other than California.

***Kosta v. Del Monte Foods, Inc.*, No. 12-CV-1722 YGR, 2015 WL 4593175 (N.D. Cal. July 30, 2015).**

Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California denied the plaintiffs' third attempt to certify a nationwide class of consumers alleging false advertising and labeling of certain food products in violation of various California consumer protection laws. Specifically, the plaintiffs alleged that Del Monte canned tomato products made claims about antioxidants and lycopene inconsistent with FDA requirements and falsely implied that their SunFresh and FruitNaturals fruit products were "fresh" and "must be refrigerated." Numerosity and adequacy were conceded, and the plaintiffs' claims were for the most part typical, since the plaintiffs saw representations as to antioxidants and lycopene on the tomato product labels. However, due to significant variations in the labeling and ingredients in various products within the tomato and fruit products, the proposed class of purchasers of "any product" in those product lines was unascertainable, as the customers were unlikely to keep records and the "variations in the products ... make it much more difficult for a purchaser to recall which particular product, with which packaging and labeling, they purchased." The court also noted that plaintiffs could not establish through classwide proof that a "reasonable consumer" would find the statements material to their purchasing decision.

***Piotrowski v. Wells Fargo Bank, NA*, No. DKC 11-3758, 2015 WL 4602591 (D. Md. July 29, 2015).**

Judge Deborah K. Chasanow of the U.S. District Court for the District of Maryland denied the plaintiffs' motion for class certification in a lawsuit alleging that Wells Fargo had violated the Equal Credit Opportunity Act (ECOA). The ECOA requires creditors to notify applicants of action taken on a "completed application for credit" within 30 days and to notify an applicant if an application is incomplete. The plaintiffs proposed a class of individuals who submitted an application to change the terms of their existing mortgage and (1) were not provided written notice within 30 days of submitting an application regarding action taken on the application or (2) were not provided with a written statement of reasons (or a disclosure that a borrower can request such a statement) regarding an adverse action taken on the application within 60 days of submitting the application. The defendant objected that the class definition expanded the class beyond the allegations of the complaint, which dealt with the notice requirements for complete applications as opposed to incomplete applications. The court rejected this argument, noting that the "fact that Plaintiffs modified the class definition beyond what was included in the amended complaint is not necessarily dispositive." The court nonetheless denied the motion for class certification, in part because the class was not ascertainable or administratively feasible. The court found that identifying borrowers whose loan modification applications were "complete" "would require fact-intensive, individualized inquiries on a loan by loan basis. ... The fact that Wells Fargo cannot determine apart from performing a loan-by-loan review when a loan modification application was complete poses an administrative barrier to ascertaining a class who were not provided written notice of any action on their completed application within thirty (30) days from submission." The court also held that the plaintiffs failed to meet the Rule 23(a) requirement of commonality and the 23(b)(3) requirements of predominance and superiority. Nor could the plaintiffs show a risk of inconsistent adjudications or that adjudication with respect to individual class members would impair the ability of nonmembers to assert violations under the ECOA as required for a class to be certified under Rule 23(b)(1).

***McKinnon v. Dollar Thrifty Automotive Group, Inc.*, No. CV 12-cv-04457-SC, 2015 WL 4537957 (N.D. Cal. July 27, 2015).**

Judge Samuel Conti of the U.S. District Court for the Northern District of California refused to certify two nationwide classes

of Dollar consumers who rented cars from locations in Oklahoma and California and were charged for three different add-on coverage options. Judge Conti found the class definition was overbroad because it "encompasses three different products; transactions that have no connection to California or Oklahoma; and purchasers who benefited from their purchase, were provided with adequate disclosures, were never exposed to any of the alleged deceptive practices, and/or received refunds." Because the class did not exclude consumers who were not exposed to any of the alleged practices, classwide reliance could not be inferred. While the numerosity requirement was met, Judge Conti found that commonality, typicality and predominance were not, due to a lack of common factual and legal issues. Determining whether Dollar's disclosures were adequate would be "an individualized matter that would depend on the specific location visited and the date of that visit" because "what the class members were told or understood regarding the products, and their reasons for purchasing the products, could have varied greatly depending on their individualized communications with Dollar agents." Different laws governed disclosures regarding the three options, and the disclosure claims did not extend to class members who purchased outside of California. The lead plaintiffs were not adequate representatives because they were not deceived into purchasing the additional coverage; instead, they claimed that they were charged for the coverage after explicitly declining to purchase it. Finally, certification under Rule 23(b)(2) was inappropriate because "liability in this case turns on individualized interactions" and because the plaintiffs sought primarily individualized monetary damages.

***Rambarran v. Dynamic Airways, LLC*, No. 14-cv-10138 (KBF), 2015 WL 4523222 (S.D.N.Y. July 27, 2015), 23(f) pet. pending.**

Judge Katherine B. Forrest of the U.S. District Court for the Southern District of New York denied certification for two classes asserting the defendant airline unreasonably delayed various flights from New York to Guyana in violation of Article 19 of the Montreal Convention. The court held that the plaintiffs plainly failed to carry their Rule 23 burdens. First, the court found that the proposed class counsel lacked necessary qualifications and was unable to adequately serve the class because counsel had "persistently misunderstood even the most basic requirements under Rule 23." In addition, the court found that one of the plaintiffs did not have the requisite moral character to represent the class because he had pled guilty to the felony of concealing a person from arrest and been disbarred from practicing law in New York for having mismanaged client funds. Second, the typicality requirement was not met because the defendant accommodated different passengers in different ways, including offering certain passengers alternate flights, flight vouchers, meal coupons and transportation costs. Third, the plaintiffs failed to meet the predominance requirement because assessing liability and damages required a passenger-specific inquiry into the reasonableness of the measures the defendant took in response to the alleged delays. Finally, the superiority requirement was not met because the plaintiffs did not present "any evidence indicating that this class action, if certified, would not disintegrate into a series of mini-trials regarding the reasonableness of [the defendant's] accommodations vis-à-vis each passenger and each passenger's individual damages."

***Taylor v. Zucker*, No. 14-CV-05317 (CM), 2015 WL 4560739 (S.D.N.Y. July 27, 2015).**

Judge Colleen McMahon of the U.S. District Court for the Southern District of New York denied certification of a class alleging that the defendant's practices led to a reduction and termination of home services for Medicaid beneficiaries without timely and adequate notice and without any change in the plaintiffs' conditions that would merit such reduction or termination. Although the proposed class met the numerosity and adequacy requirements, the court denied class certification because the claims of the named plaintiffs did not meet the commonality and typicality requirements of Rule 23. The court stated that the plaintiffs failed to "provide 'glue' connecting the *reason* for each enrollee's reduction or termination of care together" and that the plaintiffs were unable to demonstrate how the named plaintiffs' experiences were indicative of a systematic failure in the administration of Medicaid in New York state.

***O'Shaughnessy v. Cypress Media, L.L.C.*, No. 4:13-cv-0947-DGK, 2015 WL 4197789 (W.D. Mo. July 13, 2015), 23(f) pet. denied.**

Chief Judge Greg Kays of the U.S. District Court for the Western District of Missouri denied the plaintiffs' motion for class certification in a putative class involving allegations that the defendant Cypress Media, L.L.C., a newspaper publisher, unlawfully "double-billed" some of its subscribers. In ruling on the plaintiffs' motion for class certification, the court concluded that the numerosity requirement was satisfied but that the plaintiffs failed to meet any of the other requirements under Rule 23(a). The court found that the named plaintiffs' claims were not typical of other class members' claims because their claims arose out of their subscription to only one of the newspapers issued by Cypress, and each of the newspapers used different subscription agreements and renewal forms. In addition, the court found that typicality was not satisfied because the named plaintiffs' claims would be governed by Missouri law, which likely would not be the case for class members who resided in other states. The court further found that a majority of the named plaintiffs were not adequate class representatives because each plaintiff only subscribed to one of Cypress' newspapers.

***Monteleone v. Auto Club Group,* No. 13-CV-12716, 2015 WL 4076192 (E.D. Mich. July 2, 2015).**

After previously denying class certification under Rule 23(b)(3), Judge George Caram Steeh of the U.S. District Court for the Eastern District of Michigan denied class certification under Rule 23(b)(2) in a lawsuit concerning homeowners' insurance coverage for basement water damage. The court had previously found that individual issues of liability precluded certification under Rule 23(b)(3) and now determined that the plaintiffs had not satisfied the requirements under Rule 23(b)(2) to certify "a class for the sole purpose of providing notice of the court's declaratory relief to potential litigants." Finding *Pipefitters Local 636 Insurance Fund v. Blue Cross Blue Shield of Michigan*, 654 F.3d 618 (6th Cir. 2011), to be analogous, the court reasoned that it would be better to enter judgment on the plaintiffs' declaratory relief claim and permit the defendant to appeal, as resolution of the appeal would give putative class members sufficient information to decide whether to bring individual cases. Further, the court determined that certifying the requested notice-only class would not advance the policies justifying class actions: the individual claims were large damages claims, lawsuits against an insurer were not unpopular, it would not streamline the litigation (the court already found in favor of plaintiffs on summary judgment), and any notice given of the declaratory judgment would be of limited value to putative class members because individual issues of liability would still need to be resolved.

***Simmons v. Author Solutions, LLC,* No. 13cv2801 (DLC), 2015 WL 4002243 (S.D.N.Y. July 1, 2015).**

Judge Denise Cote of the U.S. District Court for the Southern District of New York denied certification of a class alleging deceptive and misleading representations and advertising under California's Unfair Competition Law. The plaintiffs claimed that the defendant, a self-publishing consulting business, fraudulently misled self-publishing authors into purchasing worthless marketing services. The court held that even if all of the requirements of Rule 23(a) were met, and the superiority condition of Rule 23(b) was also met, the class could not be certified because predominance was lacking under Rule 23(b). Classwide exposure to the representations could not be presumed because the plaintiffs offered no evidence that members of the class were exposed to the representations. Additionally, the court found that the representations straddled the line between representation and puffery, making it "all the more difficult to conclude that generalized proof could demonstrate that these statements would likely deceive a member of the public."

***Harnish v. Widener University School of Law,* No. 12-00608 (WHW)(CLW), 2015 WL 4064647 (D.N.J. July 1, 2015), *reconsideration denied,* 2015 WL 4647930 (D.N.J. Aug. 5, 2015).**

The plaintiffs, alumni of Widener Law School, filed a class action complaint alleging that the school violated consumer fraud statutes by misrepresenting the employment success of its graduates in failing to disclose that their statistics included "part time legal, law-related and non-legal positions." Senior Judge William H. Walls of the U.S. District Court for the District of New Jersey denied the plaintiffs' motion for class certification because the predominance requirement of Rule 23(b)(3) was not satisfied. The court found that the plaintiffs' proposed theory of common damages — that all class members paid a certain extra amount of tuition due to the school's alleged misrepresentations — was unacceptable for two reasons. First, many students obtained full-time legal jobs upon graduation, and thus experienced no damages. Second, New Jersey courts have rejected the "fraud on the market" theory of damages proposed by the plaintiffs outside of the securities fraud context. The court also held that the typicality requirement was not satisfied because it was not clear that all members of the proposed class were exposed to the false representations and omissions that the named plaintiffs alleged they relied on. Furthermore, it was not clear to the court that all putative class members were interested in holding the defendant liable for violating consumer fraud laws, as litigation involving their alma mater may hurt their professional interests and reputations. Thus, the class certification requirements of Rule 23 were not satisfied and the plaintiffs' motion was denied.

***In re Wellbutrin XL Antitrust Litigation*, No. 08-2433, 2015 WL 3970858 (E.D. Pa. June 30, 2015), 23(f) pet. granted.**

Defendant GlaxoSmithKline moved to decertify a class of indirect purchasers alleging that the defendants delayed the entry of generic versions of the drug Wellbutrin XL into the market by entering into illegal agreements with generic drug companies to settle patent infringement lawsuits. In light of recent Third Circuit rulings on the requirement that Rule 23(b)(3) classes be ascertainable, Judge Mary A. McLaughlin of the U.S. District Court for the Eastern District of Pennsylvania granted GSK's motion and decertified the class. In order to identify which entities were damaged by the defendants' behavior, the plaintiffs were required to show that pharmaceutical purchase records maintained by pharmacy benefit managers and retail pharmacies existed, could identify class members and could be used in a reliable, administratively feasible fashion. Both parties introduced expert witnesses to support their ascertainability arguments and submitted *Daubert* motions challenging the other experts' qualifications. The court found that the plaintiffs' and the plaintiffs' experts' conclusory statements that extensive pharmaceutical records existed was insufficient to satisfy the ascertainability

requirement without further evidence as to how the plaintiffs would utilize those records to determine class membership in an administratively feasible way. Thus, Judge McLaughlin granted the defendant's motion to decertify the class.

***City of Huntington Park v. Landscape Structures*, No. EDCV 14-00419-VAP (DTBx), 2015 WL 3948411 (C.D. Cal. June 27, 2015).**

Judge Virginia A. Phillips of the U.S. District Court for the Central District of California refused to certify a proposed class of consumers alleging that defendants PebbleFlex Services Company (PFSC) and Landscape Structures, Inc.'s (LSI) rubber surface products, PebbleFlex and AquaFlex, failed to meet the oral representations or express warranties for quality, safety and/or longevity made by the defendants. The court found that the class was ascertainable, and that, while differences in the manufacturing and installation precluded a finding of a common issue as to design defects, the defendants' "very similar" marketing representations satisfied the commonality requirement. However, the plaintiffs failed to show numerosity because they attempted to improperly combine class members who purchased PebbleFlex and AquaFlex from either PFSC or LSI; LSI could not be liable for PFSC's obligations, and vice versa. The court further found that, because PebbleFlex and AquaFlex were manufactured differently, the representative plaintiffs, who did not include AquaFlex owners, failed to offer sufficient evidence to show that PebbleFlex and AquaFlex were similar enough to satisfy the typicality and adequacy requirements.

***Crutchfield v. Sewerage & Water Board of New Orleans*, No. 13-4801, 2015 WL 3917657 (E.D. La. June 25, 2015), 23(f) pet. granted.**

Judge Martin L.C. Feldman of the U.S. District Court for the Eastern District of Louisiana denied the plaintiffs' motion to certify a class in this action stemming from damage to homes allegedly caused by the construction of an intake canal. The court found that the claims lacked commonality because "[n]ot all of the houses necessarily react to vibrations or dewatering in the same way," requiring case-by-case determinations regarding causation. Further, individual issues would predominate over classwide issues because different defendants were conducting various activities, which would affect the class members' homes in different ways. For example, as to each claimant, damages would need to be apportioned among the defendants who owned the canal, performed the timber piling and installed the dewatering system. Because the plaintiffs failed to demonstrate both commonality and predominance, they also failed to show that class action litigation is the superior means to resolve this matter.

***Longest v. Green Tree Servicing LLC*, No. 2:14-cv-08150-CAS(RZx), 2015 WL 3823944 (C.D. Cal. June 19, 2015).**

Judge Christina A. Snyder of the U.S. District Court for the Central District of California denied certification of proposed California and Florida classes of mortgagors claiming that fees charged for force-placed hazard insurance by the defendants were inflated by kickbacks paid by a non-party exclusive insurer. The court denied certification because the plaintiffs had not met their burden to proffer evidence of a damages measurement method that could be applied classwide; the expert report submitted by the plaintiffs did not explain the data upon which that expert relied and how those data were pertinent to the facts of the instant case. Moreover, the court found that the class as defined was not ascertainable because the defendants' records would not reflect whether the "premium was paid by the borrower or collected or extinguished by some other means," which meant "it may not be administratively feasible to identify class members." The court allowed the plaintiffs to file supplemental briefing on ascertainability and damages.

***Morris v. DaVita Healthcare Partners, Inc.*, No. 13-cv-00573-RBJ-KMT, 2015 WL 3814361 (D. Colo. June 18, 2015).**

Judge R. Brooke Jackson of the U.S. District Court for the District of Colorado denied the plaintiffs' motion to certify a class of persons who allegedly experienced heart attacks as a result of their exposure to GranuFlo during dialysis treatment at a DaVita clinic. The plaintiffs sought certification of a class of GranuFlo users seeking injunctive relief under Rule 23(b)(2), various classes of users seeking certification of negligence and concealment claims under Rule 23(b)(3), and an issues class under Rule 23(c)(4). The court denied certification of the injunctive-relief class, which sought an order requiring DaVita to track and record the dialysate received by patients, determine who was exposed to GranuFlo and notify exposed patients of their potential legal claims, on grounds that the named plaintiffs already had all of the information sought and therefore did not have standing to sue. The court also denied certification of plaintiffs' proposed issues class and other 23(b)(3) classes on superiority grounds. With respect to the proposed issues class, which sought certification of "common" questions regarding, *inter alia*, DaVita's company-wide policies and the company's knowledge of the alleged problems with GranuFlo, the court held that common issues predominated with respect to those specific issues. Nevertheless, the court concluded that the superiority requirement was not met, and class certification was inappropriate, because plaintiffs' ability to establish liability overall would turn on "a myriad of individual causation issues" and therefore certification of the common questions "would not achieve significant economies of time, effort and expense." Similarly, the

court held that certification of plaintiffs' negligence and concealment claims was inappropriate under Rule 23(b)(3) because "several manageability concerns," including the application of varying states' laws and the need for individualized proof of causation, "overwhelm[ed] the superiority analysis."

***Doster Lighting, Inc. v. E-Conolight, LLC*, No. 12-C-0023, 2015 WL 3776491 (E.D. Wis. June 17, 2015), 23(f) pet. denied.**

Judge C.N. Clevert, Jr. of the U.S. District Court for the Eastern District of Wisconsin reconfirmed his prior denial of the plaintiff's motion for class certification in a case involving allegations regarding the defendant's allegedly defective LED light bulb arrays and fixtures. The plaintiff sought to certify a class consisting of all U.S. residents who, during the class period, purchased one or more of several listed LED products from the defendant. Judge Clevert initially considered and denied the plaintiff's motion for class certification but subsequently granted the plaintiff's motion for reconsideration after new case law addressing class certification issues was decided. Nonetheless, after considering the new case law, Judge Clevert affirmed his prior decision. Although the court found that the proposed class satisfied the numerosity, commonality and typicality requirements under Rule 23(a), it determined that the named plaintiff was not an adequate class representative based on his decision to litigate his claims rather than request replacements, labor costs and refunds, which were remedies that were available to him under the defendant's replacement policy. In addition, the court raised concerns that the named plaintiff had expressed a willingness to abandon the claims of class members who were subject to other states' consumer protection statutes without dropping those class members from the class definition, thereby precluding them from ever bringing their claims. Accordingly, the court determined that the adequacy-of-representation requirement was not satisfied. The court also concluded that choice-of-law issues would create "insurmountable individual issues" with respect to both liability and damages, which unquestionably would predominate over any common questions in the case.

***McMahon v. LVNV Funding, LLC*, No. 12 C 1410, 2015 WL 3757052 (N.D. Ill. June 15, 2015).**

Judge Jorge Alonso of the U.S. District Court for the Northern District of Illinois denied the plaintiff's motion for class certification in a case involving alleged violations of the Fair Debt Collection Practices Act (FDCPA). Specifically, the named plaintiff alleged that the defendants violated the FDCPA by sending a letter and/or validation of debt notice to putative class members offering to settle a debt without disclosing the fact that the statute of limitations on the debt had expired. In considering the plaintiff's motion for class certification, the court first concluded that each of the prerequisites to certification under Rule 23(a) was satisfied. However, the court found that the predominance requirement of Rule 23(b)(3) was not satisfied because the case would present individual issues of causation and damages — most notably, whether each putative class member "paid the debt because of the letter, out of moral compulsion, or for some other reason[.]"

***Vista Healthplan, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1833, 2015 WL 3623005 (E.D. Pa. June 10, 2015).**

The plaintiffs, consumers and third-party payors that purchased the drug Provigil, sought certification of two classes in this antitrust action — a class of end payors with state antitrust and consumer protection law claims, and an unjust enrichment class. Judge Mitchell S. Goldberg of the U.S. District Court of the Eastern District of Pennsylvania denied class certification, finding that the plaintiffs failed to satisfy the requirements of ascertainability, predominance and superiority. The plaintiffs alleged that as a result of settlements between the manufacturers of brand name and generic Provigil, consumers and third-party payors paid more for Provigil than they otherwise would have. The court stressed the importance of the ascertainability prerequisite to class certification under recent Third Circuit precedent, and found ascertainability lacking because the plaintiffs failed to produce any evidence, aside from the records of an isolated pharmacy, as to whether other retailers kept reliable records of patient data over the proposed class period, and did not present any methodology, let alone an administratively feasible one, for identifying class members using such records. As Judge Goldberg noted, "[P]lans to create a methodology at a later date do not satisfy the rigorous analysis insisted upon by the Third Circuit[.]" The court also determined that the proposed class lacked predominance because the plaintiffs did not establish that they could demonstrate antitrust impact on a classwide basis. Uninjured persons would potentially remain within the class, and removing those class members would require extensive individualized inquiry. In addition, the proposed unjust enrichment and state consumer protection claims raised choice-of-law issues that precluded a finding of predominance.

***Bello v. Beam Global Spirits & Wine, Inc.*, No. 11-5149 (NLH/KMW), 2015 WL 3613723 (D.N.J. June 9, 2015).**

Judge Noel L. Hillman of the U.S. District Court for the District of New Jersey denied the plaintiffs' renewed motion for class certification of a class of purchasers of SkinnyGirl Margaritas, finding that class membership was not ascertainable because class members were unlikely to have retained their receipts, and many of the details proposed by plaintiffs for the affidavits — such as a description of the bottle and purchase price — could be readily

obtained from the Internet. In addition, the plaintiffs did not provide any actual evidence that their proposed ascertainment methods would screen out fraudulent claims. Thus, plaintiffs' proposal failed to satisfy the Third Circuit's "high bar" for demonstrating ascertainability in low-value consumer class actions.

***Mervyn v. Atlas Van Lines, Inc.*, No. 13 C 3587, 2015 WL 3649136 (N.D. Ill. June 9, 2015).**

Judge Ronald A. Guzman of the U.S. District Court for the Northern District of Illinois denied without prejudice the plaintiff's motion for class certification in a putative class action involving allegations that the defendant knowingly and unlawfully miscalculated and reduced payments to the named plaintiff and other similarly situated moving truck owner-operators. The plaintiff filed a motion for class certification based on discovery directed solely to the named plaintiff, rather than to the class as a whole. The district judge ultimately agreed with the magistrate judge's recommendation that class certification was not warranted at this time. There remained several open questions as to the number of potential class members, which would depend on factors such as (1) whether the contracts all contained similar terms and (2) whether the revenues were allocated to the owner-operators in a similar fashion across all of the contracts. Moreover, if express time limits to dispute payment existed but varied among contracts, individualized questions as to whether the putative class members complied with those provisions might preclude a finding of commonality or predominance. In addition, class certification could not be decided until it was known whether the putative class members' contracts contained uniform choice-of-law provisions and, if not, which state's law would apply to any particular contract. Thus, the court determined that additional class discovery was necessary before it could decide the propriety of class certification.

***Mazzei v. Money Store*, No. 01 Cv. 5694(JGK), 2015 WL 3439158 (S.D.N.Y. May 29, 2015).**

After trial, Judge John G. Koeltl of the U.S. District Court for the Southern District of New York decertified a class that had asserted breach of contract because the defendants allegedly assessed late fees after borrowers' loans were accelerated. The defendants argued that the plaintiffs failed to prove that the borrowers in the class were in a contractual relationship with the defendants. The court agreed, holding that the plaintiffs failed to provide sufficient evidence at trial to establish privity of contract. The court's original certification of the class was based on the premise that the borrowers were similarly situated with respect to contractual privity with the defendants. Because the plaintiffs failed to adduce any evidence to support that premise at trial, the requirements of Rule 23 were not met, and decertification was required.

***Markocki v. Old Republic National Title Insurance Co.*, No. 06-2422, 2015 WL 3421401 (E.D. Pa. May 27, 2015).**

The plaintiff brought suit on behalf of Pennsylvania homeowners against a title insurance company for allegedly failing to apply mandatory discounts to title insurance premiums and sharing those premiums with title agents in violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL) and the Real Estate Settlement Procedures Act (RESPA). Chief Judge Petrese B. Tucker of the U.S. District Court for the Eastern District of Pennsylvania granted in part the defendant's motion to decertify the class, finding that a change in substantive law required decertification of the UTPCPL class. In particular, in originally certifying the class, the court had reasoned that individual issues would not predominate because class members were presumed to have relied on the defendant's deceptive conduct. In *Hunt v. United States Tobacco*, 538 F.3d 217 (3d Cir. 2008), however, the Third Circuit rejected that argument, instead holding that a plaintiff alleging a UTPCPL claim was required to affirmatively prove justifiable reliance. Thus, the court found that because "[d]etermining justifiable reliance require[d] individual inquiries into each class member's transaction" and thus overwhelmed any common issues, decertification of the UTPCPL claim was warranted.

Decisions Permitting/Granting Class Certification

***Rikos v. The Proctor & Gamble Co.*, No. 14-4088, 2015 U.S. App. LEXIS 14613 (6th Cir. Aug. 20, 2015).**

In a 2-1 decision, a panel of the U.S. Court of Appeals for the Fourth Circuit (Moore, J., and Cohn, D.J.; Cook, J., dissenting) affirmed certification of a class of California, Illinois, Florida, New Hampshire and North Carolina purchasers of a particular brand of probiotics. In affirming class certification, the panel explained that if the probiotics did not provide any benefits, then every class member was injured. The panel reached a similar conclusion on Rule 23(a)'s typicality requirement because the defendant's arguments were similar to its commonality argument. Turning to Rule 23(b)'s predominance requirement, the panel recognized that the probiotic was advertised through a common theme (even if certain advertising language may have changed) and that its effectiveness would have been material to a purchaser. Consequently, the panel decided that each purchaser would have been exposed to the uniform theme, regardless of an individual's particular reason for purchasing the probiotics at issue (*e.g.*, a doctor's or friend's recommendation). With respect to ascertainability, the panel decided that the plaintiffs' class was objective and membership could be determined with reasonable, if not perfect, accuracy, relying on the Sixth Circuit's decision in *Young v. Nationwide Mutual Insurance Co.*, 693 F.3d 532 (6th Cir. 2012), and rejecting reliance on the Third Circuit's decision in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

***In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation*, No. 13-4273, 2015 WL 4547042 (3d Cir. July 29, 2015).**

A unanimous panel of the U.S. Court of Appeals for the Third Circuit (Fisher, Jordan and Greenaway, Jr., JJ.) affirmed the U.S. District Court for the Western District of Pennsylvania's order certifying a general class and five subclasses in this action brought by borrowers against PNC Bank, among others, alleging the existence of an illegal home equity lending scheme. The defendants argued, *inter alia*, that the ascertainability, commonality and predominance requirements of Rule 23 were not met. As to the ascertainability requirement, the court found PNC's argument that the fact that some borrowers may have declared bankruptcy since entering into their loans, making the bankruptcy estate rather than the borrower the real party in interest, was entirely speculative, as PNC introduced no evidence that members of the class were actually involved in bankruptcy proceedings, and that regardless, the class was ascertainable because the plaintiffs identified a "reliable, repeatable process" whereby class members could be identified through verification of the bank's business records. The court also rejected the defendants' argument that *Wal-Mart Stores, Inc. v. Dukes* foreclosed a finding of commonality where the fees charged to putative class members varied in type and amount, holding that a loan-by-loan analysis was unnecessary where the plaintiffs alleged that the class was subjected to the same type of illegal conduct by the same entities and class members were harmed in the same way, "albeit to potentially different extents." The court also found that common questions as to whether the defendants actively misled the plaintiffs predominated over any individualized issues, including whether any class members were entitled to equitable tolling. Accordingly, the court held that the defendants failed to demonstrate that the district court abused its discretion in certifying the class.

***Mullins v. Direct Digital, LLC*, No. 15-1776, 2015 WL 4546159 (7th Cir. July 28, 2015).**

A panel of the U.S. Court of Appeals for the Seventh Circuit (Bauer, Kanne and Hamilton, JJ.) affirmed the district court's order granting class certification in a consumer class action brought against the seller of a dietary joint supplement, holding that the class satisfied the implied ascertainability requirement in Rule 23 and that the federal rules do not impose a heightened ascertainability requirement for class certification, contrary to recent holdings by the Third Circuit and other district courts. In their class action complaint, the plaintiffs alleged that the defendant made fraudulent statements about the supplement's effectiveness in its advertising and marketing materials. The district court certified a class, finding that the proposed class satisfied the explicit requirements of Rules 23(a) and 23(b)(3), and rejecting the defendant's argument that Rule 23(b)(3) implies a heightened ascertainability requirement. The Seventh Circuit affirmed, stating that Rule 23 requires only "that a class must be defined clearly and that membership be defined by objective criteria." While the court recognized that "[c]lass definitions have failed this requirement when they were too vague or subjective, or when class membership was defined in terms of success on the merits (so-called 'fail-safe' classes)," the proposed class in this case did not suffer from those deficiencies. The court declined to follow the path of other courts around the country that have imposed a heightened ascertainability requirement in consumer class actions, stating that "[n]othing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3)." In the court's view, a "heightened ascertainability requirement" has the "effect of barring class actions where class treatment is often most needed: in cases involving relatively low-cost goods or services, where consumers are unlikely to have documentary proof of purchase."

***Medical Protective Co. v. Center for Advanced Spin Technologies*, No. 1:14-cv-5, 2015 WL 4653220 (S.D. Ohio Aug. 5, 2015).**

Judge Timothy S. Black of the U.S. District Court for the Southern District of Ohio certified two defendant classes in a lawsuit brought by a doctor's insurers seeking declarations that they had no obligations to the individuals suing the doctor because the doctor fled to Pakistan and, contrary to the terms of his policies with the insurers, refused to cooperate in defense of those lawsuits. First, the court found that the two class definitions satisfied the implicit ascertainability requirement of Rule 23. Although the parties stipulated that the insurers could amend the list of lawsuits identified as "Underlying Litigation" in the class definitions, this did not render the class unascertainable because not every potential member must be identified at the commencement of a class action. Moreover, the court found that commonality was satisfied because whether the doctor satisfied the policies' cooperation requirements will be based on the same conduct: the doctor's refusal to participate in the defense of the underlying litigations. Finally, Rule 23's typicality and adequacy requirements were satisfied because, as the court explained, the policy provisions were identical and all the defendants — even though adverse to each other in some of the underlying litigations — had an interest in having the insurers' funds available to pay judgments in those underlying litigations. As for Rule 23(b), the court found the class was sufficiently cohesive because the only relief sought was declaratory relief about whether the insurers were obligated to defend and indemnify the doctor.

***Ikuseghan v. MultiCare Health System*, No. C14-5539 BHS, 2015 WL 4600818 (W.D. Wash. July 29, 2015).**

Judge Benjamin H. Settle of the U.S. District Court for the Western District of Washington granted a motion to certify a modified class of "[a]ll persons who received medical treatment at a MultiCare facility, who signed MultiCare's Financial Agreement and Conditions of Treatment forms, and to whose cellular telephone number Hunter Donaldson made a call on behalf of MultiCare through the use of an automatic telephone dialing system or an artificial or prerecorded voice," allegedly in violation of the Telephone Consumer Protection Act (TCPA). The court held that the plaintiff had standing because "a violation of the TCPA may serve as a concrete injury for Article III standing." The court limited the proposed class to members who, like the plaintiff, had signed MultiCare's standardized forms, thus addressing the defendants' arguments that her claims were not typical of the class, which previously included patients who did not sign the forms and nonpatients. Moreover, under the narrower class definition, the issue of whether the standardized forms constituted prior express consent was subject to classwide resolution and satisfied the predominance inquiry. All other Rule 23 requirements and ascertainability were satisfied through the modified class.

***Coulter-Owens v. Time, Inc.*, No. 12-CV-14390, 2015 U.S. Dist. LEXIS 97352 (E.D. Mich. July 27, 2015).**

Judge George Caram Steeh of the U.S. District Court for the Eastern District of Michigan certified a class of magazine subscribers in a class action alleging that the defendant publisher improperly disclosed to marketing companies the private information of people who subscribed to its magazines through third-party websites. The defendant argued, *inter alia*, that the plaintiff failed to satisfy the predominance requirement because individualized questions — specifically, "whether each class member had their information disclosed," "whether each class member received notice of [the defendant's] marketing practices, and whether each class member was damaged" — overwhelmed any common issues. The court disagreed. While only some class members' information was disclosed to one of the marketing companies, it was undisputed that all of the putative class members' information was disclosed to the other marketing company, regardless of whether a subscriber opted out of disclosure. For similar reasons, individual differences as to notice of the defendant's marketing practices were irrelevant because the information was sent to one of the marketing companies regardless of whether the subscriber reviewed and opted out of disclosure. Finally, damages was "not an issue" because the plaintiff was proceeding under a statutory damages theory whereby each disclosure resulted in recovery of $5,000. For these reasons, the court held that individual issues did not predominate and certification was proper.

***King Drug Co. v. Cephalon, Inc.*, No. 06-cv-1797, 2015 WL 4522855 (E.D. Pa. July 27, 2015), 23(f) pet. pending.**

Judge Mitchell S. Goldberg of the U.S. District Court for the Eastern District of Pennsylvania certified a class of direct purchasers who purchased the brand-name drug Provigil directly from the defendants in this consolidated antitrust lawsuit. The parties disputed whether Rule 23(a)'s requirement of numerosity was met, with the plaintiffs contending the class consisted of 22 wholesale purchasers and the defendants arguing the number was 18. Judge Goldberg found no evidence that the plaintiffs had manipulated the number of class members and held that trying the case as a class action would best serve judicial economy, given the "complexity and extensive history of this case, the expansive discovery conducted, and the geographic dispersion of the parties[.]" The defendants also disputed the predominance requirement, arguing that the plaintiffs would not be able to demonstrate antitrust impact or damages using classwide evidence, because whether a particular direct purchaser was harmed would require individualized inquiries. As to antitrust impact, the court found that the plaintiffs' expert's classwide evidence on the effects of generic competition and evidence that all class members either purchased or would have purchased a generic Provigil satisfied the predominance requirement. The court rejected the defendants' argument that variations in damages calculations between and among class members defeats predominance in light of *Comcast Corp. v. Behrend*, finding that the plaintiffs had provided a "reliable aggregate damages model" that matched their theory of liability and impact, satisfying the predominance requirement as to damages as well. Because the plaintiffs satisfied the remaining requirements of Rule 23(a) and 23(b)(3) by a preponderance of the evidence, class certification was appropriate.

***In re Polyurethane Foam Antitrust Litigation*, No. 1:10 MD 2196, 2015 WL 4459636 (N.D. Ohio July 21, 2015).**

Judge Jack Zouhary of the U.S. District Court for the Northern District of Ohio denied the defendants' motion to decertify a class of indirect purchasers of consumer products containing polyurethane foam in an antitrust lawsuit alleging a conspiracy to improperly raise the price of foam products. Notwithstanding the defendants' arguments, the court determined that Rule 23's commonality, ascertainability, and predominance prongs were satisfied. For commonality, the court explained that Ohio's choice-of-law regime presumed that the law of the place of injury applied, making the choice-of-law analysis "simple: the law of the state where the class member purchased their foam-containing product" applied. The court also rejected the defendants' argument that the class was unascertainable because the plaintiffs could not "simply look at a sales receipt, a product instruction manual, or the product itself" to ascertain whether

the product contained polyurethane foam manufactured by one of the defendants. The court held that this argument "might have more force if Defendants did not overwhelmingly dominate" the U.S. market for polyurethane foam. Moreover, the plaintiffs proved that they could identify the manufacturer of foam in any given product by referring to the Uniform Registration Number that is required to appear on the finished product's label. Thus, although it required "sifting through substantial information," there was some "practicable process to ascertain" who was a member of the class. Finally, as to predominance, the defendants argued that even if it was possible to determine the gross amount of overcharges for foam paid by the entire class, it was not possible to determine how much of that gross amount is attributable to a given mattress, couch, or carpet underlay owned by each class member. The court, however, held that this argument went to claims administration, not proof of damages; it was sufficient that plaintiffs proposed a classwide approach to determining aggregate damages.

***Leonard v. Sears, Roebuck & Co.*, No. 06-CV-7023, 2015 WL 4430429 (N.D. Ill. July 20, 2015).**

Following remand from the U.S. Court of Appeals for the Seventh Circuit, Magistrate Judge Mary M. Rowland of the U.S. District Court for the Northern District of Illinois granted the plaintiffs' amended motion for certification of a liability-only class in one of several cases brought on behalf of "purchasers of front loading, high efficiency washing machines manufactured by Whirlpool and sold by Sears ... whose machines suffered from [a] mold defect." The plaintiffs originally had sought to certify a class of purchasers across six different states. On remand, the plaintiffs amended their class certification motion to include two new class representatives and to seek certification only on behalf of Illinois purchasers. The court noted that it was bound by the Seventh Circuit's conclusions, including that (1) "[t]here is a single, central, common issue of liability: whether the Sears washing machine was defective; and (2) any complications caused by design differences in various washing machine models can be handled by the creation of subclasses, if necessary." Accordingly, the court rejected Sears' argument that the proposed class could not be certified because most of the class members did not suffer any harm from the alleged defect. Indeed, the court noted that the Seventh Circuit had found that, if anything, Sears' argument actually added weight to the *plaintiffs'* position, because if it were true, as Sears contended, that most class members did not suffer the alleged harm, "that was an argument not for refusing to certify the class but for certifying it and then entering a judgment that would largely exonerate Sears — a course it should welcome, as all class members who did not opt out of the class action would be bound by the judgment." Accordingly, the court determined that the only question remaining after the Seventh Circuit's remand was what the class definition should be.

***Downing v. Goldman Phipps PLLC*, No. 4:13CV206 CDP, 2015 WL 4255342 (E.D. Mo. July 14, 2015).**

Judge Catherine D. Perry of the U.S. District Court for the Eastern District of Missouri granted the plaintiffs' motion for class certification in a dispute between law firms that had worked together in representing the plaintiffs against Bayer in a multidistrict litigation (MDL) proceeding before Judge Perry. The plaintiffs — three of the law firms that were part of the MDL team — sued the other two groups of law firms for unjust enrichment and quantum meruit, alleging that the defendant law firms used work product created by the MDL group when the defendants represented different clients in state-court cases against Bayer. The court found that the case satisfied the prerequisites for class certification under Rule 23(b)(3). The court first held that a choice-of-law determination was not necessary at the class certification stage because the claims of the class would at most require the application of two states' laws. Thus, the number of potential legal standards was not so many that they would overshadow the common issues presented. The court also rejected the defendants' argument that the plaintiffs' claims would require an inquiry into the specific legal work performed or paid for by each class member. Because the MDL plaintiffs, by pooling their resources, undertook a joint approach to litigating the cases in the MDL proceeding, they would only have to show that they jointly incurred the expenses that later unjustly conferred a benefit on the defendants. And while the claims did require evidence of the defendants' use of the collective work product, including the circumstances and value of that use, such evidence would remain common to the class. Thus, the court found the claims "uniquely suitable" for class treatment.

***In re Cathode Ray Tube (CRT) Antitrust Litigation*, No. CV-07-5944-SC, 2015 WL 4127859 (N.D. Cal. July 8, 2015).**

Judge Samuel Conti of the U.S. District Court for the Northern District of California certified a class of direct purchaser plaintiffs of products containing cathode ray tubes (CRT) in the United States, alleging an international conspiracy by manufacturers and others to fix prices of CRT products in violation of the Sherman Antitrust Act. Among other arguments, Mitsubishi (the only defendant to oppose the motion) argued that certification should be denied because individual issues predominated, particularly as to impact and damages. The court agreed that there could be "real differences between the products and the methodology required to prove the specific, actual loss suffered due to the impact of the conspiracy on each of the products." Nevertheless, it was persuaded by the plaintiffs' proffer of expert

evidence as a way to prove a classwide measure of impact through generalized proof. The expert's evidence suggested that all but a small fraction of the CRT market was impacted; that the conspiracy's price goals were achieved a significant portion of the time; and that the conspirators were effective at monitoring and enforcing conspiratorial agreements. Mitsubishi argued that the expert's statistical evidence was flawed, but the court held that the expert's conclusions could be accepted or rejected at trial. Mitsubishi also argued that there was no common proof of damages. The court disagreed. First, it held that individualized damages alone would not defeat class certification. Moreover, it held that the variances among the class members identified by Mitsubishi were "discount[ed]" by the plaintiffs' expert's evidence that showed the degree to which the conspiracy caused common harm to all the plaintiffs. For these reasons, the court held that individualized issues did not predominate and class certification was appropriate.

***Patel v. Trans Union, LLC*, No. 3:14-cv-00522-LB, 2015 WL 3945411 (N.D. Cal. June 26, 2015), 23(f) pet. pending.**

Magistrate Judge Laurel Beeler of the U.S. District Court for the Northern District of California certified a nationwide class alleging two violations of the Fair Credit Reporting Act (FCRA) based on allegations that the defendants — which allegedly operated as a single consumer reporting agency — generated background reports reflecting inaccurate "terrorist alert" information, due to the defendants' practice of using only names to verify hits, and not additional identifiers such as birth dates or Social Security numbers, which violated the FCRA's "reasonable procedures" requirement. The court also certified a subclass of plaintiffs who requested their files from the defendants but were not given the terrorist alert background information in the report, as required by the FCRA. In opposing ascertainability and the Rule 23(b)(3) predominance requirement, the defendants argued that the class was not ascertainable because the class was defined as all persons who received a terrorist alert and only individualized queries could determine whether that designation was inaccurate. The court acknowledged that "[n]ormally, the defendants would be right," but that "[a]bsent some pretty significant proof to the contrary, the court is willing to assume that no significant (read: certification-breaking) fraction of the tagged proposed class was in fact accurately tagged as potential terrorists." The court also held that the class satisfied Rule 23(a)'s numerosity, typicality and adequacy requirements, and common questions about the company's practices and procedures as to accuracy and disclosure predominated.

***Dial Corp. v. News Corp.*, No. 13cv6802, 2015 WL 4104624 (S.D.N.Y. June 18, 2015), 23(f) pet. pending.**

The plaintiffs, consumer packaged goods firms (CPGs), alleged that the defendants maintained a monopoly for in-store promotion (ISP) services and extracted artificially high prices from their customers. The plaintiffs moved to certify a class of CPGs that had directly purchased ISPs from the defendants at any time on or after April 5, 2008. Judge William H. Pauley III of the U.S. District Court for the Southern District of New York granted the plaintiffs' motion for class certification, holding that all requirements of Rule 23 were met. In so doing, the court rejected the defendants' argument that "the substantial variation in News Corp.'s ISP prices across customers preclude[d] class-wide proof," instead crediting the plaintiffs' expert's regression analysis that suggested that prices were systematically determined across the class. The court also found that the plaintiffs' damages model, which failed to distinguish between injuries attributable to the plaintiffs' nine theories of anticompetitive injury, was consistent with *Comcast Corp. v. Behrend*. This was so because — unlike in *Comcast* where the plaintiffs' damages model was based on multiple theories of anticompetitive injury, only one of which the court had found susceptible to classwide proof — the court had declined to reject any of the plaintiffs' theories of injury, and thus the plaintiffs' damages model need not isolate the effects of any one of those theories on prices.

***Jenkins v. Pech*, No. 8:14CV41, 2015 WL 3658261 (D. Neb. June 12, 2015).**

Joseph A. Bataillon of the U.S. District for the District of Nebraska granted in part and denied in part the plaintiff's motion for class certification in a putative class action involving allegations that a law firm violated the Fair Debt Collection Practices Act (FDCPA) and the Nebraska Consumer Protection Act by maintaining a routine practice of sending a misleading debt-collection letter that (1) failed to state that the alleged debt would be considered valid *by the debt collector*; (2) stated a fictitious name on its envelope and (3) was issued without meaningful involvement by an attorney in reviewing the receiver's account. The plaintiff moved for certification of two classes: one relating to the letter and one relating to the envelope. The magistrate judge recommended granting certification to the letter class, which consisted of Nebraska residents "(ii) to whom defendants ... sent out ... a letter in the form of Exhibit A, (iii) in an attempt to collect a purported obligation which, as shown by the nature of the alleged obligation, Defendants' records, or the records of the original creditors, was primarily for personal, family, or household purposes." The defendants challenged this recommendation, arguing that the proposed letter class was not ascertainable because there was no evidence as to whether the debt was incurred primarily for personal or

household purposes. Judge Bataillon rejected this argument and affirmed the magistrate judge's ruling. In so doing, he explained that the plaintiffs had "shown that it [wa]s sufficiently administratively feasible to identify the class through the defendant's records" and moreover, that "numerous cases ... ha[d] held that the need to differentiate business from consumer debt [wa]s not an obstacle to class certification."

***Newton v. American Debt Services, Inc.*, No. C-11-3228 EMC, 2015 WL 3614197 (N.D. Cal. June 9, 2015).**

The plaintiff brought suit on behalf of California consumers alleging violation of California's Unfair Competition Law based on the defendants' participation in a purportedly fraudulent debt settlement scheme. The defendants argued, *inter alia*, that the plaintiff's proposed class definition was too broad because it was not limited to individuals who actually did business with ADS, the defendant that was the alleged "front-man" for the debt settlement enterprise challenged in the lawsuit. Judge Edward M. Chen of the U.S. District Court for the Northern District of California agreed and limited the plaintiff's proposed class to California consumers who contracted with or otherwise paid ADS. The court held that the narrower class met all of the requirements of Rule 23. The court noted that the defendants had conceded ascertainability and numerosity by stating "the precise number of class members that are in Newton's proposed class" and that the plaintiff demonstrated "a substantial number" of common questions that will drive resolution of the litigation, including whether the defendants had actual knowledge of the former co-defendants' supposed violations of the Proraters Law and whether they substantially assisted the scheme. Further, the typicality element was satisfied as, according to the plaintiff, "all putative class members suffered the exact same injury — the imposition of all illegal fees by Defendants in violation of the Proraters Law." The plaintiff also satisfied Rule 23(b)(3) with respect to both the unlawful and unfair prong, as the allegedly unfair conduct "appear[ed] uniform across all class members" and so the court would be able to "make one uniform determination of whether the utility of the conduct outweighed the harm to class members."

***In re Checking Account Overdraft Litigation*, No. 1:09-MD-02036-JLK, 2015 WL 3551527 and 2015 WL 3551555 (S.D. Fla. June 8, 2015).**

Judge James Lawrence King of the U.S. District Court for the Southern District of Florida certified two classes of plaintiffs in a multidistrict litigation suit alleging that the defendant, Wells Fargo, and former Wachovia Bank N.A., used deceptive practices in processing debit card transactions to generate bank overdraft fees and misrepresented to customers the sequencing of transactions. The district court certified two classes in separate orders: a nationwide class of former customers of Wachovia Bank and a nationwide class of Wells Fargo customers (excluding residents of California and Indiana). The court also certified several subclasses, accepting the plaintiffs' proposal for subclasses to cover varying state jurisdictions where the subclasses allegedly implicated materially identical legal standards. The court rejected the company's argument that arbitration clauses in its customers' account contracts had to be considered in the numerosity analysis. Rather, Judge King found that the arbitration clauses in the contracts were permissive, not mandatory, and therefore that absent class members were not bound to arbitrate their claims. He also found that the class members would be ascertainable through the bank's own records and that any differences in their preferences of posting order did not defeat class certification.

***Jacobson v. Persolve, LLC*, No. 14-CV-00735-LHK, 2015 WL 3523696 (N.D. Cal. June 4, 2015).**

Judge Lucy H. Koh of the U.S. District Court for the Northern District of California granted in part and denied in part a motion to certify a class of consumers who incurred a consumer debt issued by Wells Fargo Bank, N.A., which was later sold, assigned or transferred to Stride Card, which then consigned, placed or assigned the debt to Persolve for collection. The plaintiff alleged that Persolve and Stride Card engaged in a routine practice of sending initial debt collection notices that did not disclose to the reader the name of the creditor to whom the debt was owed, in violation of the Fair Debt Collection Practices Act (FDCPA) and the Rosenthal Fair Debt Collection Practices Act (RFDCPA). The plaintiff sought to certify a hybrid class under both Rule 23(b)(3) and Rule 23(b)(2). The court certified a damages class, under Rule 23(b)(3), as each proposed class member received the same allegedly defective collection letter, supporting a finding of commonality and typicality, and the 469 putative class members satisfied the numerosity requirement and demonstrated ascertainability. Additionally, the "substantively identical" collection letters, which were "at the heart of Plaintiff's FDCPA and RFDCPA claims," satisfied the predominance requirement. The court, however, declined to certify an injunctive or declaratory relief class under Rule 23(b)(2), holding that the FDCPA does not make injunctive or declaratory relief available to a private plaintiff, and moreover, since the defendants had stopped using the form collection letter at issue, there was no risk of injury absent such relief.

***In re Yahoo Mail Litigation*, No. 13-CV-04980-LHK, 2015 WL 3523908 (N.D. Cal. May 26, 2015), 23(f) pet. denied.**

Judge Lucy H. Koh of the U.S. District Court for the Northern District of California granted in part and denied in part a motion to certify a nationwide class of persons who challenged Yahoo!, Inc.'s practice of scanning and analyzing emails of non-Yahoo Mail subscribers, allegedly in violation of federal and California wiretapping laws. The plaintiffs sought certification under Rule 23(b)(2) for injunctive relief. Judge Koh rejected Yahoo's argument that the plaintiffs lacked standing because they continued to email Yahoo subscribers despite learning of Yahoo's interception of those emails, since the plaintiffs would not be able to "avoid consenting to Yahoo's conduct while simultaneously establishing a real and immediate threat ... put[ting] Plaintiffs in a catch-22 that would essentially preclude injunctive relief altogether." Rule 23(b)(2) was satisfied because the plaintiffs' contention that all emails sent to and from Yahoo mail subscribers were subject to the same processes established a "pattern or practice that is generally applicable to the class as a whole." In assessing the application of the California Invasion of Privacy Act (CIPA) to a nationwide class, however, the court held that there are material differences between the CIPA and other states' wiretapping laws, and that each of the other 49 states had an interest in applying its own law, which would be "more impaired by applying California law than would California's interests by applying other states' laws." Thus, the court certified a California-only subclass as to the CIPA claim.

***Strawser v. Strange*, No. 14-0424-CG-C, 2015 WL 2449251 (S.D. Ala. May 21, 2015).**

Judge Callie V.S. Granade of the U.S. District Court for the Southern District of Alabama granted the plaintiffs' motion for class certification of a plaintiff class and a defendant class in a lawsuit against county probate judges who were enforcing Alabama's laws barring the issuance of marriage licenses to same-sex couples. The court granted class certification of the plaintiff class holding that (1) "2010 census data coupled with the actual experience in other states" demonstrated numerosity; (2) the commonality requirement was satisfied because the injunctive relief sought in barring the enforcement of these laws rested on identical questions of law; (3) the typicality requirement was met where the plaintiffs' shared inability to be married and have their marriages recognized because they are of the same sex was shared by all members of the proposed class; and (4) there was adequacy of representation. The court also granted class certification of the defendant class, holding that (1) the 68 probate judges satisfied numerosity; (2) commonality was satisfied by the "common questions of law that would be resolved as to all of the members of the proposed Defendant Class"; (3) typicality was satisfied because the defendants' "defenses arise from the same course of events and each class member may make the same legal arguments to defend against Plaintiffs' allegations"; and (4) there was adequacy of representation because the issuance of marriage licenses was a ministerial act such that the lack of unified position on the constitutionality of denying marriage licenses did not matter. The court concluded by holding that certification was proper under Rule 23(b)(1) and 23(b)(2).

Other Class Action Decisions

***Hooks v. Landmark Industries, Inc.*, No. 14-20496, 2015 WL 4760253 (5th Cir. Aug. 12, 2015).**

The named plaintiff sued the defendant ATM operator for failing to provide notice that the ATM machine charged a fee. Before the plaintiff filed a motion to certify the proposed class, the defendant made a Rule 68 offer of judgment, which the plaintiff rejected. The defendant then moved to dismiss the complaint as moot. The district court granted the motion to dismiss, and a unanimous panel of the U.S. Court of Appeals for the Fifth Circuit (Stewart, C.J., Haynes and Brown, JJ.) reversed. Expressing concern for the tactic of "picking off" named plaintiffs, the Fifth Circuit held "that an unaccepted offer of judgment to a named plaintiff in a class action [does not moot the case, and] is a legal nullity, with no operative effect."

***Neale v. Volvo Cars of North America, LLC*, No. 14-1540, 2015 WL 4466919 (3d Cir. July 22, 2015).**

The defendants in this putative class action brought by consumers alleging that the defendants sold certain vehicles with defective sunroof drainage systems appealed the U.S. District Court for the District of New Jersey's grant of class certification. A unanimous panel of the U.S. Court of Appeals for the Third Circuit (Smith, Chagares and Hardiman, JJ.) vacated the district court's order and remanded the case for further proceedings. In rejecting Volvo's argument that all putative class members must have Article III standing, the court held that the "cases or controversies" requirement was satisfied so long as a class representative has standing, recognizing that the Supreme Court has not yet commented on what Article III requires of unnamed class members during a motion for class certification. The court emphasized that "a class action is a *representative* action brought by a named plaintiff or plaintiffs" and the named plaintiffs are the individuals held accountable for establishing jurisdiction. Despite finding the standing requirement satisfied, the Third Circuit held that it was necessary to remand the action because the district court's certification order did not specifically identify the claims certified in accordance with *Wachtel v. Guardian Life Insurance Co. of America*, 453 F.3d 179 (3d Cir. 2006), which

requires district courts to include "a clear and complete summary of those claims, issues, or defenses subject to class treatment" in class certification orders. Furthermore, the district court erred by certifying six statewide classes without analyzing whether the predominance requirement was satisfied in the context of each putative class's actual claims, instead concluding that since the defendants' conduct was common to all class members, predominance was satisfied. For these reasons, the Third Circuit panel remanded the case so that the district court could more specifically define the class membership, claims and defenses and more rigorously analyze predominance.

Malone v. Portfolio Recovery Associates, LLC,
No. 3:14-CV-00152-CRS, 2015 WL 4720243 (W.D. Ky. Aug. 7, 2015).

Judge Charles R. Simpson III of the U.S. District Court for the Western District of Kentucky dismissed for lack of an Article III case or controversy putative class claims for violation of the Fair Credit Reporting Act and entered judgment on the named plaintiff's individual claims in accordance with an unaccepted Rule 68 offer of judgment. The defendant made the offer based on the damages listed in the plaintiff's Rule 26 initial disclosures, which included only statutory damages and attorney's fees, even though the complaint also sought actual damages. The court held that the offer was sufficient to moot the plaintiff's individual claims because she had not sought to supplement her initial disclosures. Because the plaintiff had not moved for class certification, the court, relying on Sixth Circuit precedent, dismissed the class claims and entered judgment in favor of the plaintiff in accordance with the unaccepted Rule 68 offer.

Mladenov v. Wegmans Food Markets, Inc.,
Nos. 15-00373-JEI-AMD, 15-00382-JEI-AMD, 15-00618-JEI-AMD, 2015 WL 4461252 (D.N.J. July 21, 2015).

In this putative class action against defendant grocery stores alleging that the defendants misrepresented that certain bakery products were made from scratch and that the stores charged a premium for these products, Judge Joseph E. Irenas of the U.S. District Court for the District of New Jersey *sua sponte* ordered the plaintiffs to show cause why their class allegations should not be stricken under Rule 12(f)(1), which explicitly grants the court the authority to strike class allegations without a defendant first filing a motion to strike. Judge Irenas was doubtful that the plaintiffs could satisfy either Rule 23(b)(2) or Rule 23(b)(3) based on the pleadings. While the plaintiffs' complaint included a claim for injunctive relief, Judge Irenas noted that the cases were primarily seeking money damages and the "mere existence of a claim seeking injunctive and declaratory relief does not automatically trigger 23(b)(2)." To establish a class action under Rule 23(b)(3), the plaintiffs must be able to show that the class is ascertainable, which requires the plaintiffs to demonstrate a "purported method for ascertaining class members is reliable and administratively feasible, and permits a defendant to challenge the evidence used to prove class membership." Here, Judge Irenas was not convinced that there was any way for the plaintiffs to determine who exactly purchased bakery products over the seven-year period at issue, noting that the "average consumer likely does not have records of each and every time he or she purchased bakery products," and that the defendants will have no way of verifying if a potential class member actually purchased their products or not. Finally, Judge Irenas noted that the potential for different expectations about the defendants' baked goods, an important element of the consumers' Consumer Fraud Act claims, created unavoidable questions of fact among class members that would require "mini-trials" to determine who belonged in the class, another factor weighing against ascertainability.

Iappini v. Silverleaf Resorts, Inc., **No. 4:15 CV 695 RWS, 2015 WL 4430186 (E.D. Mo. July 20, 2015).**

In a putative class action involving allegations under the Missouri Merchandising Practices Act, Judge Rodney W. Sippel of the U.S. District Court for the Eastern District of Missouri granted the defendant's motion to compel individual arbitration and dismiss the plaintiffs' complaint, holding that the plaintiffs' claims were subject to the arbitration agreement in their written contracts with the defendant and that the class action waiver in the agreement was not unconscionable. The plaintiffs alleged that the defendant used deceptive and misleading tactics to induce them to purchase timeshare units and that they attempted but were unable to timely cancel their time-share purchases because the defendant "clogged" their right to cancel by not answering their phones during the contractual cancellation period. The contracts between the plaintiffs and the defendant included an arbitration addendum governed by the Federal Arbitration Act (FAA). The addendum purported to compel binding arbitration for any disputes arising out of or relating to the contracts or the parties' relationships. The addendum also contained a purported class action waiver, requiring all claims to be arbitrated on an individual basis. The defendant moved to compel individual arbitration of all of the plaintiffs' claims. The plaintiffs opposed that motion, arguing that (1) the class action waiver was ambiguous, (2) the class action waiver was unenforceable because it was substantively and procedurally unconscionable, and (3) their claims fell under the FAA's savings clause and should not be subject to arbitration. With respect to the first of these arguments, the court found that the class action waiver, read as a whole, was unambiguous, especially in light of the fact that the arbitration disclosure, conspicuously placed at the beginning of the addendum, stated that purchasers "will not have the right to

participate as a representative or member of any class of claimants pertaining to any claim subject to arbitration." Turning to the second of the plaintiffs' arguments, the court found that the class action waiver was not procedurally unconscionable, because the waiver was stated in bold capital letters at the beginning of the addendum, the addendum was not overly lengthy or complex, and the plaintiffs acknowledged reading and reviewing the addendum when they signed it. The court also found that the plaintiffs failed to demonstrate that (1) the arbitration agreement was substantively unconscionable; (2) it would be infeasible for them to pay the costs of arbitration and (3) the class action waiver lacked adequate consideration. Finally, the court concluded that the plaintiffs' claims did not fall within the FAA's savings clause, because the plaintiffs failed to establish that the agreement to arbitrate was subject to any general contract defense.

***Boise v. ACE USA, Inc.*, No. 15-Civ-21264, 2015 WL 4077433 (S.D. Fla. July 6, 2015).**

Judge Marcia G. Cooke of the U.S. District Court for the Southern District of Florida denied the plaintiff's motion for class certification without prejudice to refiling once the factual record in the case was further developed. The plaintiff admittedly filed his motion for class certification prematurely to avoid being "picked off" by a Rule 68 offer of judgment. However, under Eleventh Circuit precedent, an individual claim is not mooted by an unaccepted Rule 68 offer of judgment, regardless of whether the offer precedes a motion for class certification, making the plaintiff's premature filing unnecessary. The court rejected the defendant's argument that the plaintiff lacked Article III standing, holding that under Eleventh Circuit precedent, the receipt of unsolicited fax advertisements in violation of the Telephone Consumer Protection Act (TCPA), like those allegedly received by the plaintiff in this case, was a concrete injury sufficient to establish standing. However, the court granted the defendant's motion to stay the action pending the resolution of two cases, to be heard by the Supreme Court in the upcoming fall Term. In *Gomez v. Campbell-Ewald Co.*, the Supreme Court will address a mootness issue similar to the plaintiff's, and in *Spokeo, Inc. v. Robins*, the Supreme Court will decide if a plaintiff has Article III standing based solely on a "bare statutory violation," like the violation of the TCPA in *Boise*. Because both of these Supreme Court cases could affect the ultimate outcome of the plaintiff's putative class action, the court held that a temporary stay was appropriate.

***Otis v. LTD Financial Services*, No. 14-13778, 2015 WL 3948847 (E.D. Mich. June 29, 2015).**

Judge Sean F. Cox of the U.S. District Court for the Eastern District of Michigan denied the defendant's motion to dismiss based on a Rule 68 offer of judgment. The court determined that the offer of judgment did not offer the plaintiff complete relief on her remaining claim (for alleged violation of the Fair Debt Collection Practices Act (FDCPA)) because the offer of judgment did not include actual damages. In so holding, the court rejected the defendant's argument that the plaintiff did not have evidence she was entitled to actual (as opposed to statutory) damages, reasoning that the motion before it was a motion to dismiss, not one for summary judgment after the close of discovery, and noting further that the plaintiff's interrogatory responses indicated that she was seeking a form of actual damages recoverable under the FDCPA.

***Charlessaint v. Persion Acceptance Corp.*, No. 14-11937, 2015 WL 3872333 (D. Mass. June 23, 2015).**

Judge Richard G. Stearns of the U.S. District Court for the District of Massachusetts denied a defendant's motion for summary judgment based on an unaccepted Rule 68 offer of judgment in a putative class action. The court held that the Rule 68 offer did not offer complete and unconditional relief — and therefore did not moot the named plaintiff's individual claims — because the offer was conditioned on the court's future findings as to the amount of the named plaintiff's actual damages. The court noted that, because the named plaintiff's claim was not moot, it need not address whether the Rule 68 offer would moot the class claims.

***Conway v. Portfolio Recovery Associates, LLC*, No. 13-07-GFVT, 2015 WL 3756410 (E.D. Ky. June 15, 2015), appeal pending.**

Judge Gregory F. Van Tatenhove of the U.S. District Court for the Eastern District of Kentucky dismissed for lack of an Article III case or controversy putative class claims for violation of the Fair Credit Reporting Act. The plaintiff had specified his alleged damages in his Rule 26 initial disclosures, and based on those alleged damages, the defendant made a Rule 68 offer of judgment satisfying all of the damages. The defendant subsequently moved to dismiss the case because the plaintiff's claims had been mooted. Only after that point did the plaintiff file a class certification motion and argue that his class claims were not moot. The court agreed with the defendant, relying upon the Sixth Circuit's decisions in *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), and *O'Brien v. Ed Donnelly Enterprises, Inc*., 575 F.3d 567 (6th Cir. 2009), which generally hold that an unaccepted offer of judgment that satisfies a plaintiff's entire demand moots his case, and dismissed the case.

***Rhea Drugstore, Inc. v. Smith & Nephew, Inc.*, No. 2:15-cv-02060-JPM-tmp, 2015 WL 3649061 (W.D. Tenn. June 10, 2015) and 2015 WL 3892139 (W.D. Tenn. June 24, 2015).**

Judge Jon P. McCalla of the U.S. District Court for the Western District of Tennessee denied a motion to dismiss on mootness grounds a putative class action in which the plaintiff had moved for class certification before receiving a Rule 68 offer of judgment. Shortly after the complaint was filed — and months before the defendant made its offer — the named plaintiff filed a motion for class certification, which the court had stayed briefing on at the plaintiff's request. Noting that the Sixth Circuit has not yet determined the effect of a Rule 68 offer made while a class certification motion is pending, the court chose to follow the guidance of other circuits that have found that a Rule 68 offer does not moot a class action in these circumstances. The court subsequently denied the defendant's request to certify its ruling on mootness for interlocutory appeal, holding that the defendant had not identified a difference of opinion within the Sixth Circuit or a split among the circuits on the issue. The court further concluded that its decision was not in tension with the reasoning in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), since in *Genesis* the plaintiff had not moved for certification at the time the offer was made.

***Charvat v. National Holdings Corp.*, No. 2:14-cv-2205, 2015 WL 3407657 (S.D. Ohio May 26, 2015).**

Judge Gregory L. Frost of the U.S. District Court for the Southern District of Ohio denied a defendant's motion to dismiss a putative class action lawsuit based on an unaccepted Rule 68 offer of judgment. In the court's view, Sixth Circuit authority — in particular, *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567 (6th Cir. 2009) — does not mandate dismissal of cases where an offer of judgment moots the plaintiff's full demand for relief. Instead, the court explained, it requires that the court enter judgment in favor of the plaintiff in accordance with the offer of judgment, but only if the offer satisfies all relief demanded in the complaint. Because the plaintiff "*demanded* class action relief in his complaint," and that was still a live issue (it had not been denied, and the plaintiff had not been dilatory in pursuing it), the court explained that the offer of judgment did not offer complete relief and therefore *O'Brien* did not mandate the court enter judgment in favor of the plaintiff. The court also noted that the plaintiff had filed a placeholder class certification motion before the offer of judgment was made, thereby avoiding conflict with pre-*O'Brien* Sixth Circuit decisions on the issue.

***Epps v. Wal-Mart Stores, Inc.*, No. 4:15CV00138 JLH, 2015 WL 2408630 (E.D. Ark. May 21, 2015).**

Judge J. Leon Holmes of the U.S. District Court for the Eastern District of Arkansas denied defendant Wal-Mart's motion to dismiss a putative class action lawsuit, holding that a defendant's Rule 68 offer of judgment to satisfy the named plaintiffs' claims before a motion for class certification is made does not moot the action. As Judge Holmes explained, federal courts are in disagreement as to whether a Rule 68 offer to class representatives can moot a class action, and the Eighth Circuit has not directly addressed the question. The court found instructive, however, *Alpern v. UtiliCorp United, Inc.*, in which the Eighth Circuit stated that "[j]udgment should be entered against a putative class representative on a defendant's offer of payment only where class certification has been properly denied and the offer satisfies the representative's entire demand for injuries and costs of the suit." Based on this guidance, the court held that Wal-Mart could not moot the action "by making an offer to satisfy in full the named plaintiffs' individual claims before a class certification motion ha[d] been filed unless there has been undue delay in filing a class certification motion." According to the court, although "[t]he nature and extent of the legal status of a class prior to certification is opaque[,] ... that the class has some legal status prior to certification seems certain."

Class Action Fairness Act (CAFA) Decisions

Decisions Denying Motions to Remand/Reversing Remand Orders/Finding CAFA Jurisdiction

***Crutchfield v. Sewerage & Water Board of New Orleans*, 603 F. App'x 350 (5th Cir. 2015) (*per curiam*).**

In a *per curiam* opinion, the U.S. Court of Appeals for the Fifth Circuit (King, Jolly and Haynes, JJ.) declined to hear an appeal of the district court's denial of a motion to remand. The court noted that the "denial of a motion to remand is an interlocutory order not usually subject to immediate appeal." The court found that it did not have appellate jurisdiction under 28 U.S.C. § 1453(c) because the case was not removed under CAFA and the district court's denial of remand was not based on CAFA. Further, even if the court could exercise jurisdiction, it would decline to do so because the appeal raised no novel questions of law under CAFA.

***Marconi v. Indiana Municipal Power Agency*, No. 14 C 7291, 2015 WL 4778528 (N.D. Ill. Aug. 13, 2015).**

Judge Rebecca R. Pallmeyer of the U.S. District Court for the Northern District of Illinois denied the plaintiffs' motion to remand a class action removed under CAFA, holding that the

action did not satisfy CAFA's "local controversy" exception and that the "interests of justice" prong of CAFA did not warrant remand. The plaintiffs alleged that the five named defendants made various misrepresentations and omissions regarding, among other things, the cost and quality of the power that they purchased from Prairie State Energy Campus, a power-generating facility located in southern Illinois. The defendants removed the case to federal court pursuant to CAFA and moved to dismiss. The plaintiffs subsequently moved to remand to state court, arguing that because the one Illinois defendant qualified as a "significant defendant" under CAFA's local controversy exception, remand to state court was mandatory. The court ultimately concluded that the plaintiffs had failed to adequately state a claim for relief against any defendant. Thus, as a matter of logic, the court concluded that none of the defendants — including the one Illinois-based defendant —was a "significant defendant" within the meaning of CAFA, rendering the statute's "local controversy" exception inapplicable. Although the plaintiffs argued that the court "must accept as true that Plaintiffs could maintain their cause of action as pled against" all the defendants, the court disagreed, noting that if that were true, "class action plaintiffs could avoid federal jurisdiction under CAFA simply by including in their complaints any claims for significant relief, even unsustainable ones, against non-diverse defendants." The court also declined to remand the case under the discretionary "interest of justice" prong of CAFA, reasoning that since the Illinois defendant was not a "significant" defendant, it could not possibly qualify as a "primary" defendant — one of the requirements for declining to exercise jurisdiction under this provision of CAFA.

***Clay v. Chobani LLC*, No. 14cv2258 (BEN)(DBH), 2015 WL 4743891 (S.D. Cal. Aug. 10, 2015).**

The plaintiff, representing a putative class of California purchasers of Chobani yogurt seeking relief under California consumer protection statutes, sought remand to state court, urging that the defendants had failed to establish that the amount in controversy exceeded $5 million. Judge Roger T. Benitez of the U.S. District Court for the Southern District of California denied the motion, finding that Chobani had established through two executive officer declarations that its sales during the class period — indeed, annually — exceeded $5 million and that the complaint alleged "tens of millions of dollars" in Chobani revenues. The plaintiff also argued the "local controversy" exception applied in spite of a first-filed factually similar class action asserting some of the same California claims against Chobani in the U.S. District Court for the Eastern District of New York because her claims were "purely local." Judge Benitez found that the local controversy exception does not apply "when an allegedly defective product is sold in all fifty states, but a class action is only brought on behalf of an in-state class against an out-of-state manufacturer and a few in-state retailers" or where "the great bulk of any damage award is sought from the manufacturer ... rather than from the local [retailers]." Although the plaintiff also named California distributors, "[t]he exception does not fit because the real Defendant, Chobani, is not a citizen of California." Moreover, the first-filed action in New York precluded applying the exception, particularly since "most of the [New York] Complaint is copied verbatim into Plaintiff's Complaint."

***Sayre v. Westlake Services, LLC*, No. ELH-15-687, 2015 U.S. Dist. LEXIS 103738 (D. Md. Aug. 7, 2015).**

Judge Ellen Lipton Hollander of the U.S. District Court for the District of Maryland declined to remand a putative class action alleging that the defendant's defective "redemption notices" violated Maryland credit law and constituted a breach of contract. The plaintiff sought to certify a class of "[a]ll persons whose personal property was repossessed by [the defendant] in connection with a credit contract governed by [the Maryland Credit Grantors Closed End Credit Provisions]." While the plaintiff did not specify the amount of damages she was seeking, the defendant removed the action to federal court under CAFA, averring that more than $5 million was in controversy. In support of removal, the defendant submitted a declaration based on a review of its database that identified all Maryland accounts that fell within the plaintiff's putative class definition. The declaration identified 2,521 customers whose personal property was repossessed by the defendant during the relevant time period. The declaration divided these customers into two categories: one encompassing those who would be entitled to refunds for paying the defendant more than the principal amount of their loan, the other representing the amount of outstanding money owed that the defendant would not be able to recover in excess of the principal on the loans. According to the court, these two measures comported with the Maryland statute at issue and provided a reasonable basis for calculating the amount in controversy. Because the plaintiff failed to present any evidence to "cast doubt on the reliability" of the defendant's calculations, the court denied the motion to remand.

***Alegre v. Atlantic Central Logistics*, No. 15-2342 (SRC), 2015 WL 4607196 (D.N.J. July 31, 2015).**

Judge Stanley R. Chesler of the U.S. District Court for the District of New Jersey denied the plaintiff's motion to remand this putative class action, determining that the case was properly removed under CAFA. The court considered each variable that impacted the amount in controversy in this case alleging

a violation of New Jersey's Wage and Hour Law — *i.e.*, the amount of overtime hours allegedly worked by the putative class members; the length of the liability period; the applicable pay rate; the size of the class; and the amount of attorneys' fees. The court ultimately found the defendants' support for the length of the liability period to be controlling and held that, even under a conservative estimate, the amount in controversy exceeded $5 million. Having found that the remaining requirements of CAFA were satisfied, the court rejected the plaintiff's argument that two statutory exceptions to jurisdiction — the "local controversy" exception and permissive remand under the "interest of justice" prong —were met. Despite the fact that the case had "certain aspects of local character," the plaintiff was unable to demonstrate that "no other class action asserting the same or similar allegations against any of the defendants had been filed in the preceding three years." The court also declined to remand the case under the permissive "interest of justice" prong because none of the primary defendants in the case were citizens of New Jersey, the state where the action was filed. Thus, federal jurisdiction was appropriate under CAFA.

***Grace v. T.G.I. Fridays, Inc.*, No. 14-7233 (RBK/KMW), 2015 WL 4523639 (D.N.J. July 27, 2015).**

Judge Robert B. Kugler of the U.S. District Court for the District of New Jersey denied the plaintiff's motion to remand this putative state law consumer fraud class action alleging that the defendants violated New Jersey law by failing to list the price of certain beverages sold at T.G.I. Fridays and charging an unreasonable amount for those beverages. Though the plaintiff argued that the defendants' notice of removal lacked sufficient detail to support their allegation that the amount in controversy exceeded the $5 million necessary to establish federal jurisdiction under CAFA, the court found that the "short and plain statement" contained in the defendants' notice satisfied the necessary plausibility standard applied at that stage. After the grounds for removal are contested, however, the court noted that the preponderance of the evidence standard, rather than the legal certainty standard, applied. In this case, the court found that the amount in controversy exceeded the jurisdictional threshold by a preponderance of the evidence. Because the Consumer Fraud Act (CFA) permits customers to recover a full refund for all "offending transactions," as well as treble damages, even using a conservative estimate of the number of beverages sold at each T.G.I. Fridays location and the average price per beverage based on information, Judge Kugler found that the amount in controversy under the plaintiff's CFA claim alone exceeded CAFA's $5 million jurisdictional requirement.

***Dawsey v. Travelers Indemnity Co.*, No. 3:15-cv-05188-RBL, 2015 WL 4394545 (W.D. Wash. July 16, 2015);**
***Lewis v. Hartford Casualty Insurance Co.*, No. 3:15-CV-05275-RBL, 2015 WL 4430971 (W.D. Wash. July 20, 2015).**

Judge Ronald B. Leighton of the U.S. District Court for the Western District of Washington refused to remand two substantially similar class actions removed under CAFA, alleging that the insurance company defendants failed to pay automobile policyholders for the diminished value of their repaired vehicles. The plaintiffs in both cases argued that they were not seeking treble damages, which kept the amount in controversy below $5 million. Judge Leighton found that by asserting a claim under the Washington Consumer Protection Act, the plaintiffs had put treble damages at issue, which had to be factored into the amount-in-controversy calculus. Given the possibility of treble damages and attorneys' fees, the court determined that the amount in controversy was satisfied. In so doing, the court explained that while a plaintiff "is free to otherwise stipulate to an amount at issue that falls below the federal jurisdiction requirement, he cannot bind absent class members."

***Mezzadri v. Medical Depot, Inc.*, No. 14cv2330 AJB (DHB), 2015 WL 4138748 (S.D. Cal. July 1, 2015).**

After the plaintiff's class claims for injunctive relief under California consumer protection laws were dismissed for failure to satisfy federal standing requirements requiring the likelihood of future injury, the plaintiff sought a partial remand of his injunctive relief claims to state court. The plaintiff argued that partial remand would avoid forfeiture of an otherwise viable state law claim. The defendants countered that partial remand would mean a federal district court and California state court would simultaneously be adjudicating the same causes of action based on the same alleged violative conduct. Judge Anthony J. Battaglia of the U.S. District Court for the Southern District of California denied the plaintiff's motion for partial remand, finding that "[t]he logistics of splitting a remedy from the cause of action — and having solely a remedy stayed in state court pending the outcome of a federal action — is beyond the scope of this Court." Moreover, permitting the plaintiff to return to state court to litigate only his injunctive relief remedy was "unworkable once a federal court has determined that subject matter jurisdiction does not exist."

***Whisenant v. Sheridan Production Co.*, No. CIV-15-81-M, 2015 WL 4041514 (W.D. Okla. July 1, 2015).**

The plaintiff sought to remand a putative class action asserting claims for breach of implied covenant by underpaying and/or not paying royalties and breach of fiduciary duty for failing to properly account for and distribute natural gas under the terms of

the putative class members' leases. Chief Judge Vicki Miles-LaGrange of the U.S. District Court for the Western District of Oklahoma denied the motion, holding that the defendant had demonstrated the requisite amount in controversy. The court rejected the plaintiff's contention that the defendant did not provide sufficient evidence of the amount in controversy in the form of gas leases and other business records and that jurisdictional discovery was needed, because "once plaintiff contested defendant's estimate, defendant filed a response brief with evidence and an explanation of how it reached its conclusion" and no further evidentiary submission was required. The court also found that 12 percent interest on the claimed damages should be included in the amount in controversy "because plaintiff explicitly requests interest as part of his damages, the language set forth above in plaintiff's Class Action Petition implicates a potential remedy under the [Production Revenue Standards Act (PRSA)], and the PRSA defines actual damages to include the 12% interest." Because the PRSA interest provision was compensatory in nature and part of the total liability to be potentially recovered, the amount in controversy exceeded $5 million and satisfied CAFA's jurisdictional requirement.

***Downing v. Goldman Phipps PLLC*, No. 4:13CV206 CDP, 2015 WL 3971054 (E.D. Mo. June 30, 2015).**

Judge Catherine D. Perry of the U.S. District Court for the Eastern District of Missouri denied the defendants' motion to dismiss for lack of subject matter jurisdiction, holding that CAFA conferred jurisdiction over a putative class action against several law firms that were representing Bayer in connection with a multidistrict litigation related to alleged contamination of the U.S. rice supply by Bayer's genetically modified rice. The court noted that, on a plain reading of the plaintiffs' second amended complaint, it was clear that the amount in controversy exceeds $5 million. Moreover, it was clear that CAFA's minimal diversity requirement was satisfied because the defendants were citizens of Texas, Arkansas and Louisiana, and the class plaintiffs and co-trustees were citizens of Missouri, Illinois, Texas, New York, New Jersey, Connecticut and California. Accordingly, the court found that the only question was whether there were 100 or more plaintiffs. The court noted that the plaintiffs had alleged that the proposed class numbered in the thousands and that the proposed subclass numbered over 100. The defendants did not provide any evidence that the actual numbers of class and subclass members were below the jurisdictional threshold. Because the defendants failed to provide any evidence to suggest that the plaintiffs' numbers were inaccurate, the court concluded that CAFA jurisdiction existed.

***Frederick v. Service Experts Heating & Air Conditioning LLC*, No. 2:14-CV-1647-RDP, 2015 U.S. Dist. LEXIS 80400 (N.D. Ala. June 22, 2015).**

Judge R. David Proctor of the U.S. District Court for the Northern District of Alabama denied a second motion to remand a case that had previously been remanded. The plaintiff initially filed suit against certain defendants, asserting contract and fraud-based claims with respect to the defendants' products. The plaintiff filed an amended complaint, adding General Electric (GE) as a defendant and asserting a claim under the Racketeer Influenced Corrupt Organizations Act (RICO). Certain defendants, but not GE, then removed the action, asserting federal question jurisdiction under RICO. While GE did not join in the removal, the notice of removal stated that the company consented to removal. The plaintiff moved to remand the action, arguing that removal was improper because not all served defendants had joined in the removal. While the motion to remand was pending but before the defendants filed their opposition brief, one of the defendants shared with GE an affidavit estimating approximately 19,000 potential class members and over $9 million in potential damages. Relying on this affidavit, GE and the other defendants filed a joint opposition to the motion to remand, arguing that jurisdiction was proper under CAFA. However, because that basis for removal had not been identified in the notice of removal, the court did not consider it and remanded the action on the ground that not all the defendants had joined in the removal. The case was again removed within 30 days following the court's remand order, and this time GE joined in the removal. The plaintiff moved to remand but did not actually contest that the requirements of CAFA had been satisfied. Instead, the plaintiff argued, inter alia, that GE was improperly seeking to remove a case a second time and that it had waived its right to remove under CAFA. The court rejected all of the plaintiff's arguments. According to the court, while the initial notice of removal stated that GE had consented to removal, it did not sign the removal and therefore had not joined it. The court also determined that GE had not waived its right to remove because it only learned of the CAFA basis for removal after the action had already been removed and timely removed the action within 30 days after the court granted the initial motion to remand. The court explained that while the defendants could have moved to amend the first removal petition, the law did not require them to do so.

***Wickens v. Blue Cross of California, Inc.*, No. 15cv834-GPC (JMA), 2015 WL 3796272 (S.D. Cal. June 18, 2015), 23(f) pet. pending.**

Judge Gonzalo P. Curiel of the U.S. District Court for the Southern District of California denied the plaintiff's motion to remand a class action originally filed in San Diego Superior Court alleging that the defendants failed to secure and safeguard the plaintiff's personal identifying information. The plaintiff argued

that the defendants had not proven minimal diversity to satisfy CAFA. The court addressed the motion, despite a pending transfer pursuant to 28 U.S.C. § 1407, finding that because the issue of minimal diversity was not complex, it would be in the interest of judicial economy and efficiency to resolve jurisdiction. The complaint alleged claims on behalf of a proposed class of "[a]ll residents of California who entered into contracts with Blue Cross and/or Blue Cross Life and had their personal information compromised as a result of the Security Breach." The defendants argued that the use of "residents" could include non-California citizens, including "students or members of the military temporarily housed in California," thus establishing minimal diversity. The court accepted this analysis and refused to limit California residents to actual citizens. However, while the court refused to remand the action, it noted that plaintiffs could amend the complaint to change the term "residents" to "citizens," and therefore granted the plaintiffs leave to file an amended complaint.

***Argentine v. Bank of America Corp.*, No. 8:15-cv-957-T-26MAP, 2015 U.S. Dist. LEXIS 79178 (M.D. Fla. June 18, 2015).**

Judge Richard A. Lazzara of the U.S. District Court for the Middle District of Florida denied a motion to remand a putative class action seeking damages and injunctive relief in connection with the defendants' allegedly misleading Travel Rewards Program. The plaintiff sued on behalf of all Florida residents who "accumulated points under the Travel Rewards Program, and received less than one penny ... per point upon redemption." With respect to injunctive relief, the plaintiff requested that the defendants honor their obligation to recognize each point as having a redemptive value of 1 cent and also sought to bar the defendants from redeeming points under the program at less than one cent. In support of their notice of removal, the defendants submitted a declaration stating that, as of December 2014, there were over 9,000 Florida cardholders of the Travel Reward Program credit card. According to the declaration, these 9,000 cardholders had accumulated points under the Travel Program and had received less than one cent per point upon redemption of nontravel rewards. The declaration also averred that as of March 2015 there were 146,231 Florida cardholders holding the Travel Rewards Program credit card. The plaintiff alleged that his individual damages, which were typical of all class members, were approximately $64.00 — the difference between redemption for a credit of one cent per dollar ($160.00 for 16,000 points) and six-tenths cent per dollar ($96.00 awarded for 16,000 points). The defendants argued that the plaintiff's allegation that his claim was typical of the claims of each class member, coupled with the injunctive relief requested, allowed them to extrapolate the $64.00 for the approximately 150,000 Florida cardholders, resulting in an amount in controversy well in excess of $5 million. The court agreed, emphasizing the broad nature of the injunctive relief requested, which covered not only cardholders who already redeemed points, but also those who had not yet done so.

***Rowell v. Shell Chemical LP*, No. 14-2392, 2015 WL 3505118 (E.D. La. June 3, 2015).**

In a case relating to noxious emissions from a chemical refinery facility, Judge Carl J. Barbier of the U.S. District Court for the Eastern District of Louisiana denied the plaintiffs' motion to remand without prejudice. At issue were the $5 million jurisdictional amount in controversy and the "local controversy" exception. The court found that the face of the amended petition clearly satisfied the jurisdictional amount both because of the number of plaintiffs (at least hundreds, possibly thousands) and the severity of the injuries. As to the local controversy exception, the court determined that it lacked sufficient evidence to determine the citizenship of one of the defendants. Accordingly, the court ordered limited discovery on the issue of the defendant's principal place of business, to be completed within 60 days, at which time the plaintiffs could renew their motion.

***Bird v. Turner, No. 5:14CV97 (STAMP)*, 2015 U.S. Dist. LEXIS 69555 (N.D. W. Va. May 29, 2015).**

Judge Frederick P. Stamp, Jr. of the U.S. District Court for the Northern District of West Virginia denied remand of a putative class action on behalf of individuals who were subject to fraudulent common-law liens in violation of West Virginia law. The plaintiffs provided an oil-and-gas lease to defendant Chesapeake Appalachia, LLC, which subsequently assigned the lease to defendant CHK Utica, LLC. CHK Utica ultimately entered a deed of trust using the lease as collateral to secure a loan. The plaintiffs then attempted to refinance their home, which was denied, which led them to file suit. The defendants removed the action to federal court on multiple grounds, including CAFA. However, the plaintiffs moved to remand, arguing that the defendants had not satisfied either CAFA's numerosity or amount-in-controversy requirement. With respect to numerosity, the court found that an affidavit submitted by Chesapeake's land supervisor demonstrated that the class contained well in excess of 100 members. That affidavit explained that there were 343 oil-and-gas leases that were pledged by CHK Utica pursuant to the deed of trust, and the number of lessors on those leases exceeded 100 different individuals or entities. While the plaintiffs argued that the deed of trust did not accurately represent the individuals who fell within the class, the court disagreed, finding that the deed of trust "provides the best option ... for" assessing "who may fall within the proposed class definition" because "[t]hose persons

are lessors who have dealt with the defendants in some way and have assigned, conveyed or encumbered their mineral rights" — the three items listed at the end of the proposed class definition. The court also found that the defendants had proven the amount in controversy by a preponderance of the evidence, because the same affidavit showed that if the plaintiffs secured the relief they requested — *i.e.*, voiding the oil-and-gas leases — the cost to CHK Utica to reacquire equivalent lease rights would exceed $5 million. This figure was based on a $935.87 per-acre amount that the court found was reasonable to use in estimating the amount in controversy.

Decisions Granting Motions to Remand/Finding No CAFA Jurisdiction

***Benko v. Quality Loan Service Corp.*, 789 F.3d 1111 (9th Cir. 2015).**

The U.S. Court of Appeals for the Ninth Circuit (Smith and Watford, JJ., Wallace, J. (dissenting)) considered the applicability of the CAFA "local controversy exception" to a class action brought exclusively by Nevada consumers, alleging the defendants had engaged in illegal debt collection practices in carrying out nonjudicial foreclosures. All of the alleged misconduct took place in Nevada, one of the six defendants was domiciled in Nevada, and the Nevada defendant was allegedly responsible for between 15 and 20 percent of the wrongs alleged. The court acknowledged that the local controversy exception "is a narrow one, particularly in light of the purposes of CAFA," and that the case turned on whether the Nevada defendant's conduct constituted a "significant basis" for the claims and whether the plaintiffs sought "significant relief" from that defendant. The court assessed the question of jurisdiction based on the allegations set forth in the second amended complaint. The Court of Appeals explained that "[w]here a defendant removes a case to federal court under CAFA, and the plaintiffs amend the complaint to explain the nature of the action for purposes of our jurisdictional analysis, we may consider the amended complaint to determine whether remand to the state court is appropriate." According to the appellate court, the allegations in the second amended complaint made clear that the plaintiffs were seeking between $5 million and $8 million (or "significant relief") from Meridian, the Nevada defendant, which triggered the "local controversy" exception under CAFA. The court therefore vacated the lower court's judgment with instructions to remand the action to state court. Judge Wallace dissented, stating that the majority rule departed from controlling precedent and would "frustrate Congress's intent that the local controversy exception be a narrow one, carefully drafted to ensure that it does not become a jurisdictional loophole."

***Briggs v. Merck Sharp & Dohme*, Nos. 15-55873, 15-55876, 15-55874, 15-55877, 15-55875, 2015 WL 4645605 (9th Cir. Aug. 6, 2015).**

The U.S. Court of Appeals for the Ninth Circuit (Fletcher, Paez and Berzon, JJ.) overturned the district court's order finding that CAFA's "mass action" provision provided federal jurisdiction over five consolidated actions asserting claims based on a defective diabetes medication. The district court pointed to statements made by the plaintiffs in four of the five cases at issue at earlier remand hearings that they intended for their cases to be joined for trial in a coordinated action asserting similar claims already pending in Los Angeles Superior Court and, further, that the plaintiffs filed their suits in San Diego after the coordinated action was already pending in Los Angeles. Though the Ninth Circuit confirmed that implicit proposals can trigger CAFA's removal jurisdiction, neither of these acts constituted an implicit proposal. The court adopted the Seventh Circuit's holding that to qualify as a proposal, a request for a joint trial must be made to a court that can effect the proposed relief; statements made to a federal district court did not qualify, nor did "merely ... filing their actions in state court" when another coordinated case was pending. The later-filed plaintiffs' "knowledge that there was a strong likelihood that their cases would be joined" to the pending action was not enough because "some entity — either one of the parties or the state court — would have to take some action to effectuate the joinder." The panel ordered the cases remanded to state court, holding that "[i]f we were to agree with the district court that plaintiffs proposed a joint trial merely by filing their actions in state court, we would ... permit defendants to lock later-filing plaintiffs out of state court systems by preemptively initiating coordinated judicial proceedings in earlier-filed state court suits."

***Allen v. Boeing Co.*, No. C14-0596RSM, 2015 WL 4773580 (W.D. Wash. Aug. 13, 2015).**

After the U.S. Court of Appeals for the Ninth Circuit remanded the issue of whether the action fell within CAFA's local controversy exception (discussed in the Summer 2015 edition of the *Class Action Chronicle*), Judge Ricardo S. Martinez of the U.S. District Court for the Western District of Washington granted the plaintiffs' motion to remand. The purported class of Washington residents alleged that groundwater contamination from a Boeing fabrication plant resulted in property damage and that Boeing and its environmental-remediation contractor, Landau, were liable for negligently investigating, remediating and cleaning up the contamination and for failing to warn the plaintiffs of the contamination. Recognizing that the "local controversy" exception is a narrow one given CAFA's favoring of federal jurisdiction over class actions, the court, nonetheless, found that the instant action fell within the exception, which required that

(1) greater than two-thirds of the members in the aggregate be Washington residents, (2) at least one defendant from whom significant relief is sought and whose alleged conduct forms a significant basis for the claims be a Washington resident, and (3) principal injuries resulting from the alleged conduct be incurred in Washington. The court rejected Boeing's assertion that the alleged conduct of Landau, the only Washington-domiciled defendant, was not a significant basis for the plaintiffs' claims or a significant source of relief, as the plaintiffs included numerous allegations regarding Landau's conduct and "claim equal relief from both Defendants."

***Smilow v. Anthem Blue Cross Life & Health Insurance Co.*, No. CV 15-4556-MWF(AGRx), 2015 WL 4778824 (C.D. Cal. Aug. 13, 2015).**

Judge Michael W. Fitzgerald of the U.S. District Court for the Central District of California granted the plaintiff's motion to remand a class action asserting that a California health care provider failed to appropriately safeguard California residents' personal information in violation of California state and common law. The defendant removed on the basis that the plaintiff's "proposed class of California *residents* does not foreclose the inclusion of non-California *citizens* — such as students or members of the military temporarily housed in California." Following removal, the plaintiff requested leave to amend her complaint and limit the proposed class to California "citizens" — not "residents." Although plaintiffs generally cannot amend their complaints to eliminate diversity jurisdiction that existed at the time of removal, the court held that the proposed change was a "clarification" and not an "amendment." The court found the plaintiff's wording "instructive" in determining her intent because she "clearly identified at the outset of her complaint that this action is not removable" and thus intended a "class of citizens and residents that would render the case non-removable."

***Harris v. CVS Pharmacy, Inc.*, No. ED CV 13-02329-AB (AGRx), 2015 WL 4694047 (C.D. Cal. Aug. 6, 2015).**

Judge André Birotte Jr. of the U.S. District Court for the Central District of California granted the defendant's motion to dismiss a class action for lack of subject matter jurisdiction under CAFA. The plaintiff filed a false advertising putative class action of purchasers of the dietary supplement "Ultra CoQ10," which allegedly did not dissolve as advertised. The plaintiff asserted claims under Rhode Island law and the Magnuson-Moss Warranty Act on behalf of all persons in the United States who purchased CVS Ultra CoQ10 and under California law on behalf of a California subclass who purchased the supplement in California. The defendant challenged the plaintiff's jurisdictional claims — in particular, the claim that the amount in controversy exceeded $5 million, as required under CAFA. The court held that the plaintiff, a California resident who purchased the supplement in California, lacked standing to assert claims under the Rhode Island Deceptive Trade Practices Act, and thus could not claim statutory damages, punitive damages or attorney's fees thereunder. The court also held that the plaintiff failed to offer "substantial, plausible evidence" indicating the value of any injunctive relief sought. Without including the value of injunctive relief or damages under the Rhode Island statute, the plaintiff could only allege under California law damages amounting to $151,701, the total sales within that state, and thus could not meet CAFA's amount-in-controversy requirement to establish federal jurisdiction.

***Chulsky v. First Niagara Bank, N.A.*, No. 15-421(MAS)(TJB), 2015 WL 4647991 (D.N.J. Aug. 5, 2015).**

Judge Michael A. Shipp of the U.S. District Court for the District of New Jersey granted the plaintiff's motion to remand this putative class action, finding that the $5 million amount-in-controversy requirement had not been satisfied. The parties disputed proper trebling of damages under New Jersey's Consumer Fraud Act (CFA), which provides for trebling of damages if a party proves that he or she has suffered an ascertainable loss that is causally related to the unlawful conduct at issue. Only those damages arising from the CFA violation itself, not other statutory damages, may be trebled under the CFA. In this case, the defendant had inappropriately trebled the plaintiff's damages under all the statutory causes of action, which led to an inflated and inaccurate amount in controversy.

***All-South Subcontractors, Inc. v. Amerigas Propane, Inc.*, No. 3:15cv9/MCR/CJK, 2015 U.S. Dist. LEXIS 99600 (N.D. Fla. July 30, 2015).**

Chief Judge M. Casey Rodgers of the U.S. District Court for the Northern District of Florida adopted the report and recommendation of a magistrate judge and granted a motion to remand a putative class action that implicated certain of the defendant propane company's billing practices. The plaintiff alleged that the defendant's "fuel recovery fee" was not used to offset fuel costs, as represented, but rather was used to generate extra profit at customer expense. The plaintiff asserted claims for consumer fraud and unjust enrichment. The defendant removed the action under CAFA, and the plaintiff moved to remand. In support of removal, the defendant submitted an employee affidavit stating that the company had billed customers for over $14 million in fuel recovery fees. In support of the motion for remand, the plaintiff argued that the amount in controversy was the amount customers had actually paid in fuel recovery fees, not what the defendant had billed customers. The magistrate judge agreed

with the plaintiff that there was no way to know whether the customers had paid more than $5 million of the $14 million billed. The defendant filed a timely objection to the report and recommendation, arguing that it established the amount in controversy by a preponderance of the evidence and even submitted a new affidavit that attested to the fact that its customers actually paid over $8 million in fuel recovery fees. Chief Judge Rodgers overruled the objection and adopted the report and recommendation, agreeing with the magistrate judge that the defendant had "offered evidence only of the billed amount." Further, the court refused to consider the defendant's new affidavit, which was not presented to the magistrate judge, because the defendant had access to that evidence while the motion to remand was pending before the magistrate judge. The court therefore adopted the report and recommendation and remanded the action.

***In re Eagle US 2 LLC, No. 2:15-cv-00671 et al.*, 2015 WL 4623649 (W.D. La. July 29, 2015).**

Judge Richard T. Haik of the U.S. District Court for the Western District of Louisiana granted the plaintiffs' motion to remand in this action arising from a chemical plant explosion in Louisiana. The plaintiffs filed suit under a Louisiana procedural rule that allows individual claims to be bound together but maintain their individuality and not become a representative action. The case involved 76 cumulated petitions. The defendants removed to federal court and argued that the district court had jurisdiction under CAFA as a class action or, in the alternative, as a "mass action." As to the CAFA "class action" jurisdictional argument, the court noted that the plaintiffs' actions are not class actions within the meaning of CAFA because they are not representative actions, there are not at least 100 plaintiffs, and the complaint does not mention a class or Rule 23. As to the "mass action" jurisdictional argument, remand was appropriate because no single plaintiff was seeking damages in excess of $75,000.

***Jane Doe v. Georgetown Synagogue-Kesher Israel Congregation*, No. 15-cv-00026 (CRC), No. 15-cv-00028 (CRC), 2015 U.S. Dist. LEXIS 96696 (D.D.C. July 24, 2015).**

Judge Christopher R. Cooper of the U.S. District Court for the District of Columbia remanded putative class actions accusing Bernard Freundel, a former rabbi of Kesher Israel Congregation, of filming and viewing females who used a mikvah, a Jewish ritual bath most frequently used by married Orthodox women, as well as by women undergoing the process of converting to Judaism. Two sets of Freundel's victims brought class action suits: one involving women whom Freundel illicitly recorded during his tenure, and another involving all women who used the mikvah during the relevant time period, regardless of whether they were recorded. The plaintiffs asserted claims for negligence and vicarious liability against the synagogue, the mikvah and the Rabbinical Council of North America. The defendants removed under CAFA, and the plaintiffs moved to remand, invoking, *inter alia*, the "interest of justice" exception, which permits a court to remand an action where more than one-third but less than two-thirds of the proposed class members and primary defendants are citizens of the forum state. One of the plaintiffs also challenged the amount in controversy, which the court briefly addressed and rejected based on damages recovered in similar voyeurism cases. The court then addressed the applicability of CAFA's interest-of-justice exception. The court relied on information provided from jurisdictional discovery, including that the synagogue had 294 female members between 2005 and Freundel's arrest, 163 of whom had a last known address in the District of Columbia, and information from the U.S. Attorney's Office regarding the residency of Freundel's victims. The jurisdictional discovery also provided information regarding the residency of the women who converted under Freundel's supervision in the relevant time period. The court held that "based on the best evidence available of class citizenship[,] … the plaintiffs have met their burden to show that at least one-third of the proposed classes are more likely than not citizens of the District." The court then addressed the various "interest of justice" factors, all of which militated in favor of remand. As the court explained, although "Freundel's crimes have garnered national and international attention and involve a number of victims from beyond the District's borders, they fundamentally involve activities at a local synagogue and mikvah, making these claims of local, not national, interest."

***Balila v. USPlabs, LLC*, No. CV 15-3252-R, 2015 WL 4507440 (C.D. Cal. July 23, 2015); *Billones v. USPlabs, LLC*, No. CV 15-3275-R, 2015 WL 4508425 (C.D. Cal. July 23, 2015); *Ka Wing Tsui v. USPlabs, LLC*, No. CV 15-3282-R, 2015 WL 4507575 (C.D. Cal. July 23, 2015); *Morales v. USPlabs, LLC*, No. CV 15-3272-R, 2015 WL 4508443 (C.D. Cal. July 23, 2015); *Murray v. USPlabs, LLC*, No. CV 15-3264-R, 2015 WL 4507463 (C.D. Cal. July 23, 2015); *Nadura v. USPlabs, LLC*, No. CV 15-3267-R, 2015 WL 4507770 (C.D. Cal. July 23, 2015); *Novida v. USPlabs, LLC*, No. CV 15-3268-R, 2015 WL 4507939 (C.D. Cal. July 23, 2015); *Olson v. USPlabs, LLC*, No. CV 15-0705-R, 2015 WL 4508357 (C.D. Cal. July 23, 2015); *Stussy v. USPlabs, LLC*, No. CV 15-3269-R, 2015 WL 4508347 (C.D. Cal. July 23, 2015); *Tali v. USPlabs, LLC*, No. CV 15-3270-R, 2015 WL 4508337 (C.D. Cal. July 23, 2015); *Tnaimou v. USPlabs, LLC*, No. CV 15-3276-R, 2015 WL 4507490 (C.D. Cal. July 23, 2015); *Vista v. USPlabs, LLC*, No. CV 15-3278-R, 2015 WL 4507622 (C.D. Cal. July 23, 2015).**

Judge Manuel L. Real of the U.S. District Court for the Central District of California granted motions to remand twelve related actions brought on behalf of 129 separate plaintiffs, joined

in Los Angeles County Superior Court in *In re JCCP 4808, USPlabs Dietary Supplement Case*s. The defendants removed after the plaintiffs filed a petition for coordination pursuant to CAFA's "mass action" provision. Judge Real cited *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218, 1220 (9th Cir. 2014) (discussed in the Spring 2015 edition of the *Class Action Chronicle)*, in which the Ninth Circuit held that the petition in *Corber* sought to try the cases jointly for the purposes of CAFA's mass action provision because, *inter alia*, it referenced "potential 'duplicate and inconsistent rulings'" and sought coordination "for all purposes." Noting that *Corber* "left open the door to situations in which a section 404 petition for coordination seeks to limit its request for coordination to pretrial matters," Judge Real found that the instant petition sought coordination for pretrial purposes only. The petition requested assignment of one judge for "coordination for discovery" and referenced numerous pretrial motions and depositions, and did not use "a single one of the[] phrases at issue in *Corber*." Because the petition did not propose a joint trial as required by the mass action provision, the jurisdictional requirements under CAFA were not met.

***All-South Subcontractors, Inc. v. Sunbelt Rentals, Inc.*, No. 1:14-CV-124 (WLS), 2015 U.S. Dist. LEXIS 90918 (M.D. Ga. July 14, 2015).**

Judge W. Louis Sands, Sr. of the U.S. District Court for the Middle District of Georgia remanded a putative class action accusing the defendant construction equipment rental company of charging excessive transportation fees. In support of removal, the defendant submitted a declaration specifying the total amount of refueling and transportation costs. The court ordered the parties to conduct limited jurisdictional discovery, after which the plaintiff identified certain flaws with the defendant's calculation of the amount in controversy. Specifically, the plaintiff argued that it only challenged those fees that were excessive, but the defendant's calculation included the total amount of the fee revenue — not just the excessive portion. Although the defendant filed a revised declaration that addressed some of the deficiencies highlighted by the plaintiff, it still failed to separate out the portion of the fees that was excessive. As the court explained, "[o]f the total $16,342,964.35 in transportation fees collected during the relevant period, $2 million could just as easily be hugely excessive as could $8 million" and "[i]f only $2 million is the amount in controversy ... the Court would not have subject matter jurisdiction over th[e] case." The court therefore granted the plaintiff's motion to remand.

***Davis v. Omega Refining, LLC*, No. 15-518, 2015 WL 3650832 (E.D. La. June 11, 2015).**

Judge Mary Ann Vial Lemmon of the U.S. District Court for the Eastern District of Louisiana granted the plaintiffs' motion to remand in this toxic tort action arising from the operation of an oil recycling plant in Louisiana. The dispute in this motion centered on whether there was a defendant, a citizen of Louisiana, whose alleged conduct formed a significant basis for the claims. The defendants argued that because the plant was owned by a non-Louisiana citizen during most of the relevant time period, the local controversy exception did not apply. In agreeing with the plaintiffs, the court noted that, while some allegations were time-specific, other allegations were more general, relating to the period during which the defendant that was a Louisiana citizen owned the facility.

***Leff v. Belfor USA Group, Inc.*, No. 15-2275 (SRC), 2015 WL 3486883 (D.N.J. June 2, 2015).**

Judge Stanley R. Chesler of the U.S. District Court for the District of New Jersey granted the plaintiff's motion to remand this putative class action arising from allegedly illegal consumer contracts used by the defendant for remediation work for property damage caused by Hurricane Irene. The complaint sought statutory civil penalties in the amount of $100 per contract under the Truth-In-Consumer Contract, Warranty and Notice Act. The defendant's removal petition argued that CAFA's $5 million amount-in-controversy requirement was satisfied based on a statement by the plaintiff's counsel during a meet and confer that the plaintiff may decide to seek rescission of the allegedly unlawful work authorizations. Judge Chesler found that Belfor's assertion that the amount in controversy exceeded $5 million was unfounded, as both the plaintiff's complaint and an email sent following the meet and confer indicated that the plaintiff was only seeking statutory penalties. The court noted that even if the plaintiff had included rescission of the contracts as a remedy in the complaint, Belfor's assertions about the value of that relief would be wholly conclusory. Thus, because the court was not satisfied that the amount-in-controversy requirement under CAFA was met, the case was remanded to New Jersey state court.

***Weider v. Verizon New York Inc.*, No. 14-CV-7378 (FB)(JO), 2015 WL 3474102 (E.D.N.Y. June 2, 2015).**

The plaintiffs brought this putative class action against defendant Verizon for allegedly assessing an unlawful surcharge on its New York State accounts in violation of an order of the New York Public Service Commission. The plaintiffs asserted common law claims and violations of the New York General Business Law. Judge Frederic Block of the U.S. District Court for the Eastern District of New York granted the plaintiffs' motion to remand, finding that discretionary remand was appropriate under CAFA. The citizenship requirement was satisfied because it was "eminently reasonable" to assume that at least one-third of the members of the putative class had New York citizenship. The

court also found that statutory factors weighed heavily in favor of discretionary remand, noting that the plaintiffs' claims were governed by New York law, the state of New York had a "distinct nexus" to both the defendant and the alleged harm and New York citizens comprised a substantially larger portion of the putative class than citizens of other states.

***Keltner v. SunCoke Energy, Inc.*, No. 3:14-cv-01374-DRH-PMF, 2015 WL 3400234 (S.D. Ill. May 26, 2015).**

Judge David R. Herndon of the U.S. District Court for the Southern District of Illinois granted the plaintiffs' motion to remand to state court a class action asserting claims for temporary nuisance, trespass and negligence against defendants SunCoke Energy, Inc., Gateway Energy Coke Company, LLC (GECC) and United States Steel Corporation, holding that the action fell within CAFA's local controversy exception. The plaintiffs' complaint, originally filed in Illinois state court, was based on the defendants' alleged contamination of the plaintiffs' property through operation of a GECC facility and steel mill located in Granite City, Illinois. The plaintiffs claimed that operation of the Granite City facility regularly released substantial amounts of particles that left a deposit on nearby residents' properties and entered into nearby homes. The parties disputed whether the plaintiffs had established that greater than two-thirds of the proposed class members were Illinois citizens. The plaintiffs argued that to fall within the class definition, the proposed class members must reside or have recently resided in Illinois. In support of their motion to remand, the plaintiffs relied on declarations from 181 putative class members stating that they currently reside and intend to remain in Illinois, as well as a declaration from an expert statistician concluding that more than two-thirds of the class members reside in Illinois and intend to remain there. The court concluded that the survey employed by the plaintiffs' expert was sufficiently well-designed to yield data that satisfied the preponderance-of-the-evidence standard required under CAFA. Based on the expert evidence and the class member declarations, the court determined that more than two-thirds of the putative class members were citizens of Illinois, which required remand under CAFA's "local controversy" exception.

Other CAFA Decisions

***Lee v. Central Parking Corp.*, No. 2:15-CV-0454 (KM)(MAH), 2015 WL 4510128 (D.N.J. July 24, 2015).**

Judge Kevin McNulty of the U.S. District Court for the District of New Jersey, upon recommendation from Magistrate Judge Michael A. Hammer that the plaintiffs' motion to remand be denied, ordered that limited jurisdictional discovery be permitted to create a fuller record before deciding whether to adopt the magistrate's report regarding a "state law case involving a local parking lot." In particular, Judge McNulty found that the record was insufficient to determine whether the amount-in-controversy requirement was satisfied, whether more than two-thirds of the class members were citizens of New Jersey for purposes of applying the mandatory "home state" exception, and who the "primary defendants" were for establishing whether the "home state" exception applied. Judge McNulty was "mindful that, in a removal setting, the normal incentives can be reversed," and permitted additional jurisdictional discovery to "redress the informational imbalance and realign the incentives," noting that "a party should not be permitted to profit from the absence of evidence that it could readily obtain, and may even possess."

The Class Action Chronicle

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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.

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