The Class Action Chronicle

Skadden

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This is the second 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. This 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 Winter 2013 edition focuses on the ascertainability requirement for class certification, which was recently the subject of a significant ruling by the Third Circuit.

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COURTS WEIGH IN ON ASCERTAINABILITY

Class action defendants have long argued that "ascertainability" is an implicit prerequisite to class certification that requires the proponent of certification to prove that membership in the putative class can be easily determined using objective criteria. In recent years, a number of courts have agreed, finding that the ascertainability requirement is critical to ensure manageability and fairness in class action proceedings. Nevertheless, the struggle to define this requirement is still in its early stages, and courts across the country are debating the showing necessary to satisfy it.

Earlier this year, the U.S. Court of Appeals for the Third Circuit handed down one of the most noteworthy ascertainability rulings to date in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013) (discussed on page 4). In *Carrera*, the Third Circuit reversed the district court's order certifying a class of Florida purchasers of Bayer's One-A-Day WeightSmart multivitamins who alleged consumer fraud claims. According to the Third Circuit, the class was not viable because "extensive and individualized fact-finding or mini-trials" would be required to determine who purchased the specific product at issue — and therefore the class was not ascertainable. *Id.* at 305 (internal quotation marks and citation omitted). The *Carrera* ruling is particularly significant because it: (i) makes clear that ascertainability is a real class-certification requirement that is subject to a "rigorous analysis"; and (ii) establishes that defendants have a fundamental due process right to challenge an individual's membership in a proposed class.

Recognizing the implications *Carrera* has for federal class action practice, the plaintiff in that case filed a petition for panel rehearing or rehearing en banc and obtained amicus support from several plaintiffs' groups. Public Citizen submitted a brief stating that "[u]nless overturned, the panel's ruling [in *Carrera*] would make it impossible for many people injured by deceptive marketing or defective products to obtain relief [and] eliminate an important deterrent of illegal conduct." The

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Third Circuit has requested a response to the petition for panel rehearing, and it remains to be seen whether it will revise its original ruling.

As it currently stands, the *Carrera* ruling adopts the common-sense position that a class may not be certified unless the court is able to determine at the outset — based on objective evidence — who is and who is not part of the class. As the Third Circuit explained, ascertainability serves three essential purposes at the class certification stage:

> [(1)] at the commencement of a class action, ascertainability and a clear class definition allow potential class members to identify themselves for purposes of opting out of a class[; (2)] it ensures that a defendant's rights are protected by the class action mechanism[; and (3)] it ensures that the parties can identify class members in a manner consistent with the efficiencies of a class action.

727 F.3d at 307. Thus, a plaintiff seeking class certification "must show, by a preponderance of the evidence, that the class is 'currently and readily ascertainable based on objective criteria,'" and the trial court must evaluate this showing by employing a "rigorous analysis." *Id.* at 306 (citation omitted).

Carrera also embraced the argument that defense practitioners have been advancing for several years: class action defendants have a fundamental due process right to challenge an individual's putative membership in a class. *Id.* at 307. In *Carrera*, the court noted that "[i]f this were an individual claim, a plaintiff would have to prove at trial he purchased" the product, and the right to raise such an individual defense is not extinguished just because the plaintiff seeks to proceed on a class basis. *Id.* After all, "a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Id.* Thus, the court held that the plaintiff in *Carerra* could not establish class membership simply by having proposed class members submit affidavits swearing that they purchased the product at issue. *Id.* at 309-11. As the court explained, "[a] defendant has a similar, if not the same, due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim" and therefore cannot be forced to take proposed class members at their word that they are part of a class. *Id.* at 307.

Carrera is just one of several recent judicial decisions to take the requirement of ascertainability seriously when assessing the suitability of a class action proposal. The U.S. District Court for the Northern District of California reached a similar result in *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011), 23*(f) pet. denied*, refusing to certify a class of California cigarette purchasers who smoked Marlboro cigarettes for at least 20 "pack-years" — *i.e.*, "one pack of Marlboro cigarettes per day for twenty years or the equivalent (*e.g.*, two packs a day for ten years)." *Id.* (internal quotation marks and citation omitted). The court reasoned that "[t]here [was] no good way to identify . . . individuals" who had smoked 20 pack-years of cigarettes because "[u]nlike in many cases, there [were] no defendant records on point to identify class members." *Id.* As a result, class membership could not be ascertained, derailing the class action. *Id.* at 1089-90; *see also Quality Mgmt. & Consulting Servs., Inc. v. SAR Orland Food Inc.*, No. 11 C 06791, 2013 WL 5835915, at *4 (N.D. Ill. Oct. 30, 2013) (refusing to certify proposed class alleging that consumers were sent unsolicited faxes in violation of the Telephone Consumer Protection Act on ascertainability grounds because proposed "class members would have to prove that they received a fax . . . to be entitled to statutory damages" and plaintiff did not have objective evidence capable of "reliably demonstrat[ing] the identity of the fax recipients").

However, not all courts have been willing to jump on the ascertainability bandwagon. For example, in *Astiana v. Kashi Co.*, 291 F.R.D. 493 (S.D. Cal. 2013), *23(f) pet. denied*, the district court certified a class of California consumers who had purchased cereal and snack products labeled as "all natural" or containing "nothing artificial," but which allegedly contained artificial or synthetic ingredients. The plaintiffs asserted consumer fraud claims under California law, and the court certified the proposed class in part. In so doing, the court rejected the defendant's argument that there was "no feasible mechanism for identifying class members" because the defendant does not have "records of consumer purchases, and potential class members will likely lack proof of their purchases." *Id.* at 500. According to the court, "[t]here is no requirement that the identity of the class members . . . be known at the time of certification." *Id.* (internal quotation marks and citation omitted). Any other rule, the court warned, would signal the death knell of consumer class actions. *Id.* ("If class actions could be defeated because membership was difficult to ascertain at the class certification stage, 'there would be no such thing as a consumer class action.'" (citation omitted)). *See also Terrill v. Electrolux Home Prods., Inc.*, No. 108-030, 2013 U.S. Dist. LEXIS 147652, at *16-17 (S.D. Ga. Oct. 11, 2013) (rejecting defendant's ascertainability argument that the "Court would need to undertake the 'painstaking task of inspecting each machine purchased' to determine whether an alleged purchaser falls within the Class definitions" (citation omitted)), *23(f) pet. pending*.

Class action defendants should give particular focus to the ascertainability issue in light of this recent case law. If it is followed in other circuits, *Carrera* would make it extremely difficult to bring class actions related to the sale of low-value, disposable consumer items for which consumers do not tend to keep receipts. And ascertainabil-

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ity can extend to other scenarios as well, such as where the class definition turns on actions by the plaintiff (*e.g.*, fulfillment of certain criteria for an application) or exposure to advertisements or other representations that could only be determined through individualized mini-trials. In short, a rigorous ascertainability requirement will prove a potent weapon in resisting class treatment in a broad range of consumer cases.

CLASS CERTIFICATION DECISIONS

Decision Granting Motion to Strike

***Loreto v. Procter & Gamble Co.*, No. 1:09-cv-815, 2013 WL 6055401 (S.D. Ohio Nov. 15, 2013).**

Judge Timothy S. Black of the U.S. District Court for the Southern District of Ohio granted a motion to strike class allegations in a consumer protection action arising from allegedly false representations on the defendant's website. Based on the documents provided by the defendant as exhibits to the motion to strike — even though the defendant had not yet produced any documents to the plaintiff — the court found that the allegedly false statement appeared on a web page providing general health tips that was not a product advertisement and that only received a few thousand page views, so that less than 1 percent of the proposed class could have been exposed to the statement. As a result, the court held that the proposed class of residents who purchased the product was overbroad, the plaintiff could not establish commonality or typicality, and individual issues regarding causation predominated.

Decisions Denying Motions to Strike

***Stalley v. ADS Alliance Data Systems, Inc.*, No. 8:11-cv-1652-T-33 TBM, 2013 WL 4495133 (M.D. Fla. Aug. 20, 2013).**

Judge Virginia M. Hernandez Covington of the U.S. District Court for the Middle District of Florida denied the defendant's motions to dismiss and to strike the plaintiffs' third amended class action complaint. The plaintiffs filed a putative class action in state court, alleging violations of the Florida Security of Communications Act, § 934.01 *et seq.*, which "'makes it a crime to intentionally intercept a person's electronic communications, including a telephone call, without prior consent of all parties to the communication.'" After the defendant removed the case to federal court pursuant to CAFA, it moved to dismiss, arguing that the plaintiffs failed to state a cause of action on behalf of the putative class members because the class definition was not limited to "'those persons whose telephone conversations with [defendant's] employees were recorded without consent.'" The court held that the defendant's arguments, which challenged the definition and scope of the putative class, would be better addressed by ruling on the plaintiffs' motion to certify the class, and that the complaint on its face satisfied Rule 8(a)(2).

***Smith v. Washington Post Co.*, No. 12-1746 (RCL), 2013 WL 4495132 (D.D.C. Aug. 23, 2013).**

Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia denied defendant's motion to strike class allegations in a suit alleging that the Washington Post Co. failed to properly record and account for newspapers returned to the defendant as required under written and oral contracts. The defendant moved to dismiss the complaint, or in the alternative, to strike class allegations. With regard to the defendant's motion to strike, the court first emphasized that courts in the D.C. Circuit "strongly disfavor motions to strike," which are a "drastic remedy." Next, the court rejected the defendant's argument that an order striking the class allegations was proper because the plaintiff failed to comply with the Local Rules by identifying the subsection of Rule 23 under which the plaintiff sought class certification. According to the court, "[p]laintiff's alleged non-compliance with Local Rule 23.1(a)(1) does not serve as a proper basis for striking [plaintiff's] class allegations." Then, the court determined that there was a plausible claim for classwide relief and that the alleged harm was subject to common proof — "that the Washington Post Company had breached its form contracts with its independent distributors through homogenous conduct." Accordingly, the court determined that the plaintiff properly pled class allegations and that the class allegations were not "facially implausible."

***Moore v. Walter Coke, Inc.*, No. 2:11-cv-1391-SLB, 2013 WL 5519508 (N.D. Ala. Sept. 30, 2013).**

Judge Sharon Lovelace Blackburn of the U.S. District Court for the Northern District of Alabama denied a motion to strike (styled a "motion to dismiss") class allegations in a suit alleging that the defendant's manufacturing operations resulted in the deposition of "'various waste substances' onto" the plaintiff's property. The defendant argued that the plaintiff had failed to plead allegations that could satisfy the ascertainability or predominance requirements for class certification, among others. The court disagreed. With respect to ascertainability, the court concluded that the definition was not inherently subjective despite being defined to include property owners within two miles of Walter Coke's facility who "have been damaged." As to predominance, the court concluded that the motion could only be granted if the plaintiff had

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pursued claims that were categorically incapable of class treatment and that no such categorical bar existed with respect to the plaintiff's trespass and nuisance claims.

***Lucas v. Chesapeake Exploration, L.L.C.*, No. 2:12-cv-00592-JRG, 2013 WL 5200046 (E.D. Tex. Sept. 16, 2013).**

Judge Rodney Gilstrap of the U.S. District Court for the Eastern District of Texas denied the defendants' motion to strike (styled as a "motion to dismiss") class allegations as premature in a case involving the alleged breach of certain provisions of oil and gas leases. The court observed that the parties had undertaken a "fair amount of discovery relating to the class certification issues." Rather than adjudicating maintainability of a class action on the pleadings, the court concluded that "a better course is to allow Plaintiffs an opportunity to subsequently present evidence as to whether a class action is maintainable."

Decisions Rejecting/Denying Class Certification

***Spagnola v. Great Northern Insurance Co.*, Nos. 12-1521-cv, 12-2746-cv, 2013 WL 4476753 (2d Cir. Aug. 22, 2013); *Spagnola v. Chubb Corp.*; Nos. 06 Civ. 9960 (HB), 08 Civ. 193 (HB), 264 F.R.D. 76 (S.D.N.Y. 2010).**

With minimal comment, the U.S. Court of Appeals for the Second Circuit affirmed the decision of Judge Harold Baer, Jr. of the U.S. District Court for the Southern District of New York that granted the defendants' preemptive motion to deny class certification. The plaintiffs alleged that the defendant insurance companies breached the terms of their homeowner's policies by improperly increasing renewal premiums without their consent and in excess of the consumer price index. The district court found that the plaintiffs met the typicality and commonality requirements of Rule 23(a) because, although the two plaintiffs had conflicting opinions regarding the meaning of the identical relevant language in their insurance policies, a contract can only have one meaning. Nevertheless, the district court found that the plaintiffs were not adequate class representatives, in part because their differing opinions about the language at issue would likely have led to them having conflicting theories of their cases.

***Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), pet. for rehearing pending.**

The plaintiff filed a consumer class action claiming false and deceptive advertising based on the defendant's claims related to a vitamin supplement. Judge Jose L. Linares of the U.S. Court for the District of New Jersey had certified a class comprised of Florida purchasers of Bayer's One-A-Day WeightSmart multivitamins. The U.S. Court of Appeals for the Third Circuit (Scirica, Smith and Chagares, JJ.) invalidated the lower court's order certifying the class on the ground that the class was not ascertainable — *i.e.*, membership in the class could not be identified "'without extensive and individualized fact-finding or mini-trials.'" The gravamen of the plaintiff's suit is that Bayer falsely advertised the multivitamin as enhancing metabolism. Bayer challenged class certification, arguing that the proposed class was not ascertainable because there was no list of purchasers and Bayer did not sell WeightSmart directly to consumers. The plaintiff claimed class members could be determined based on online sales and loyalty cards records or from purchaser affidavits. The Third Circuit disagreed, finding that since Bayer did not sell the product directly to consumers, and it was unlikely that purchasers retained documentary proof of purchase, the class could not be sufficiently ascertained. Beyond confirming that ascertainability is an essential prerequisite to class certification that must pass the "rigorous analysis" test, the Third Circuit also determined that defendants have a due process right to contest an individual's membership in the class. In short, the court held that "[a] defendant has a similar, if not the same, due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim." Because none of the proposals advanced by the plaintiff would have allowed the defendant to adequately challenge class membership, the Third Circuit reversed the lower court's certification order.

***Coleman v. Union Carbide Corp.*, No. 2:11-0366, 2013 U.S. Dist. LEXIS 140613 (S.D. W. Va. Sept. 30, 2013).**

Judge John T. Copenhaver, Jr. of the U.S. District Court for the Southern District of West Virginia refused to certify a putative medical-monitoring class action involving seven defendants who were allegedly responsible for releasing 17 toxic substances into the air. The proposed class was defined as all persons who resided in, went to school in, or were employed by a business in the "contamination area" for various lengths of time depending on the age of the putative class member, and who had not yet been diagnosed with an illness or disease that may be attributed to exposure to the substances at issue. The court found that the plaintiffs' experts' opinions about the radius of impact around the plant were not reliable, making it impossible to identify whether an individual "resided in, worked in or attended school in the radius of impact." Moreover, the court determined that class membership could not be ascertained even with the excluded opinions, because the court would still have to undertake an "individualized" examination as to whether each class member had been diagnosed with a condition that could be attributed to the substances emitted from the plant. The court also emphasized that "no circuit court of appeals has ever approved certification of a medical monitoring class action."

***Mitchell v. Conseco Life Insurance Co.*, No. 8:12-548-TMC, 2013 U.S. Dist. LEXIS 136467 (D.S.C. Sept. 24, 2013), motion for reconsideration filed.**

Judge Timothy M. Cain of the U.S. District Court for the District of South Carolina denied a motion for class certification filed by a purchaser of supplemental insurance covering various cancer treatments, including blood and plasma benefits. The plaintiff sued the insurance company for breach of contract and bad faith refusal to pay after the company refused to pay benefits that the plaintiff believed were due under the policy. The court denied the motion for class certification solely on numerosity grounds, reasoning that the class only consisted of a small number of potential class members.

***Amarelis v. Notter School of Culinary Arts, LLC*, No. 6:13-cv-54-Orl-31KRS, 2013 WL 5798573 (M.D. Fla. Oct. 28, 2013).**

Judge Gregory A. Presnell of the U.S. District Court for the Middle District of Florida adopted the magistrate judge's recommendation to deny the plaintiffs' motion for class certification in a suit alleging that a culinary school made false representations about the qualification of instructors, job-placement rates, annual salaries graduates could earn, availability of internships, and the quality of the facilities and equipment used in teaching. The plaintiffs sued on a number of theories, including violation of the Florida Deceptive and Unfair Trade Practices Act, and sought to certify four different classes. The court refused to certify any of the classes, in part because of individualized legal and factual issues. As the court noted, the plaintiffs received the alleged misrepresentations in different states, meaning that they were likely governed by different states' laws. Because some states require a plaintiff to establish reliance on an alleged misstatement, the court held, the "need for such individualized proof . . . undermines a finding of commonality." The court also found that the named plaintiffs failed to demonstrate that they would be adequate class representatives because they did not offer any evidence, such as a declaration, to support the claim in their motion that they were committed to the case and that their interests were not antagonistic to those of other putative class members.

***Taylor v. Screening Reports, Inc., No.* 1:11-CV-3426-AT-GGB, 2013 WL 5229966 (N.D. Ga. Sept. 11, 2013).**

Judge Amy Totenberg of the U.S. District Court for the Northern District of Georgia agreed with the magistrate judge that the plaintiff's motion for class certification should be denied in a suit alleging claims under the Fair Credit Reporting Act based on the allegation that the defendant — who prepared an incorrect criminal background check on the plaintiff — failed to give the plaintiff a complete copy of his consumer file. The plaintiff sought to certify a class of all individuals who requested copies of their consumer files from defendant but did not receive the entire file. The court determined that the plaintiff failed to demonstrate that his proposed class suffered any injury because the putative class definition made no distinction "between those consumers who clearly requested a specific subset of their file — and in fact may have wanted only such subset — and those like himself who purportedly wanted their entire file." Furthermore, because the court would have to conduct a "fact-specific inquiry" to determine which consumers were injured, the plaintiff's definition also failed to satisfy Rule 23(b)(3)'s predominance requirement.

***Connelly v. Hilton Grand Vacations Co.*, No. 12CV599 JLS (MDD), 2013 WL 5835414 (S.D. Cal. Oct. 29, 2013), 23(f) pet. pending.**

Judge Janis L. Sammartino of the U.S. District Court for the Southern District of California denied class certification in a case alleging violation of the Telephone Consumer Protection Act (TCPA). The plaintiffs moved to certify a class of people who received telemarketing calls on their cell phones from Hilton Grand Vacations. The court found that the class did not satisfy predominance because "[t]he context of class members' interactions with Hilton is sufficiently varied to provide dissimilar opportunities for the expression of consent." Judge Sammartino also refused to certify a Rule 23(b)(2) class because each plaintiff was entitled to statutory damages under the TCPA of $500 to $1500 per unlawful call. Citing Dukes, the court held that plaintiffs' TCPA claims were ineligible for Rule 23(b)(2) certification, regardless of plaintiffs' parallel request for injunctive relief, given that their claims sought an individualized award of monetary damages.

***Dennis F. v. Aetna Life Insurance*, No. 12-cv-02819-SC, 2013 WL 5377144 (N.D. Cal. Sept. 25, 2013).**

Judge Samuel Conti of the U.S. District Court for the Northern District of California denied certification of a class of adolescents with mental health conditions who sought care at residential treatment centers and alleged that Aetna improperly used a Level of Care Assessment Tool (LOCAT) to deny treatment coverage. Judge Conti found that "a classwide proceeding on Aetna's LOCAT scoring practices would not 'generate common answers apt to drive resolution of the litigation,' since coverage determinations ultimately turn on the medical necessity of the treatment proposed." Thus, the plaintiffs' case did not satisfy Rule 23(a)'s commonality requirement.

***In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation*, MDL No. 10-2193-RWZ, 2013 WL 4759649 (D. Mass. Sept. 4, 2013).**

Judge Rya W. Zobel of the U.S. District Court for the District of Massachusetts denied class certification in an action claiming that the putative class members entered into trial-period plans to modify their mortgages and made

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the required trial payments but did not receive a permanent loan modification or written denial of eligibility by the required date. The court found that the plaintiffs did not demonstrate predominance because each class member would need to show that he or she complied with the contract, which would entail individualized inquiries, including whether they made the required payments and obtained credit counseling. In addition, the court concluded that Rule 23(b)(3)'s superiority requirement was not satisfied because the proposed class was unmanageable given the need to consider so many individual factors and the fact that individual plaintiffs had sufficient motivation to bring claims necessary to save their homes.

***Nilon v. Natural-Immunogenics Corp.*, No. 3:12cv00930-LAB (BGS), 2013 WL 5462288 (S.D. Cal. Sept. 30, 2013).**

The plaintiff sued the manufacturer of Sovereign Silver, a dietary supplement, alleging that the manufacturer made misleading statements regarding the product's benefits for the immune system. Judge Larry Alan Burns of the U.S. District Court for the Southern District of California denied the plaintiff's motion for class certification, holding: "It is one thing for a plaintiff to say a certain representation is actually untrue or misleading; that case passes go. It is another thing, however, for a plaintiff to say that a certain representation hasn't been shown to be true; that case does not pass go." Judge Burns "acknowledge[d] . . . reaching beyond the parties' own arguments and the strict Rule 23 analysis," but deemed such action warranted because "the rule against lack of substantiation claims seems to be both settled and fundamental" and because *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) held that "frequently the class certification analysis 'will entail some overlap with the merits of the plaintiff's underlying claim.'"

***Waller v. Hewlett-Packard Co.*, No. 11 cv0454-LAB RBB, 2013 WL 5551642 (S.D. Cal. Sept. 29, 2013).**

Judge Larry Alan Burns of the U.S. District Court for the Southern District of California refused to certify a class of purchasers allegedly misled by representations about the capabilities and functioning of SimpleSave external backup devices. Judge Burns concluded that class certification was not warranted because Hewlett-Packard had released a free software update, effectively satisfying the plaintiffs' claims for restitution. The court concluded that pursuing a suit with attendant attorneys' fees and costs was not in the interests of the class or a superior means of resolving the class claims in light of the update.

***Yordy v. Plimus, Inc.*, No. C12-0229 TEH, 2013 WL 5832225 (N.D. Cal. Oct. 29, 2013).**

Judge Thelton E. Henderson of the U.S. District Court for the Northern District of California denied certification of a consumer fraud class of purchasers of "unlimited downloads" of media titles from 19 websites, who alleged that they received content that violated copyright law or was already available for free. The defendant Plimus, which processed the payments for the download rights, argued that it only handled the payments and had nothing to do with the marketing and advertising of the websites. Judge Henderson agreed and found commonality lacking on this basis. The court acknowledged that Plimus's argument implicated the merits, but it concluded that the plaintiff's failure to generate any evidence linking Plimus to the representations meant that there was no proof that Primus had an identical role in allegedly promoting each of the 19 websites, and thus the class likely would not be able to prove its claims on a common basis. For similar reasons, the court also concluded that the plaintiff was not typical because she had not shown that Plimus's alleged relationship with the one website she used was identical to its alleged relationships with the 18 other websites.

***Lipstein v. UnitedHealth Group*, No. 11-1185 (JBS/JS), 2013 WL 5410631 (D.N.J. Sept. 26, 2013).**

Chief Judge Jerome B. Simandle of the U.S. District Court for the District of New Jersey denied class certification in an action brought under the Employee Retirement Income Security Act. Health plan participants sued claims administrators for thousands of health insurance plans, alleging that the administrators failed to follow the clear language of the plans when determining secondary insurance coverage payments to insureds who: (i) were enrolled in or eligible for Medicare; and (ii) received medical treatment from providers who had opted out of Medicare or who received treatment from Medicare providers and did not submit a claim to Medicare. The court ruled that the class did not satisfy the requirements of commonality, ascertainability and predominance given the variations in each member plan and the need for inquiries into whether each member in fact received reduced benefits as a result of the administrator's estimation policy. The court also concluded that the plaintiffs failed to show that injunctive relief or a declaratory judgment could have provided classwide relief.

***Reyes v. Zions First National Bank*, No. 10-345, 2013 WL 5332107 (E.D. Pa. Sept. 23, 2013), 23(f) pet. pending**

Judge Juan R. Sánchez of the U.S. District Court for the Eastern District of Pennsylvania denied class certification in a class action alleging fraud under the Racketeer Influenced and Corrupt Organizations Act (RICO) by several defendant banks. The plaintiff alleged that the banks knowingly provided banking services to fraudulent telemarketers. He sought to certify a class of individuals who were allegedly defrauded by telemarketers receiving banking services from defendants. The court denied certification, ruling that the plaintiff failed to establish commonality and predominance. Specifically, the court found

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that the plaintiff had relied on high return rates as proof of fraud under the "complete sham" theory of RICO, but because the return rates were different for each member of the class, he could not prove his complete sham theory based on evidence common to the class.

***Quality Management & Consulting Services, Inc. v. SAR Orland Food Inc.*, No. 11 C 06791, 2013 WL 5835915 (N.D. Ill. Oct. 30, 2013).**

Judge Edmond E. Chang of the U.S. District Court for the Northern District of Illinois denied class certification in a case involving allegations that the defendants sent unsolicited faxes in violation of the Telephone Consumer Protection Act. The court concluded that the class was not ascertainable because the plaintiff could not identify the fax recipients. The only evidence the plaintiff offered on this point was a list provided by another company that had apparently obtained its recipient list from the same online database. The court rejected this evidence, however, concluding that the list was "unreliable" and that it would "require the Court to rely on a long chain of unsupported inferences." Because the plaintiff was unable to obtain transmission reports or other lists to identify the fax recipients, the court held that it had failed to establish that the class was ascertainable. Finally, the court noted that even if the plaintiff could have identified the putative class, the defendants had an individualized defense due to evidence that they had an established business relationship with the plaintiff.

***Wiedenbeck v. Cinergy Health, Inc.*, No. 12-cv-508-wmc, 2013 WL 5308206 (W.D. Wis. Sept. 20, 2013), 23(f) pet. denied.**

Judge William M. Conley of the U.S. District Court for the Western District of Wisconsin denied class certification in a case involving allegedly false and misleading advertisements for medical benefit plans. The court concluded that the commonality, typicality and predominance requirements of Rule 23 were not satisfied because there was no "uniform misrepresentation" to the proposed class. Specifically, the putative class members had received information about the medical benefit plans through at least two different advertisements and multiple sales scripts. In addition, the plaintiffs could not provide a basis for proving reliance or causation on a classwide basis.

***McManus v. Sturm Foods Inc.*, No. 11-565-GPM, 2013 WL 4510109 (S.D. Ill. Aug. 26, 2013).**

Judge G. Patrick Murphy of the U.S. District Court for the Southern District of Illinois denied the plaintiffs' motion for class certification. The case involved allegations that the defendants, a dry grocery manufacturer and distributor, violated the consumer protection statutes of eight states by misrepresenting its single-serving coffee as containing fresh ground coffee rather than instant coffee. The plaintiffs sought to certify eight subclasses under each state consumer protection statute of all individuals who purchased the defendant's product. The court found that the plaintiffs' class definitions were overbroad under the state consumer protection laws that required causation or reliance, because the class definition necessarily included people who knew that the product contained instant coffee and did not rely on the defendants' alleged misrepresentation. Even with respect to the consumer protection laws of California and New Jersey, which the court believed to permit a classwide presumption of reliance in limited circumstances, the class definition was deemed overbroad because it included individuals who were not exposed to the defendants' alleged misrepresentation. Accordingly, the court concluded that "[i]ndividual issues clearly predominate."

***Gustafson v. BAC Home Loans Servicing, LP*, No. SACV 11-915-JLS (ANx), 2013 WL 5911252 (C.D. Cal. Nov. 4, 2013).**

Judge Josephine L. Staton of the U.S. District Court for the Central District of California denied certification of a class of mortgage holders charged for "force-placed" hazard insurance coverage, who brought suit for violation of California's unfair competition law, breach of contract and the implied covenant of good faith and fair dealing, and unjust enrichment. First, Judge Staton found that the choice-of-law provisions contained in the putative class members' contracts for properties in other states were enforceable and barred a nationwide class under California's unfair competition law. Judge Staton then found that the plaintiffs could not satisfy the commonality or predominance requirements of Rule 23(a) and (b)(3) for their remaining three claims. Specifically, a nationwide class could not be certified as to the breach of contract claim due to "numerous material variations" in numerous provisions of the 2,627 mortgage templates in use by the defendants, as well as the differences in state law regarding breach of contract and available defenses. The court also held that commonality and predominance were lacking as to the plaintiffs' other claims because the relevant state laws differed, the mortgages had different provisions, and individualized inquiries would be necessary to determine what the putative class members knew when they entered into the mortgage agreements.

***Britt Green Trucking, Inc. v. FedEx National, LTL, Inc.*, No. 8:09-cv-445-T-33TBM, 2013 WL 6051752 (M.D. Fla. Nov. 15, 2013), 23(f) pet. pending.**

Judge Virginia M. Hernandez Covington of the U.S. District Court for the Middle District of Florida denied the plaintiffs' motion for class certification in a suit alleging breach of contract, violation of the implied duty of good faith and fair dealing, and violation of the Florida Deceptive and Unfair Practices Act. The plaintiffs alleged that FedEx had

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terminated its contracts with independent contractors (ICs) without providing the 30-day notice as required by the contract. The court initially denied the plaintiffs' motion for class certification, finding that the plaintiffs failed to meet the typicality and predominance requirements of Rule 23(a)(3) and Rule 23(b)(3), respectively. The U.S. Court of Appeals for the Eleventh Circuit then reversed the district court's order and remanded, finding that the district court had relied on the parties' oral communications in making its class certification decision, but had failed to analyze whether the oral communications between the parties were material to the issue of breach of contract under Florida law. The plaintiffs again moved the district court to certify the class action. The court once again found that the plaintiffs failed to meet the predominance requirement of Rule 23(b)(3). The court explained that determining FedEx's liability as to the breach of contract claim would require an individualized inquiry into whether FedEx was the breaching party with respect to each contract, whether any oral communication between FedEx and the respective IC was material to the breach of contract issue, and whether FedEx complied with the notice requirement. Additionally, some contracts contained a 30-day notice requirement and other contracts were revised to require only a three-day notice. The court also found that trying to determine whether any affirmative defenses asserted by FedEx applied to each particular IC also would have required individualized inquiries.

***Dvorin v. Chesapeake Exploration, LLC*, No. 3:12-CV-3728-G, 2013 WL 6003433 (N.D. Tex. Nov. 13, 2013).**

Judge A. Joe Fish of the U.S. District Court for the Northern District of Texas denied class certification in a case involving claims for breach of royalty provisions under oil and gas leases. First, the court concluded that the plaintiffs had not established numerosity under Rule 23. The plaintiffs sought to certify a class of approximately 43 members and had not shown that the proposed class was so "geographically dispersed and difficult to identify as to render joinder impracticable." The court also concluded that the plaintiffs could not establish the commonality, typicality and predominance requirements of Rule 23 because there were "significant differences between the leases of the proposed class members that make answering the question of whether [the defendant] violated the royalty provisions under Texas law a highly individualized inquiry." Finally, the court found that superiority did not exist. "Due to the relatively small size of the proposed class and the serious commonality problems with that class," the court concluded that "the plaintiffs' claims could be more easily resolved if the plaintiffs bring them individually or if the plaintiffs with identical royalty provisions join together their claims."

***Cannon v. BP Products North America, Inc.*, No. 3:10-CV-00622, 2013 WL 5514284 (S.D. Tex. Sept. 30, 2013).**

Judge Gregg Costa of the U.S. District Court for the Southern District of Texas denied class certification in a putative class action arising from allegations that the defendant's chemical releases and emissions caused residential properties to decrease in value. The court concluded that the plaintiffs could not prove causation or damages on a classwide basis, because "each of the roughly 14,300 putative Plaintiffs would have to prove damages by presenting appraisal figures before and after December 22, 2008 and would have to prove causation by presenting evidence th[at] BP's wrongful conduct, and not some other source, caused the diminution in their property value."

Decisions Permitting/Granting Class Certification

***In re U.S. Foodservice Inc. Pricing Litigation*, No. 12-1311-cv, 729 F.3d 108 (2d Cir. 2013).**

In a unanimous opinion, Judge Debra Ann Livingston, writing for the U.S. Court of Appeals for the Second Circuit (Livingston, Straub and Lynch, JJ.), affirmed the trial court's decision granting class certification in a case alleging violations of the Racketeer Influenced and Corrupt Organizations Act with respect to goods purchased from a nationwide food supplier under "cost-plus contracts." The plaintiffs alleged that the supplier was using sham intermediary companies whose sole purpose was to increase the invoiced costs of the goods that the defendant supplier purchased from the manufacturers, and thus charge the plaintiff customers higher prices. The court rejected the argument that individualized issues predominated because: (i) the alleged price mark-ups at issue were "uniform misrepresentations"; (ii) payment of inflated prices may be circumstantial evidence of causation; and (iii) in determining injury, customers would be entitled to the difference between the amount they paid on fraudulently inflated cost-plus invoices and the amount they would have been billed but for the sham intermediaries.

***Holtzman v. Turza*, 728 F.3d 682 (7th Cir. 2013).**

A unanimous panel of the U.S. Court of Appeals for the Seventh Circuit (Easterbrook, Williams and Tinder, JJ.) affirmed the district court's certification of a class in an action alleging that the defendant sent more than 200 unsolicited faxes in violation of the Telephone Consumer Protection Act. The court rejected the defendant's argument that individual issues predominated over common questions, noting that each recipient was not required to individually prove that he or she printed the fax or otherwise suffered monetary loss. Moreover, to the extent the defendant contended that each recipient was required to prove that he or she received the fax, there were records indicating which faxes were received and by whom. The Seventh Circuit then went on to address the district court's

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sua sponte decision to issue a "*cy pres* award," concluding that it was "premature" and would be necessary only if the defendant "pays more than enough to satisfy all claims by class members." On remand, the court instructed that "[o]nce the [district] court knows what funds are available for distribution, it should (if necessary) reconsider how any remainder will be applied."

***Adair v. EQT Production Co.*, No. 1:10CV00037, 2013 U.S. Dist. LEXIS 140611 (W.D. Va. Sept. 30, 2013), 23(f) pet. pending.**

Judge James P. Jones of the U.S. District Court for the Western District of Virginia adopted a magistrate's report and recommendation and certified five related class action suits alleging that energy companies cheated Southwest Virginia residents out of millions of dollars in royalty payments for natural gas drilled on their land. The plaintiffs sought an accounting of all royalties allegedly owed to the plaintiffs and the class members and asserted claims for, *inter alia*, conversion, breach of fiduciary duty, trespass and unjust enrichment. The plaintiffs sought class certification under both Rule 23(b)(2) and Rule 23(b)(3). As to Rule 23(b)(3), the magistrate judge found that predominance was satisfied because the claims "revolve around the price of the [gas] as sold by the operators, the volume of [it] and the amount of post-production deductions taken from the sale proceeds before calculating royalties." 2013 U.S. Dist. LEXIS 142005 (June 5, 2013). The district court summarily adopted the report and recommendation over the defendants' objection that individualized issues predominated. The defendants subsequently petitioned for interlocutory review of the class certification rulings to the U.S. Court of Appeals for the Fourth Circuit. Judge Jones has refused to stay the proceedings pending disposition of the petition.

***Muzuco v. Re$ubmitIt, LLC*, No. 11-62628-Civ., 2013 WL 4566305 (S.D. Fla. Aug. 28, 2013), 23(f) pet. denied.**

Judge Robert N. Scola, Jr. of the U.S. District Court for the Southern District of Florida granted class certification in a suit alleging that the defendants violated the Fair Debt Collection Practices Act and the federal Electronic Funds Transfer Act in connection with insufficient-fund fees. The court determined that commonality was met because defendants engaged in a "common course of conduct," the legality of which will affect all class members. The court also determined that the plaintiff satisfied the predominance requirement of Rule 23(b)(3) because the defendants relied on a uniform notice to obtain authorization from putative class members to impose fees for checks returned for insufficient funds, allowing classwide resolution of issues pertaining to the notice. Finally, the court found that the plaintiff satisfied the superiority requirement of Rule 23(b)(3) because of the large number of claims, with relatively small statutory damages.

***Klewinowski v. MFP, Inc.*, No. 8:13-cv-1204-T-33TBM, 2013 WL 5177865 (M.D. Fla. Sept. 12, 2013).**

Judge Virginia M. Hernandez Covington of the U.S. District Court for the Middle District of Florida granted the plaintiff's unopposed motion for class certification in a case alleging that the defendant violated the Fair Debt Collection Practices Act (FDCPA) by sending a letter to the plaintiff notifying her that her past due account with creditors was referred to debt collection services, but failing to identify the creditors. The court determined that the plaintiff satisfied Rule 23(a) requirements because: (i) it was undisputed that defendant sent similar debt collection letters to 16,262 consumers; (ii) each member's claims hinged on whether the defendant's standardized letters violated the FDCPA; (iii) the plaintiff's claims arose from the same alleged pattern or practice and same legal theory as each of the members' claims; and (iv) the plaintiff was willing and capable of fulfilling her responsibilities as class representative and counsel were adequate. The court similarly found that predominance was met because of the standardized nature of the defendant's conduct and the common question as to whether the standardized letter violated the FDCPA.

***Terrill v. Electrolux Home Products, Inc.*, No. CV 108-030, 2013 WL 5603873 (S.D. Ga. Oct. 11, 2013), 23(f) pet. pending.**

Judge Lisa Godbey Wood of the U.S. District Court for the Southern District of Georgia granted class certification in a suit involving allegedly defective front-load washers, holding that all doubts should be resolved in favor of class certification. Even though the alleged defect had not manifested in most class members' machines, the court concluded that the class was not overbroad because the plaintiffs "allege[d] that the design defect injured the putative class members from the time of purchase," regardless of manifestation of defect. The court also concluded that common issues predominated notwithstanding the requirement that the plaintiffs prove reliance on a classwide basis, concluding that it was reasonable to presume classwide reliance.

***Whitlock v. FSL Management, LLC*, No. 3:10CV-00562-JHM, 2013 WL 5656100 (W.D. Ky. Oct. 16, 2013).**

Chief Judge Joseph H. McKinley, Jr. of the U.S. District Court for the Western District of Kentucky denied the defendant employer's motion to reconsider his prior decision granting class certification in an employment action in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838 (6th Cir. 2013), *cert. pet. filed*. The court held that the presence of individualized damages cannot by itself defeat class certification because the issues of liability and damages can be bifurcated at trial. The court rejected the employer's argument that the

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employee classes should be decertified because — as the plaintiffs conceded — each class member's damages would need to be individually calculated based on their individual wages lost.

***Merendo v. VHS of Michigan, Inc*, No. 06-15601, 2013 WL 5106520 (E.D. Mich. Sept. 13, 2013).**

Chief Judge Gerald E. Rosen of the U.S. District Court for the Eastern District of Michigan granted class certification in an antitrust action alleging that certain hospitals allegedly shared compensation information regarding their registered nurses in order to reduce competition for and wages paid to nurses. The court concluded that the plaintiffs' claims raised a number of common issues, including whether the defendant hospitals had agreed on a common course of action to exchange wage information and whether the benchmark analysis of the plaintiffs' expert, on which the plaintiffs' theory of damages rested, was a viable measure of wage loss, even though there was variation in compensation paid both between and within each hospital. The court reasoned that, while other courts have denied class certification on antitrust claims based on wage suppression, Rule 23(b)(3)'s predominance requirement was satisfied here because the plaintiffs' theory of damages did not rely on individualized factors affecting compensation, and the hospitals' compensation structures for nurses were "fairly rigid."

***Knutson v. Schwan's Home Service, Inc.*, No. 3:12-cv-0964-GPC-DHB, 2013 WL 4774763 (S.D. Cal. Sept. 5, 2013), 23(f) pet. pending.**

Judge Gonzalo P. Curiel of the U.S. District Court for the Southern District of California granted in part and denied in part a motion for class certification of a class of plaintiffs who purportedly received pre-recorded calls regarding rescheduling of NutriSystem deliveries without their express consent, in violation of the Telephone Consumer Protection Act. Applying the "rigorous analysis" required by *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), Judge Curiel determined that the class was ascertainable, sufficiently numerous, that common questions of law and fact existed and that the plaintiffs were adequate representatives with typical claims. However, the court denied the plaintiffs' request to certify a Rule 23(b)(2) class for declaratory or injunctive relief, finding that the plaintiffs were "primarily interested in monetary damages," the number of calls received was "unclear" and injunctive relief was not appropriate because "it is undisputed that Defendants have ceased calling NutriSystem customers."

***Hallmark v. Cohen & Slamowitz, LLP*, No. 11-CV-842S, 2013 WL 5178128 (W.D.N.Y. Sept. 16, 2013).**

Chief Judge William M. Skretny of the U.S. District Court for the Western District of New York granted the plaintiff's motion for class certification in a case alleging that the defendant violated the Fair Debt Collection Practices Act (FDCPA) by sending a debt collection letter that included $140 in court costs. The court found that commonality and typicality were satisfied because deciding whether the defendant improperly included court fees in the debt would resolve all potential claims. The court also concluded that the plaintiff demonstrated predominance because the court would use a "least sophisticated consumer" test in order to determine whether a FDCPA violation had occurred. The court further found superiority because multiple lawsuits would be inefficient and costly, and the prospect of a small recovery meant that class members might be dissuaded from bringing claims.

***Mahon v. Chicago Title Insurance Co.*, No. 3:09CV690 (AWT), 2013 WL 5434614 (D. Conn. Sept. 30, 2013).**

Judge Alvin W. Thompson of the U.S. District Court for the District of Connecticut granted the plaintiff's motion for class certification in a suit alleging that the defendant had overcharged her for title insurance when refinancing her mortgage loan. As to commonality, the court found that the plaintiff had demonstrated a common issue: whether the members of the proposed class who were entitled to a discounted rate under the defendant's statutorily filed rates received the proper discounted rates. The court also found that common questions of fact and law predominated and that class certification was appropriate as to all three claims because each claim turned on the standardized nature of the transactions and the statutorily filed rate premiums. Therefore, the facts and law supporting the claims were the same, and any individualized circumstances were generally not relevant. With regard to superiority, the court found that individual plaintiffs would likely have a limited ability to litigate their claims on their own, a class action would be in the best interests of judicial economy, and that damages calculations would be based on uniform application of the defendant's filed rates. While the court acknowledged the defendant's argument that it would be burdensome to go through its records to identify class members, the court stated that such burdens would be the same for the defendant whether a class was certified or class members filed individual lawsuits.

***Vu v. Diversified Collection Services, Inc.*, No. 10-CV-5178 (NGG)(RER), 2013 WL 5502850 (E.D.N.Y. Sept. 30, 2013).**

Judge Nicholas G. Garaufis of the U.S. District Court for the Eastern District of New York granted in part, and denied in part, the plaintiff's motion for class certification in a case under the Fair Debt Collection Practices Act (FDCPA) involving student loans. The plaintiff moved to certify two classes, a class of individuals who experienced a delay in receiving an initial communication of certain of their rights and a class of individuals who received letters

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that contained allegedly false and contradictory language. The court denied certification of the first class because the court would have been required to make both an individualized factual inquiry and an individualized legal inquiry as to each class member. First, the court would have needed to determine whether the "initial communication" — which the defendant had done via various methods including mailed letters, phone calls and leaving voice messages — was sufficient under the FDCPA. Second, the court would have had to make a factual determination as to when the communication actually occurred. As to the second class, the court found that commonality, typicality and predominance were satisfied because the court would employ an objective standard under the FDCPA, making it unnecessary to engage in subjective, individualized inquiries regarding the class members' understanding of the letters.

***A & L Industries, Inc. v. P. Cipollini, Inc.*, No. 12-07598 (SRC), 2013 WL 5503303 (D.N.J. Oct. 2, 2013).**

Plaintiff A&L Industries alleged that the defendant sent the plaintiff and a class of recipients junk faxes in violation of the Telephone Consumer Protection Act (TCPA). Judge Stanley R. Chesler of the U.S. District Court for the District of New Jersey granted plaintiff's renewed motion for class certification. The court found that numerosity, commonality, typicality and adequacy were met, stating that a determination as to the legality of the single junk fax would resolve the issue "'central to the validity of each one of the claims.'" The court further found that predominance and superiority were met, noting that certifying a class would "further[] the policy behind Rule 23 by 'aggregating' class members' 'relatively paltry potential individual recoveries,'" which would have otherwise deincentivized plaintiffs under the TCPA to bring individual suits.

***Williams v. Pressler & Pressler, LLP*, No. 11-7296 (KSH), 2013 WL 5435068 (D.N.J. Sept. 27, 2013).**

The plaintiffs brought a putative class action, alleging violations of the Fair Debt Collection Practices Act (FDCPA) based on an allegedly false and misleading settlement letter sent by the defendant, a consumer collection law firm, during the pendency of a collection lawsuit. The complaint generally alleged that the implication in the settlement letter — that by agreeing to settle, the defendant would remove negative information from the plaintiffs' credit reports — was false and misleading. Judge Katharine S. Hayden of the U.S. District Court for the District of New Jersey granted class certification, finding that numerosity, commonality, typicality, adequacy, predominance and superiority had been established. The court found that the viability of the plaintiffs' claims would turn on a determination of whether the letters conformed with the requirements of the FDCPA, an objective inquiry that would not involve individualized facts.

***Pollock v. Energy Corp. of America*, No. 10-1553, 2013 WL 5338009 (W.D. Pa. Sept. 16, 2013).**

The plaintiff landowners claimed that the defendant, Energy Corporation of America, underpaid natural gas royalties due to them under lease agreements and the Guaranteed Minimum Royalty Act. The plaintiffs sought to certify three subclasses of lessors based on defendant's alleged failure to pay royalties under three circumstances. Magistrate Judge Robert C. Mitchell of the U.S. District Court for the Western District of Pennsylvania held that two classes of lessors — with claims based on defendant's deduction of transport and marketing fees, respectively — met the numerosity, commonality, typicality, predominance and superiority requirements, finding that if the plaintiffs could show that profits were improperly deducted before royalties were paid, they could prove breach regardless of the lease form. However, the court refused to certify the subclass of lessors claiming a failure to pay royalties for gas used as plant fuel because differences among leases and other facts specific to each lessor would have determined the issue of breach, failing the commonality prong.

***Parko v. Shell Oil Co.*, No. 12-336-GPM, 2013 WL 4721382 (S.D. Ill. Sept. 3, 2013), 23(f) pet. pending.**

Judge G. Patrick Murphy of the U.S. District Court for the Southern District of Illinois granted class certification in a suit brought by property owners against the owners and operators of an oil refinery in Roxana, Ill. The plaintiffs alleged that the defendants caused or allowed hazardous petroleum by-products to contaminate their property. The court concluded that the plaintiffs raised a common question: "did Defendants' failure to contain petroleum byproduct at the refinery result in contamination to Roxana property?" The court also emphasized that the U.S. Court of Appeals for the Seventh Circuit's recent decision in *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), (as discussed in the Fall 2013 *Class Action Chronicle*, at 11) "effectively shuts down Defendants' arguments against predominance" because "[c]ommon proof of damages is simply not required for class certification." In particular, the court quoted the Seventh Circuit's statement in *Butler* that "'[i]t would drive a stake through the heart of the class action device . . . to require that every member of the class have identical damages.'"

***Huyer v. Wells Fargo & Co.*, No. 4:08-CV-00507, 2013 WL 5754885 (S.D. Iowa Oct. 23, 2013).**

Judge Robert W. Pratt of the U.S. District Court for the Southern District of Iowa granted class certification in a lawsuit challenging Wells Fargo's policy of ordering property inspections for all mortgage loans meeting certain delinquency criteria. The plaintiffs moved for certification of an injunctive relief class, a damages class under the Racketeer Influenced and Corrupt Organizations Act, and a

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damages class under California's Unfair Competition Law. The court first rejected the defendants' argument that there were no common issues. "Although there can be no doubt that the circumstances surrounding each individual inspection vary on a borrower-by-borrower basis," the court concluded that there was a common question concerning a policy that was applied uniformly to all class members. The court also concluded that the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), did not preclude certifying the injunctive relief and monetary relief classes separately under Rules 23(b)(2) and 23(b)(3).

***Jackson v. Collections Acquisition Co.*, No. 4:13-CV-00570-JAR, 2013 WL 5592603 (E.D. Mo. Oct. 9, 2013).**

Judge John S. Ross of the U.S. District Court for the Eastern District of Missouri granted class certification in a lawsuit brought under the Fair Debt Collection Practices Act (FDCPA). The plaintiff alleged that he received a debt collection letter from the defendant in which the defendant neither identified itself as a debt collector nor provided a disclaimer that the letter was an attempt to collect a debt, as required by the FDCPA. In certifying a class, the court noted that it "need not engage in individualized inquiries to determine class membership" because the defendant sent the same form collection letter to all class members. The court also concluded that a class action was superior to individual actions because the case involved plaintiffs with "relatively small claims, who might not otherwise seek or obtain relief absent a class action."

***Hartley v. Suburban Radiologic Consultants, Ltd.*, No. 11-2664 (JRT/JJG), 2013 WL 5467300 (D. Minn. Sept. 30, 2013).**

Judge John R. Tunheim of the U.S. District Court for the District of Minnesota granted class certification in a case brought under the Fair Debt Collection Practices Act (FDCPA). The court concluded that the questions of law and fact implicated by the action all arose out of the defendants' form collection letters, and therefore were identical to all class members and predominated over any individual issues. Even if individual class members claimed differing damage amounts, the court stated, "such damage determinations would not predominate over the liability questions in the litigation." The court also addressed the defendants' argument that a class action was not superior to individual actions because the FDCPA limits recovery in a class action to the lesser of $500,000 or 1 percent of the debt collector's net worth. The defendants contended that their small net worth, combined with a class of potentially 22,000 plaintiffs, would limit each plaintiff's recovery to $0.13, whereas individual actions would permit plaintiffs to recover $1,000 in statutory damages as well as attorneys' fees and costs. The court rejected this argument, however, and concluded that "the small amount of recovery is not a bar to class certification" because "all class plaintiffs are unlikely to bring their own claims for FDCPA violations." Finally, the court observed that individuals who desired to pursue their own claims could opt out of the class action, and that declining to certify a class would only reward the defendants "for sending large quantities of potentially illegal form letters."

***In re Nexium (Esomeprazole) Antitrust Litigation*, No. 12-md-02409-WGY, 2013 WL 6019287 (D. Mass. Nov. 14, 2013).**

Judge William G. Young of the U.S. District Court for the District of Massachusetts certified a class under Rule 23(b)(3) in an antitrust action alleging that the defendant pharmaceutical companies entered into agreements that delayed entry of generic competition and thus led to inflated prices for the branded drug. The defendants argued that the proposed representatives were inadequate because they were third-party payors — *i.e.*, entities that paid for others' use of the drug — who had an incentive to maximize their recovery at the expense of another category of class members: consumers of the drugs at issue. The court rejected that argument, holding that the defendants had not demonstrated that there was a fundamental conflict of interest between the groups, because all putative class members had allegedly suffered the same economic injury (allegedly paying supracompetitive prices for the drug) and the question of allocating damages could be reserved for trial. As to predominance, the court concluded that the plaintiffs had adequately demonstrated that common questions predominated because: (i) there was sufficient similarity between the state and federal antitrust provisions; (ii) there was sufficient commonality among the various state consumer protection claims; and (iii) the plaintiffs' damages model adequately demonstrated that the common antitrust impact predominated over individual differences in damages. Even though some class members potentially suffered no injury, the court held that the incidence of uninjured class members was insufficient to overcome the showing of common antitrust impact to the class by the plaintiffs' expert.

***In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, No. C 09-1967 CW, 2013 WL 5979327 (N.D. Cal. Nov. 8, 2013).**

Judge Claudia Wilken of the U.S. District Court for the Northern District of California certified a class of current and former college athletes pursuing claims against the NCAA for violating the Sherman Antitrust Act by conspiring with Electronic Arts and the Collegiate Licensing Company to restrain competition in the market for the commercial use of their names, images and likenesses. The plaintiffs sought certification of a 23(b)(2) injunctive relief class and a 23(b)(3) damages class. Judge Wilken determined that the Rule 23(a) numerosity, typicality and commonality

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requirements were satisfied with respect to both classes. The court also found adequacy satisfied, rejecting the NCAA's argument that conflicts of interest within the class existed because star athletes "would command a higher price for their name, image, and likeness rights than others" and would be entitled to more damages. The court found that the plaintiffs' proposal to allocate damages equally among class members was appropriate at least for purposes of establishing liability, because the plaintiffs "allege harm to competition within a *group* licensing market, not an individual licensing market," which "renders irrelevant any differences in the value of each class member's individual publicity rights." Judge Wilken certified a 23(b)(2) class seeking to bar the NCAA from prohibiting current and former student-athletes from entering into group licensing deals for the use of their names, images and likenesses in video games and game broadcasts, finding that an injunction would offer all class members "uniform relief" from ongoing antitrust harms. However, the court refused to certify a 23(b)(3) damages class, finding that the plaintiffs failed to satisfy the manageability requirement because there was no means to determine which members of the class would still have played for Division I teams (as opposed to leaving college to play professionally) if not for the challenged conduct, or which student-athletes were actually depicted in game footage or video games during the relevant class period "without conducting thousands of individualized comparisons between real-life college football players and their potential videogame counterparts" and "cross-check[ing] thousands of team rosters against thousands of game summaries and compar[ing] dozens of game schedules to dozens of broadcast licenses simply to determine who belongs in the Damages Subclass."

***Glaberson v. Comcast Corp.*, No. 03-6604, 2013 WL 5988966 (E.D. Pa. Nov. 12, 2013).**

The plaintiff subscribers of cable-television services filed a class action alleging antitrust violations. The U.S. District Court for the Eastern District of Pennsylvania certified the class, and the U.S. Court of Appeals for the Third Circuit affirmed. The Supreme Court reversed on the grounds that the class failed to meet the Rule 26(b)(3) predominance requirement with regard to antitrust impact. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). The plaintiffs then moved for recertification of a narrowed class. Comcast moved to strike this motion, arguing that the Supreme Court's decision to reverse, rather than vacate or remand, precluded the lower court from considering the issue. Judge John R. Padova of the U.S. District Court for the Eastern District of Pennsylvania denied Comcast's motion, holding that certifying a narrowed class was not precluded as a matter of law. The court found it significant that the Supreme Court did not decide that classwide proof could never be established, but rather left open the question of whether the plaintiffs could build a more limited antitrust damages model that could satisfy the predominance requirement.

***Kelen v. World Financial Network National Bank*, No. 12 Civ. 5024(PAC), 2013 WL 6003513 (S.D.N.Y. Nov. 12, 2013).**

Judge Paul A. Crotty of the U.S. District Court for the Southern District of New York granted class certification in an action alleging violations of the Truth in Lending Act's (TILA) requirement of disclosure of credit terms. The defendant issued consumer credit cards for use at Ann Taylor Loft. The plaintiff alleged that the defendant issued her such a card but violated TILA's disclosure requirements by "inaccurately disclosing certain information and omitting required information in its Billing Rights Notice." The plaintiff moved to certify a class of those persons who: (i) were furnished certain account-opening disclosure statements on or after June 27, 2011; (ii) made purchases with the credit card; and (iii) had not been precluded from participating in the action as a result of an arbitration agreement. The defendant argued that the plaintiff was an inadequate class representative because she lacked knowledge of the case. The court disagreed. Noting that ignorance does not prove inadequacy, the court recounted that the plaintiff reviewed her discovery responses, produced documents both before and after her deposition, completed an errata sheet and was willing and able to represent the class. The court also determined that the plaintiff was not a mere "'key to the courthouse'" for her lawyers. With respect to predominance, the court found that individualized inquiries would not be necessary because the plaintiff sought only statutory damages from the defendant's failure to furnish the account-opening statements.

***Christy v. Heritage Bank*, No. 3:10-cv-874 (M.D. Tenn. Nov. 8, 2013).**

Judge Kevin H. Sharp of the U.S. District Court for the Middle District of Tennessee granted class certification in an action alleging that the defendant bank failed to provide ATM fee notices required by the Electronic Fund Transfer Act (EFTA). After finding that the plaintiff had adequately demonstrated the putative class's commonality, typicality and numerosity, the court held that the fact that the named plaintiff and his law firm had affirmatively sought out ATMs that lack the required notice did not make them inadequate representatives of the class because the EFTA is a strict liability statute under which the consumer's state of mind is irrelevant. The court also rejected the defendant's argument that the process of identifying the non-accountholders who used its ATMs was sufficiently arduous to render the class non-ascertainable. Further, the court held that Rule 23(b)(3)'s predominance requirement was satisfied because the putative class sought only statutory damages, the period of time the required notice was lacking was a common factual issue and the EFTA does not preclude liability when fees are later reimbursed by a third party such as a class member's own bank. Finally, the court explained that the EFTA expressly contemplates class actions as a method of enforcement, any public policy arguments

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against "manufactured" class actions are best addressed by the legislature and the small potential recovery for each class member makes individual actions unlikely.

***Harter v. Beach Oil Co.*, No. 3:10-cv-0968, 2013 U.S. Dist. LEXIS 162989 (M.D. Tenn. Nov. 15, 2013).**

Judge Kevin H. Sharp of the U.S. District Court for the Middle District of Tennessee granted class certification in an action alleging that the defendant retailer failed to provide ATM fee notices required by the Electronic Fund Transfer Act (EFTA). The plaintiff sought only the statutory damages provided by EFTA. Although the defendant admitted that two of its ATMs lacked the required notices for a certain period of time during which 6,000 transactions were logged on the machines, it argued that class certification should be denied because the plaintiff's and her counsel's credibility problems made her an inadequate representative and a class action was not a superior mechanism to adjudicate EFTA claims. In granting class certification, the court incorporated by reference its analysis in *Christy v. Heritage Bank*, No 3:10-cv-874 (M.D. Tenn. Nov. 8. 2013), an EFTA action similar in nearly all material respects and involving the same attorneys.

***DL v. District of Columbia*, No. 05-1437 (RCL), 2013 U.S. Dist. LEXIS 160018 (D.D.C. Nov. 8, 2013).**

Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia granted the plaintiffs' motion for class certification in a case alleging that the District of Columbia failed to provide the plaintiffs with free appropriate public education (FAPE) in violation of the Individuals with Disabilities Education Act (IDEA). The U.S. Court of Appeals for the D.C. Circuit had previously reversed the court's class certification order, holding that the class had been defined too broadly under *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), because the supposedly common question of whether the class members had been denied a FAPE was "only an allegation that the class members 'have all suffered a violation of the same provision of law'" that may have been violated in different ways. On remand, the plaintiffs sought to certify four subclasses, each defined by a distinct type of failure to provide a FAPE. The court determined that the subclasses satisfied the commonality requirement as construed by *Dukes* because the subclasses were fashioned to advance claims that turned on "objective, statutorily-defined obligations" as to whether the District of Columbia met its obligations under IDEA.

Decisions Granting Decertification of Classes

***Hart v. Louisiana-Pacific Corp.*, No. 2:08-CV-47-BO, 2013 U.S. Dist. LEXIS 125493 (E.D.N.C. Aug. 30, 2013).**

Judge Terrence W. Boyle of the U.S. District Court for the Eastern District of North Carolina decertified breach-of-contract claims in the wake of a North Carolina appeals court ruling making clear that the named plaintiffs' claims were barred by the applicable statute of repose under North Carolina law. The plaintiff homeowners commenced suit against the defendant, the manufacturer of allegedly defective window and door trim, asserting, *inter alia*, claims for breach of express warranty. The court had previously concluded that a claim for breach of express warranty may be brought after the expiration of the applicable six-year statute of repose so long as the express warranty period extends beyond the statute of repose. The court later certified the class. However, the North Carolina Court of Appeals thereafter decided a case holding to the contrary, which prompted the defendant to move for summary judgment and decertification of the class. Judge Boyle ultimately granted the motions. With respect to the motion for decertification, the court reasoned that the breach of contract claims could not be proven on a classwide basis because of the need for individualized inquiries as to whether each class member's claim fell within the statute of repose, which "destroy[ed] 'typicality, . . . predominance, [and] otherwise foreclose[d] class certification.'"

Decision Denying Decertification of Class

***Schell v. OXY USA Inc.*, No. 07-1258-JTM, 2013 WL 4857686 (D. Kan. Sept. 11, 2013).**

Judge J. Thomas Marten of the U.S. District Court for the District of Kansas refused to decertify a class action involving Kansas oil and gas leaseholders in light of the U.S. Court of Appeals for the Tenth Circuit's recent decision vacating certification of similar classes in *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213 (10th Cir. 2013) (discussed in the Fall 2013 *Class Action Chronicle*, at 4-5). Judge Marten found that the defendant did not "show that the facts or law have materially changed or developed" sufficiently to change the court's prior finding of commonality and predominance of a common issue, rejecting the defendant's argument that *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) "introduced a heightened commonality inquiry" because "the court's previous analysis of commonality was short and simple for a reason: commonality was clearly established. *Dukes* does not change this." The court concluded that the leaseholders shared a common question of law, and differences between the leases were immaterial because the court had determined that all the leases were ambiguous, so that "[t]his case is unhampered by the several differences present in *Dukes* and *Roderick* that would make classwide resolution difficult and potentially inconsistent between plaintiffs."

CLASS ACTION FAIRNESS ACT (CAFA) DECISIONS

Decisions Denying Motions to Remand/Reversing Remand Orders

***Addison Automatics, Inc. v. Hartford Casualty Insurance Co.*, 731 F.3d 740 (7th Cir. 2013).**

A unanimous panel of the U.S. Court of Appeals for the Seventh Circuit (Easterbrook, Rovner and Hamilton, JJ.) reversed the district court's order remanding an action to state court for lack of jurisdiction under CAFA. The case arose out of a separate class action filed by Addison Automatics, Inc. for violation of the Telephone Consumer Protection Act (TCPA). In settling the TCPA action, the defendant assigned to Addison, as class representative, any claims it may have had against its liability insurers. Addison then filed a new state court action against one of the defendant's insurers, seeking a declaratory judgment holding the insurer liable for the $18 million TCPA judgment. Addison expressly stated that it was bringing an "individual" action and not a "class action." The insurer removed the case to federal court. The Seventh Circuit held that removal was proper under CAFA, despite Addison's characterization of the suit as an "individual" action, because Addison had standing only in its capacity as class representative.

***Walker v. Trailer Transit, Inc.*, 727 F.3d 819 (7th Cir. 2013).**

A unanimous panel of the U.S. Court of Appeals for the Seventh Circuit (Bauer, Cudahy and Sykes, JJ.) affirmed the district court's denial of the plaintiff's motion to remand to state court under CAFA. Representing a class of truck owner-operators, the plaintiff sued a broker of trucking services for breach of contract in Indiana state court. The defendant removed the suit to federal court under CAFA, and the plaintiff filed a motion to remand contending that removal was untimely. The Seventh Circuit noted that CAFA includes two different 30-day time limits for removal. The first applies to cases that are removable based on the initial pleading. 28 U.S.C. § 1446(b)(1). The second 30-day time limit applies after receipt by the defendant of a pleading or other litigation paper "from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3). As to the second time limit, the Seventh Circuit joined several other circuits in holding that "[t]he 30-day removal clock does not begin to run until the defendant receives a pleading or other paper *that affirmatively and unambiguously reveals that the predicates for removal are present*." With respect to the amount in controversy, the court announced a "bright-line rule" that "the pleading or other paper must specifically disclose the amount of monetary damages sought." Because none of the post-complaint documents received by the defendant affirmatively specified a damages figure, the court held that "the removal clock never actually started to run," and removal was therefore not untimely.

***Rodriguez v. AT&T Mobility Services LLC*, 728 F.3d 975 (9th Cir. 2013).**

The U.S. Court of Appeals for the Ninth Circuit (Tallman, Clifton and Callahan, JJ.) construed the Supreme Court's recent decision in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), as abrogating the "legal certainty standard" for proving the amount-in-controversy requirement under CAFA. In *Standard Fire*, the Supreme Court held that a named plaintiff could not evade federal jurisdiction under CAFA by waiving any class claims in excess of the $5 million amount-in-controversy. In *Rodriguez*, the plaintiff brought a putative class action on behalf of retail sales managers asserting various violations of California employment laws. The plaintiff opposed AT&T's removal of the case by relying on language in the complaint purporting to waive class claims in excess of $5 million. The district court remanded the case, refusing to consider AT&T's extrinsic evidence in light of the waiver set forth in the complaint. On appeal, the Ninth Circuit reversed, holding that the district court also erred in applying the "legal certainty" standard rather than the "preponderance of the evidence" test for establishing CAFA's amount-in-controversy. According to the Ninth Circuit, the rationale for imposing a "legal certainty" standard is that the plaintiff "is the 'master of her complaint' and can plead to avoid federal jurisdiction." Such a standard, the Ninth Circuit explained, could not be reconciled with *Standard Fire*.

***Visendi v. Bank of America, N.A.*, No. 13-16747, 2013 WL 5734802 (9th Cir. Oct. 23, 2013), 23(f) pet. denied.**

On the heels of *Romo v. Teva Pharmaceuticals USA, Inc.*, 731 F.3d 918 (9th Cir. 2013), the U.S. Court of Appeals for the Ninth Circuit (Nelson, Smith and Ikuta, JJ.) found that the defendants in a putative class action properly removed a 137-plaintiff action alleging deceptive mortgage lending and securitization practices against 25 financial institutions from state court to federal court under the CAFA mass action provision. The district court had remanded the action to state court after finding that, while the plaintiffs' initial complaint had proposed a joint trial, no common questions of law or fact existed to justify jurisdiction under CAFA. The Ninth Circuit held that the district court's post-removal conclusion regarding the lack of common questions "does not affect the court's jurisdiction, because — at the time of removal — Plaintiffs proposed a joint trial," and distinguished *Romo* because the *Visendi* plaintiffs had filed a single complaint on behalf of more than 100 named plaintiffs seeking a jury trial and individual damages

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of more than $75,000 each. The Ninth Circuit rejected the plaintiffs' claim that CAFA's numerosity requirement was not satisfied because the action involved only 95 properties, since CAFA refers to "persons," not "properties," and refused to consider the plaintiffs' attempt to invoke CAFA's local controversy exception because the plaintiffs failed to raise the argument in the district court. The Ninth Circuit also found that all plaintiffs but Visendi were misjoined because "[t]his case involves over 100 distinct loan transactions with many different lenders . . . secured by separate properties scattered across the country" and thus "[n]othing unites all of these Plaintiffs but the superficial similarity of their allegations and their common choice of counsel." The court remanded with instructions to dismiss the claims of all the plaintiffs but Visendi without prejudice.

***Kemper v. Quicken Loans, Inc.*, No. 5:13-CV-91, 2013 U.S. Dist. LEXIS 142682 (N.D. W. Va. Oct. 2, 2013).**

Chief Judge John Preston Bailey of the U.S. District Court for the Northern District of West Virginia denied a motion to remand in a putative class action consisting of West Virginia residents whose Quicken mortgage loans were closed by a person not licensed to practice law in West Virginia, not supervised by a West Virginia-licensed lawyer and not a bona fide full-time employee of Quicken or Title Source. The plaintiff claimed that she and class members overpaid for the loan closings and sought to recoup these amounts. The defendants removed the case to federal court under CAFA, and the plaintiff moved to remand, arguing that the amount-in-controversy requirement had not been met. The court denied the plaintiff's motion, relying on a declaration submitted by the defendants stating that defendants originated more than 1,200 loans to 900 West Virginia borrowers where non-lawyers or laypersons assisted with the closing. The court embraced the defendants' proposal of multiplying the 1,200 loans by the $4,500 maximum statutory penalty authorized by West Virginia, which yielded an amount-in-controversy well in excess of $5 million dollars. The court also accepted the defendants' request for multiplying the number of loans by $575, the amount of the allegedly improper closing fee charged to the plaintiff, which equaled $690,000. These figures, taken together, were "well above the required threshold," even without considering attorneys' fees or punitive damages. The court therefore declined to remand the case.

***Mondragon v. Capital One Auto Finance*, No. 13-56699, 2013 U.S. App. LEXIS 23856 (9th Cir. Nov. 27, 2013).**

The U.S. Court of Appeals for the Ninth Circuit (Clifton, Goodwin and Fisher, JJ.), vacated a district court order remanding a putative consumer-fraud class action to California state court based on the local controversy exception. The plaintiff brought suit on behalf of individuals who purchased and registered automobiles in California, alleging that the defendants had violated California law related to certain automobile finance contract disclosures. The district court granted the plaintiff's motion to remand under the local-controversy exception, but the Court of Appeals vacated that decision. The plaintiff reasoned that the class definition, which was limited to those individuals who purchased and registered automobiles in California, gave rise to an inference that at least two-thirds of the class members were citizens of California. While "[i]t is likely that most of the prospective class members . . . were California citizens[,]" the Court of Appeals nonetheless recognized that some class members were citizens of other states. For example, some class members were likely members of the military or out-of-state students. The Court of Appeals explained that CAFA determinations must be "based on more than guesswork." Because the burden of remanding an action pursuant to the local-controversy exception rests with the plaintiff, the Ninth Circuit held that the plaintiff must furnish some evidence in support of his contention that at least two-thirds of the putative class members are citizens of California. The Ninth Circuit therefore vacated the lower court's ruling, giving the plaintiff an opportunity to renew his motion to remand and produce such evidence.

***Lizza v. Deutsche Bank National Trust Co.*, No. 13-00190 HG-BMK, 2013 WL 5376036 (D. Haw. Sept. 24, 2013).**

The plaintiffs brought a putative class action in Hawaii state court against Deutsche Bank, alleging various unfair and deceptive practices related to allegedly unlawful assignments and subsequent non-judicial foreclosures of residential real properties in Hawaii. Deutsche Bank removed to federal court, asserting diversity jurisdiction and jurisdiction under CAFA. Judge Helen Gillmor of the U.S. District Court for the District of Hawaii denied remand, finding that jurisdiction under CAFA was appropriate. Relying on *Rodriguez v. AT&T Mobility Services LLC*, 728 F.3d 975 (9th Cir. 2013) (discussed on page 15), Judge Gillmor concluded that Deutsche Bank had established by a preponderance of the evidence that the $5 million amount-in-controversy requirement was satisfied by the plaintiffs' lost use and lost net equity claims and request for treble damages, further noting that "Defendant has not submitted any evidence regarding the amount in controversy for the claims for attorneys' fees, moving/relocating costs, and the lost net equity for the unnamed Plaintiffs" and that "[s]uch evidence can only increase the amount in controversy, and may be considered in calculating the amount in controversy."

***Edwards v. ZeniMax Media Inc.*, No. 12-cv-00411-WYD-KLM, 2013 WL 5420933 (D. Colo. Sept. 27, 2013).**

After striking class allegations in a complaint brought by purchasers of a purportedly defective video game a year earlier, Senior Judge Wiley Y. Daniel of the U.S. District Court for the District of Colorado determined that the federal court nonetheless retained subject-matter jurisdiction under CAFA to decide a renewed motion to dismiss the complaint. Acknowledging that the jurisdictional determination was an issue of first impression in the U.S. Court of Appeals for the Tenth Circuit, Judge Daniel followed the Sixth, Seventh, Eighth, Ninth and Eleventh Circuits in holding that "a federal district court retains jurisdiction over a case filed or removed under the Class Action Fairness Act, 28 U.S.C. § 1332(d), following the denial of class certification or the striking of class allegations" and denied the motion to dismiss.

***Steckmest v. Farmers Insurance Exchange*, No. 12-35-BU-DLC-RWA, 2013 WL 5234305 (D. Mont. Sept. 17, 2013).**

Judge Dana L. Christensen of the U.S. District Court for the District of Montana adopted the findings of Magistrate Judge Richard W. Anderson, recommending that the plaintiff's motion to remand be denied. The plaintiff brought a putative class action on behalf of insureds whose cars sustained hail damage, asserting that Farmers underestimated the amount of damage. Farmers removed to federal court, citing the plaintiff's claims that "thousands" of vehicles were implicated, thus meeting the $5 million CAFA threshold. The magistrate judge recommended that the motion to remand be denied because the defendant had proven the amount-in-controversy requirement by a "preponderance of the evidence" standard. In particular, the court relied on defendant's numerical calculations that easily demonstrated potential damages in excess of $5 million dollars. These calculations were based in large part on plaintiff's own claimed compensatory damages of $5,237.07. This amount, which plaintiff described as "typical" of the class, was multiplied by 1,000 potential claimants, resulting in compensatory damages in excess of $5 million. The magistrate judge therefore recommended that the motion be denied, a recommendation that the district court later accepted.

***Composite Co. v. American International Group, Inc.*, No. 13-10491-FDS, 2013 WL 5236534 (D. Mass. Sept. 16, 2013).**

Judge F. Dennis Saylor IV of the U.S. District Court for the District of Massachusetts upheld CAFA jurisdiction in an action alleging that defendant insurers overcharged for workers' compensation premiums. The complaint did not allege that the matter in controversy exceeded CAFA's threshold of $5 million. When removing, the defendants pointed to the complaint in a similar action filed in federal court in South Carolina that expressly alleged that the matter in controversy exceeded $5 million (*Thrift Development Corp. v. American International Group, Inc.*, D.S.C. No. 12-cv-861-MGL). The court looked to the South Carolina action and concluded that the defendants had satisfied their burden to show CAFA's $5 million threshold was exceeded (a "reasonable probability" in the U.S. Court of Appeals for the First Circuit) because the South Carolina action had similar allegations, Massachusetts' population is larger than South Carolina's and the Massachusetts complaint sought treble damages (unlike the South Carolina complaint).

***Brown v. Paducah & Louisville Railway, Inc.*, No. 3:12-CV-00818-CRS, 2013 WL 5273773 (W.D. Ky. Sept. 17, 2013).**

Senior Judge Charles R. Simpson, III of the U.S. District Court for the Western District of Kentucky upheld CAFA jurisdiction in an action on behalf of a putative class for alleged injuries arising from a train derailment. The court determined that the removing defendants showed that CAFA jurisdiction existed because they demonstrated minimal diversity and, by a preponderance of the evidence, that CAFA's $5 million threshold was satisfied. The court rejected the plaintiffs' attempt to demonstrate that CAFA's home-state and local-controversy exceptions applied. As a threshold matter, the plaintiffs did not demonstrate that the citizenship of the aggregated three putative classes had a sufficient percentage of Kentucky citizens to trigger either exception. Moreover, the local-controversy exception requires that all "primary defendants" — defendants who are directly liable to either the whole class or to a substantial portion of it — be citizens of Kentucky, but the plaintiffs sought recovery from some non-Kentucky citizens on behalf of the whole class. Similarly, the putative classes covered business or commercial entities affected by the derailment, which included a large number of non-Kentucky entities, making the local-controversy exception inapplicable.

***Norris v. People's Credit Co.*, No. 1:12CV3138, 2013 WL 5442273 (N.D. Ohio Sept. 27, 2013).**

Judge Christopher A. Boyko of the U.S. District Court for the Northern District of Ohio upheld CAFA jurisdiction in an action alleging that certain automobile sales contracts impermissibly contained usurious interest rates. The defendants showed by a preponderance of the evidence that CAFA's $5 million threshold was exceeded by submitting affidavits attesting that the cost of rescinding the relevant contracts (one form of relief sought in the complaint) exceeded $5 million.

***Puerto Rico College of Dental Surgeons v. Triple S Management Inc.*, No. 09-1209 (JAF), 2013 WL 4806454 (D.P.R. Sept. 6, 2013).**

Judge José Antonio Fusté of the U.S. District Court for the District of Puerto Rico concluded that the federal court retained CAFA jurisdiction even after denying class certification on plaintiff's claim. The court recognized that the U.S. Courts of Appeal for the Sixth, Seventh, Eighth, Ninth and Eleventh Circuits have all concluded that CAFA jurisdiction is not divested upon a denial of class certification and that district courts in the Second, Fifth and Tenth Circuits have come to a similar conclusion. The court therefore determined it would follow those circuits and retain jurisdiction over the action even though it denied class certification.

***Hoffman v. Natural Factors Nutritional Products, Inc.*, No. 12-7244 (ES), 2013 WL 5467106 (D.N.J. Sept. 30, 2013).**

Judge Esther Salas of the U.S. District Court for the District of New Jersey denied the plaintiff's motion to remand. The plaintiff filed a putative class action in the Superior Court of New Jersey, seeking damages for alleged violations of the New Jersey Consumer Fraud Act. The defendant removed the suit to federal court, asserting that the plaintiff's claims were subject to CAFA jurisdiction because diversity exists, and the amount in controversy exceeds $5 million. The plaintiff, however, sought remand, arguing that class certification was impossible based on his pleading and that the plaintiff's dual role as both class counsel and class representative this position "puzzling" given that the plaintiff had originally brought the action as a class action and considered himself fit to be class representative. Therefore, the court denied the plaintiff's motion to remand.

***Johnson v. Bankers Life & Casualty Co.*, No. 13-cv-144-wmc, 2013 WL 5308225 (W.D. Wis. Sept. 20, 2013).**

Judge William M. Conley of the U.S. District Court for the Western District of Wisconsin found that jurisdiction existed under CAFA in an action alleging misrepresentation and breach of fiduciary duty in connection with the sale of an annuity. The court noted that the complaint and the defendant's notice of removal were sufficient to show complete diversity. In addition, both parties had agreed that the putative class contained hundreds of individuals, and the defendant credibly estimated that the amount in controversy exceeded $29.5 million.

***Basham v. American National County Mutual Insurance Co.*, No. 4:12-CV-4005, 2013 WL 5755684 (W.D. Ark. Oct. 23, 2013), pet. for permission to appeal denied.**

Judge Susan O. Hickey of the U.S. District Court for the Western District of Arkansas denied the plaintiffs' motion to remand the action to state court under CAFA. The plaintiffs sued numerous auto insurers and their affiliates in Arkansas state court, alleging that the defendants conspired to underpay bodily injury insurance claims. The defendants removed the case to federal court. The district court initially granted the plaintiffs' motion to remand based upon the plaintiffs' stipulation, limiting class recovery to a sum less than $5 million. After the Supreme Court's decision in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013) — which held that such stipulations do not defeat jurisdiction under CAFA — the U.S. Court of Appeals for the Eighth Circuit remanded the case to the district court. On remand, the district court determined that CAFA's $5 million amount-in-controversy requirement was met. The court found that the defendants had presented sufficient evidence of compensatory damages, statutory damages, punitive damages, the value of injunctive relief and attorneys' fees in excess of $5 million. Because the plaintiffs did not counter with evidence showing to a legal certainty that the amount in controversy was $5 million or less, the court held that CAFA's jurisdictional requirements were satisfied.

***Nelson v. American Family Mutual Insurance Co.*, No. 13-cv-607 (SRN/SER), 2013 WL 5745384 (D. Minn. Oct. 23, 2013).**

Magistrate Judge Steven E. Rau of the U.S. District Court for the District of Minnesota found that the court had jurisdiction under CAFA and denied the plaintiffs' motion to remand to state court. The plaintiffs sued American Family Mutual Insurance Company, alleging that they were induced to buy unnecessary and excessive homeowners insurance coverage. American Family removed the case to federal court under CAFA, and the plaintiffs filed a motion to remand, arguing that class damages were less than $5 million. In support of removal, American Family submitted a declaration by one of its actuaries and pricing managers who concluded (using a series of calculations and estimations) that the amount in controversy exceeded $5 million. Because the plaintiffs did not offer any evidence to contradict the declaration, the court concluded that it could not evaluate the credibility of the declaration "at this early juncture in the proceedings." Thus, the court concluded that American Family had satisfied its burden to establish the amount in controversy and that the plaintiffs had not met their burden to prove it was legally impossible for them to be awarded more than $5 million. The magistrate judge therefore recommended that the plaintiffs' motion to remand be denied.

***Catron v. Colt Energy, Inc.*, No. 13-4073-CM, 2013 WL 6016231 (D. Kan. Nov. 13, 2013).**

A putative class action against energy companies for allegedly restraining trade in leasing minerals in Southeast Kansas was removed from Kansas state court to federal court under CAFA. The plaintiff sought expedited jurisdictional discovery to support his motion for remand under CAFA's "local controversy" exception, claiming that discovery was required to establish that more than two-thirds of the putative class members are Kansas citizens. Judge Carlos Murguia of the U.S. District Court for the District of Kansas denied the request for expedited discovery, finding that the court already had CAFA jurisdiction, that "this is a question of mandatory abstention—not jurisdiction," that the information sought by the plaintiff was not "readily available," and that the plaintiff's initial evidence supporting the applicability of the local controversy exception was not sufficient to warrant prioritizing the plaintiff's discovery requests over other discovery and scheduling matters. Judge Murguia also found that the plaintiff's limited local controversy evidence did not "me[e]t his burden of showing that remand is appropriate" and denied remand without prejudice to refiling if the plaintiff obtained evidence supporting the application of the exception in discovery.

***Orlander v. Staples, Inc.*, No. 13 Civ. 703(NRB), 2013 WL 5863544 (S.D.N.Y. Oct. 31, 2013).**

Judge Naomi Reice Buchwald of the U.S. District Court for the Southern District of New York determined that the plaintiff had shown a reasonable probability that CAFA's amount-in-controversy requirement had been met and that, because CAFA's other requirements were met, the court had subject matter jurisdiction pursuant to CAFA. The plaintiff purchased a computer from the defendant along with a two-year protection plan which, the plaintiff alleged, the defendant assured him would cover any repairs for a two-year period. The plan, however, did not provide coverage in the first year because the computer was covered under the manufacturer's warranty during that time. The plaintiff claimed that any terms and conditions that might have articulated this restriction were not shown to him before or after he purchased the computer and plan. The court observed that the complaint's allegation that "the aggregate claims of Plaintiff and members of the Class exceed the sum or value of $5,000,000" created a presumption that the amount-in-controversy requirement had been satisfied. Moreover, the parties' submissions to the court revealed that approximately 1.2 million plans were sold during the putative class period ranging in cost from $14.99 to $349.99. The court could thus "posit more than one plausible theory which would result in damages exceeding $5 million."

***Magnum Minerals, L.L.C. v. Homeland Insurance Co. of New York*, No. 2:13-CV-103-J, 2013 WL 4766707 (N.D. Tex. Sept. 5, 2013).**

Judge Mary Lou Robinson of the U.S. District Court for the Northern District of Texas denied the plaintiffs' motion to remand under CAFA in a class action involving claims against Texas insurers for violation of the Texas Insurance Code. The parties agreed that minimal diversity existed but disagreed as to whether the defendants could show that there was more than $5 million in controversy. The court considered the value of the injunctive relief sought by the plaintiffs, noting that the plaintiffs had placed the validity of the class members' insurance contracts in question and that the face value of those policies was the proper measure of the amount in controversy. Because the case involved 117 insureds, and because each policy had a liability limit of at least $1 million, the court concluded that the defendants had shown by a preponderance of the evidence that there was more than $5 million in controversy. The court also concluded that CAFA's "local controversy" exception did not apply, because the plaintiffs failed to show that they sought "significant relief" from any of the Texas defendants.

Decisions Granting Motion to Remand

***Vodenichar v. Halcon Energy Properties, Inc.*, No. 13-2812, 2013 WL 4268840 (3d Cir. Aug. 16, 2013).**

Landowners filed a putative class action against an oil and gas company and an energy company, alleging breach of lease. The defendants removed, and Judge Arthur J. Schwab of the U.S. District Court for the Western District of Pennsylvania remanded to state court pursuant to CAFA. Defendants appealed, and the U.S. Court of Appeals for the Third Circuit (Rendell, Smith and Schwartz, JJ.) affirmed the remand based on CAFA's "local controversy" exception (disagreeing with the district court that the "home-state" exception applied). The court found that at least two-thirds of the class members were citizens of Pennsylvania, there was a local defendant whose conduct formed a significant basis of the plaintiffs' claims, the principal injuries occurred in Pennsylvania, and — contrary to the district court — the subsequent putative class action complaint filed by plaintiffs did not amount to an "other class action" under CAFA, but was essentially the same case with the same named plaintiffs and counsel.

***Romo v. Teva Pharmaceuticals USA, Inc.*, 731 F.3d 918 (9th Cir. 2013).**

The plaintiffs petitioned the California Judicial Council to establish a coordinated proceeding for more than 40 cases alleging injuries related to the ingestion of the pain reliever propoxyphene pending in California state court, pursuant to California Code of Civil Procedure Section 404. After the plaintiffs' petition for coordination was filed, Teva removed the case to federal district court under CAFA's mass action provision. The U.S. Court of Appeals for the Ninth Circuit (Rawlinson and Lemelle, JJ.; Gould, J. dissenting) affirmed remand. Writing for the majority, Judge Johnnie B. Rawlinson concluded that CAFA jurisdiction must be narrowly construed and that "the plaintiffs' petition for coordination stopped far short of proposing a joint trial." Judge Rawlinson also distinguished the U.S. Court of Appeals for the Seventh Circuit's decision in *In re Abbott Laboratories, Inc.*, 698 F.3d 568 (7th Cir. 2012), which held that a petition for consolidation gave rise to CAFA mass action jurisdiction, because *Abbott* involved consolidation, not coordination, and the plaintiffs there expressly requested consolidation through trial. Judge Ronald Murray Gould dissented on the ground that plaintiffs had "implicitly proposed a joint trial, bringing their cases within CAFA's mass action provision" and noted his "regret that the majority here misinterprets CAFA and does so in a way that creates a circuit split, for practical purposes, with the Seventh Circuit's decision in *Abbott*."

***Hochstrasser v. Broadspire Services, Inc.*, No. 5:13CV53, 2013 U.S. Dist. LEXIS 145549 (N.D. W. Va. Oct. 8, 2013).**

Judge Frederick P. Stamp, Jr. of the U.S. District Court for the Northern District of West Virginia remanded a putative class action brought by the plaintiff on behalf of West Virginia residents whose confidential information, unrelated to workers' compensation investigations, was unlawfully accessed. The plaintiff asserted a number of claims against the defendants, which included her employer, for, *inter alia*, invasion of privacy, negligence and outrageous conduct. The defendants removed the case to federal court under CAFA, and the plaintiff moved to remand. The court granted the plaintiff's motion to remand, finding that defendants had not established by a "preponderance of the evidence" that the $5 million jurisdictional requirement had been satisfied. The court initially recognized that the complaint's stipulation seeking to limit the amount-in-controversy to below $5 million was to be given no effect in light of the Supreme Court's decision in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013). Nonetheless, the court still remanded the case, reasoning that neither the complaint, nor any argument by the defendants, demonstrated that the jurisdictional minimum had been satisfied. Although the defendants pointed to a couple of cases where a significant amount of damages had been awarded in privacy cases against employers, the court found those cases distinguishable on the ground that the alleged wrongdoing in those cases was far more serious than what was alleged in the present case.

***Thomack v. West Virginia University Hospitals, Inc.*, No. 1:13CV31, 2013 U.S. Dist. LEXIS 143379 (N.D. W. Va. Oct. 3, 2013).**

Judge Frederick P. Stamp, Jr. of the U.S. District Court for the Northern District of West Virginia remanded a purported class action brought by the plaintiff on behalf of former patients who, within the last five years, requested medical records from the defendant hospital and paid fees charged for those records. The gravamen of the lawsuit was that the defendant violated West Virginia law by charging class members 40 cents per page plus a $10 search, even though class members received a compact disc, rather than a paper copy, which was worth less than $1. The defendant removed the case to federal court under CAFA, and the plaintiff moved to remand. The court granted the motion to remand, concluding that the defendant had not proven by a "preponderance of the evidence" that the claims at issue satisfied the amount-in-controversy requirement. As part of its analysis, the court highlighted that the plaintiff set forth a specific damages amount for her individual claims. In other words, the present case was distinguishable from other cases, where the plaintiffs have specified an average damages amount, or a maximum damages amount. Because the "plaintiff . . . made no claim as to an average damages amount nor as to a maximum amount of damages sought per class member . . . the defendant's assertion that the plaintiff's damages amount can be used for each class member provides only a 'mere possibility that the requirement could be met.'"

***Covert v. Automotive Credit Corp.*, No. JKB-13-1928, 2013 U.S. Dist. LEXIS 130950 (D. Md. Sept. 12, 2013).**

Judge James K. Bredar of the U.S. District Court for the District of Maryland granted a motion to remand in a case involving a putative class action arising out of defendant company's repossession of the plaintiff's car. The plaintiff asserted breach-of-contract and other claims against defendant, alleging that it failed to send defaulting borrowers adequate possession notices and unlawfully collected interest and other charges in violation of Maryland law. The defendant removed the case to federal court under CAFA and 28 U.S.C. § 1332(a), but failed to allege that the number of class members exceeded 100. The plaintiff filed a motion to remand, which the court granted. With respect to the CAFA basis for removal, the court explained that the defendant's failure to allege the necessary jurisdic-

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tional facts for removal in its notice was fatal. "[A]llowing [d]efendant to amend its notice," the court reasoned, "would allow it to insert an allegation that is entirely missing from the notice." The court therefore declined to permit the defendant leave to amend its notice of removal and remanded the case.

***Halliburton v. Johnson & Johnson*, Nos. CIV-13-832-L, CIV-13-833-L, CIV-13-834-L, CIV-13-836-L, CIV-13-838-L, CIV-13-839-L, CIV-13-840-L, CIV-13-841-L, CIV-13-844-L, CIV-13-845-L, CIV-13-846-L, 2013 WL 5719016 (W.D. Okla. Oct. 18, 2013), pet. for permission to appeal pending.**

The plaintiff, an Oklahoma resident, and 47 other named plaintiffs filed an action in Oklahoma state court alleging claims against Johnson & Johnson and Ethicon, Inc., both New Jersey companies engaged in the business of designing, manufacturing and distributing pelvic mesh products. Eleven other actions were filed against the same defendants in the same state court within the next two days, alleging the same claims. Every case had at least one Oklahoma plaintiff and one or more plaintiffs who were citizens of New Jersey, eliminating federal diversity jurisdiction. The defendants nonetheless removed all 12 cases to federal court, arguing that (i) the New Jersey plaintiffs should be disregarded because they were fraudulently misjoined to defeat diversity jurisdiction and (ii) the cases should be treated in the aggregate under CAFA's mass action provision because once aggregated, there would be more than 100 plaintiffs. The plaintiffs in 11 of the 12 cases moved to remand. Judge Tim Leonard of the U.S. District Court for the Western District of Oklahoma declined to adopt the "severely criticized" procedural misjoinder doctrine and noted that "[i]f plaintiffs' claims are in fact improperly joined under Oklahoma law, the proper course of conduct for defendants would have been to file a motion to sever in state court and then remove the diverse claims, if any." Judge Leonard then considered whether 11 separate lawsuits could be treated as one action brought by more than 100 plaintiffs asserting the same claims, for purposes of removal under the CAFA mass action provision. Citing authority from the U.S. Courts of Appeal for the Third, Seventh, Ninth and Eleventh Circuits holding "that defendants cannot manufacture CAFA jurisdiction by asking a federal court to aggregate separate cases with fewer than 100 plaintiffs each," Judge Leonard granted the motions to remand, noting that the law permits the plaintiffs to "fashion th[eir] complaints in a manner that does not invoke federal jurisdiction."

***Walker v. Hunter Donaldson LLC*, No. C13-5412 BHS, 2013 WL 5200073 (W.D. Wash. Sept. 16, 2013), pet. for permission to appeal pending.**

The plaintiffs filed a putative class action against Washington corporation MultiCare Health Systems and other defendants, alleging that they fraudulently processed medical liens after the plaintiffs received health care services from defendants following severe injuries caused by third parties. The defendants removed the case to federal court under CAFA, and the plaintiffs moved to remand under the "local controversy" exception to CAFA. Judge Benjamin H. Settle of the U.S. District Court for the Western District of Washington agreed, finding that the conduct of MultiCare, a Washington company, formed "a significant basis for the claims asserted by the proposed plaintiff class." The court reasoned that while the class action complaint was littered with allegations specific to non-local defendants — i.e., that certain of them erred in preparing, recording and assisting with the recovery on plaintiffs' liens — virtually all of the allegations described some MultiCare involvement. Further, the claims involved questions of Washington state law. Accordingly, the court concluded that "the 'controversy is at its core a local one'" and remanded the case to state court.

***Houchens v. Government Employees Insurance Co.*, No. 3:13-CV-00214-CRS, 2013 WL 5740131 (W.D. Ky. Oct. 22, 2013), pet. for permission to appeal pending.**

Judge Charles R. Simpson III of the U.S. District Court for the Western District of Kentucky remanded a putative class action claiming that GEICO allegedly denied policyholders' claims for benefits based upon an "independent medical review" when (according to plaintiffs) GEICO was instead required to petition a court for an "independent medical examination." The court reasoned that GEICO did not demonstrate that CAFA's $5 million threshold was exceeded because the injunctive relief sought was limited to $1.94 million, based on the number of class members and policy limits on benefits when valued from the putative class's perspective, and that alleged compensatory damages should not be added to that amount, as those amounts were "effectively subsume[d]" by the value of the injunctive relief sought. Consequently, even if the putative class recovered the attorney's fees requested, it would not bring the matter in controversy above the $5 million threshold.

***McJunkins Development LLC v. JP Morgan Chase Bank, N.A.*, No. 1:13 CV 1251, 2013 WL 4508422 (N.D. Ohio Aug. 22, 2013).**

Judge Donald C. Nugent of the U.S. District Court for the Northern District of Ohio remanded a putative class action claiming that JP Morgan had initiated foreclosures without legal standing under Ohio state law. The original complaint had been brought on behalf of purchasers of property but was ultimately amended to add borrowers as well. The defendant bank sought to remove the case following the plaintiffs' amendment; however, the district court determined that removal was untimely. The court sided with the plaintiffs, who had argued that the amended complaint did not create a "new action" sufficient to trigger a renewed opportunity to remove under CAFA because it involved the same factual allegations and claims as the original complaint. In so doing, the district court relied on a line of cases from the Seventh Circuit holding that changes to a class definition do not commence a new action unless they alter the substance of the original allegations. Because the "new class just add[ed] people who were injured by the same conduct that allegedly injured the initial class," it did not create a new 30-day removal period under CAFA. The court therefore remanded the case to state court.

***Bass v. Alexander*, No. 4:13CV00365 SWW, 2013 WL 5530355 (E.D. Ark. Oct. 7, 2013), pet. for permission to appeal denied.**

Judge Susan Webber Wright of the U.S. District Court for the Eastern District of Arkansas found that the district court lacked jurisdiction under CAFA and granted the plaintiffs' motion to remand in a class action brought by Arkansas citizens against Arkansas surplus lines brokers for violation of Arkansas law. While the case was pending in state court, certain underwriters at Lloyd's of London — a non-Arkansas citizen — filed a motion to intervene in the action. The defendants then filed a notice of removal to federal court. In support of removal, the defendants argued that Rule 19 of the Federal Rules of Civil Procedure mandated joinder of certain underwriters and required the court to consider the intervenors' citizenship in determining whether CAFA's minimal diversity requirement was met. The court rejected this argument, reasoning that "[a] plaintiff is the master of the complaint, and a defendant cannot employ Rule 19 as a basis for removal or to compel a plaintiff to assert a claim against an unnamed defendant." Moreover, the court found no authority for extending the fraudulent joinder doctrine — which involves joinder of a party to defeat diversity — to claims of "fraudulent non-joinder." Thus, because certain underwriters were neither named nor joined as defendants at the time of removal, the court concluded that the defendants did not establish minimal diversity under CAFA.

***Cutrone v. Mortgage Electronic Registration Systems, Inc.*, No. 13-cv-3075 (ENV)(VMS), 2013 WL 5960827 (E.D.N.Y. Nov. 6, 2013).**

Judge Eric N. Vitaliano of the U.S. District Court for the Eastern District of New York granted the plaintiffs' motion for remand following removal, holding that while CAFA's amount-in-controversy requirement had likely been met, the defendant's notice of removal was untimely. The defendant provided services related to financing and refinancing mortgages. The defendant admittedly filed its notice of removal more than 30 days after the complaint was filed but argued that the delay resulted from its inability to discern from the face of the plaintiffs' complaint whether CAFA's $5 million amount-in-controversy requirement was met, and that the "removal clock was tolled" pending the plaintiffs' service of papers rendering that amount explicit. The court noted that when the amount in controversy is unclear from the face of the complaint, a removing defendant need only show a "reasonable probability" that the amount in controversy could be met. The court observed that while the complaint did not specify the amount of damages sought, it did state that the plaintiffs were charged a second mortgage tax of $6,835 and that the proposed class would contain "hundreds, and likely thousands" of people and entities. The court concluded that such information "would arguably give rise to an inference that there was a reasonable probability that the amount in controversy exceeded $5 million," and that the defendant was not permitted to "dither" until the "magic words" relating to the amount in controversy appeared in a later pleading.

***Payton v. Entergy Corp.*, No. 12-2452, 2013 WL 5722712 (E.D. La. Oct. 21, 2013), pet. for permission to appeal denied.**

Judge Jane Triche Milazzo of the U.S. District Court for the Eastern District of Louisiana granted the plaintiffs' motion to remand under CAFA in a putative class action brought against two Louisiana utility service providers alleging that they breached their duties to ensure a timely restoration of power to their customers. The court concluded that remand was justified under the local controversy and home-state exceptions to CAFA, both of which required that at least two-thirds of the class members were Louisiana citizens. "Given that the proposed class exceeds 500,000 customers," the court noted that it was "impractical for Plaintiffs to prove the citizenship of at least 330,000 individuals and corporations." Thus, the court admitted expert evidence, based on surveys of a representative sample of customers, that more than 90 percent of the listed customers were Louisiana citizens. The court rejected the defendants' objections to the design and administration of the surveys. Based upon this evidence, the court found that the plaintiffs had proven by a preponderance of the evidence that more than two-thirds of the proposed class members were Louisiana citizens.

Other Rulings — Courts Finding No CAFA Jurisdiction

***Park v. Webloyalty.com, Inc.*, No. 12cv1380-LAB (JMA), 2013 WL 4711159 (S.D. Cal. Aug. 30, 2013), pet. for permission to appeal denied.**

Judge Larry Alan Burns of the U.S. District Court for the Southern District of California dismissed a putative class action asserting claims under California and Connecticut consumer protection laws alleging that Webloyalty.com misled class members into allowing charges to be placed on their credit cards. The complaint alleged that the plaintiff was a California citizen and that Webloyalty.com's principal place of business was in California, but only that the nationwide class members "are citizens of a state different from Webloyalty." While the plaintiff's complaint sought certification of a nationwide class, it failed to identify the citizenship of anyone other than the named plaintiff. Because the complaint did not specify who the putative class members are — let alone indicate their state of citizenship — the court concluded that minimal diversity of citizenship under CAFA was lacking. Although the court conceded that it "seems likely [plaintiff] can plead facts to establish diversity, it is for him to do so, not the Court," and thus the plaintiff's "failure to plead facts establishing diversity requires that the complaint be dismissed without regard to the merits."

***Kryachkov v. Mooser Moto, LLC*, No. 5:13CV73-RLV, 2013 WL 6058478 (W.D.N.C. Nov. 14, 2013).**

Judge Richard L. Voorhees of the U.S. District Court for the Western District of North Carolina granted the defendants' motion to dismiss a putative class action, finding that there was no basis for jurisdiction. The plaintiff alleged fraudulent and negligent misrepresentation and violation of the Georgia Fair Business Practices Act, alleging that the defendants advertised low prices and discounts to lure in consumers to purchase damaged or defective vehicles. The plaintiff brought suit on behalf of "[a]ll purchasers of any vehicle, accessory, or any other item from" the defendants. The court dismissed the case, finding that the case did not involve any questions of federal law, the amount-in-controversy requirement for federal diversity jurisdiction was not satisfied and jurisdiction under CAFA was lacking. With respect to CAFA, the court reasoned that jurisdiction was lacking because the plaintiff did not specify the number of members of the putative class or the amount of damages being sought. In other words, the plaintiff's complaint failed to include any information bearing on the numerosity and amount-in-controversy requirements under CAFA. In addition, the court determined that the local-controversy exception to CAFA applied because no similar suits against the defendants had been filed in the prior three years. For all of these reasons, the court dismissed the case for lack of jurisdiction.

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