The Class Action Chronicle

Skadden

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

The Fall 2014 edition focuses on rulings issued between May 16, 2014, and August 15, 2014, and begins with a short article regarding some of the challenges posed by recent class action jurisprudence.

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4 Times Square | New York, NY 10036

THE SEVENTH CIRCUIT'S PROBLEMATIC APPROACH TO OVERBROAD CONSUMER CLASSES

In a series of decisions over the past four years, the U.S. Court of Appeals for the Seventh Circuit has signaled its approval of class treatment in consumer-protection cases alleging product defects notwithstanding significant evidence that a majority of class members have never experienced any problem with their products. In particular, as discussed in the lead article of the Fall 2013 edition of *The Class Action Chronicle*, the Seventh Circuit approved class treatment in *Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010) (*per curiam*), a case involving allegedly defective windows, and in *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014), a case involving allegedly defective washing machines, despite arguments by the defendants in both cases that the claimed defect would not manifest in most class members' products.

We noted our concern in that article that the Seventh Circuit's approach to these cases — which calls for an "issues" class trial on the question of defect that is ostensibly to be followed (if necessary) by individual class-member trials on causation and injury — would spawn trials of dubious benefit. Class certification creates pressure on the defendant to settle that is unrelated to the merits of the suit, even if very few are plausibly injured, while the "issues" approach means that the plaintiffs and the class will not have won anything at the end of the class phase even if they prevail on the merits. These problems are magnified in cases, like *Pella* and *Butler*, in which the claimed defect has manifested for only a small number of class members because few putative class members would have claims that could actually qualify for compensation. And despite an inclination to settle on both sides in such cases, even settlement is problematic due to the inherently flawed structure of a class action that advances a theory of injury that affects only a small minority of the class. Plaintiffs' attorneys will be driven to collect

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a fee sufficient to cover their investment in the case, but because the vast majority of consumers are generally happy with their purchases, the settling parties will have difficulty in attracting enough interest in the settlement to justify such a fee.

This quarter, the problems of the Seventh Circuit's approach were underscored in *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014). *Eubank* was the sequel to the court's 2010 decision in *Pella v. Saltzman* ordering class treatment in a case alleging that certain windows contained a defect that sometimes caused leaking. Employing its issues-class approach, the Seventh Circuit determined in *Pella* that class certification was appropriate with respect to one "common issue": "whether the windows suffer from a single, inherent design defect leading to wood rot," while the issue of damages could be dealt with in individual follow-on proceedings. *Pella v. Saltzman*, 606 F.3d at 393. The case was remanded for further proceedings, which led to settlement talks.

When the case returned to the Seventh Circuit this June, the court found the resulting settlement to be "inequitable — even scandalous." *Eubank*, 753 F.3d at 721. A principal object of the court's ire was the fee of $11 million. While class counsel argued that the settlement was worth $90 million to the class, the Seventh Circuit noted that Pella itself only estimated that the class would recover $22.5 million. *Id.* at 724. As the Seventh Circuit explained, "the settlement did not specify an amount of money to be received by the class members as distinct from class counsel. Rather, it specified a procedure by which class members could claim damages" — a procedure that was "stacked against the class." *Id.* at 723-24. In particular, class members could submit a claim directly to Pella with a maximum award of $750, or submit a claim to arbitration with a $6,000 damages cap. Under the arbitration approach, Pella had the right to assert various defenses that could result in certain class members receiving zero compensation. *Id.* at 724-25. The Seventh Circuit invalidated the settlement as one-sided.[1]

Instead of recognizing in the wake of *Pella* that the problem with overbroad class actions is that so few class members are actually injured, the Seventh Circuit appeared to embrace overbroad class actions once again a month later in another putative product class action: *In re IKO Roofing Shingle Products Liability Litigation*, No. 14-1532, 2014 WL 2958615 (7th Cir. July 2, 2014). In that case, consumers brought a putative class action on behalf of purchasers of roofing shingles that were allegedly deceptively marketed. The district court had ruled that the differences in consumers' experiences with the tiles prevented class certification under *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In particular, the district court read both of those Supreme Court cases as requiring "proof that the plaintiffs will experience a common damage and that their claimed damages are not disparate." *IKO Roofing*, 2014 WL 2958615, at *3 (internal quotation marks and citation omitted). On appeal, the Seventh Circuit reversed, holding that it could not affirm the district court's reading of *Comcast* "without overruling *Pella*." *Id.* And the court was not inclined to do that — even though it acknowledged the "problems encountered in an effort to settle" that case. *Id.* at *4. Instead, the court recommended that the *IKO* plaintiffs (and presumably plaintiffs in future cases) might prefer to seek uniform damages on behalf of the entire class on the theory that undisclosed defects make a product worth less than the class members paid for it, even absent manifestation. *Id.* According to the Seventh Circuit, as applied to the *IKO* case, such damages could "reflect the difference in market price between a tile as represented and a tile that does not satisfy" certain industry standards as represented. *Id.* This approach seems at odds with the Seventh Circuit's former understanding that "recoveries by those whose products function properly mean excess compensation," *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002), but the court did not engage that issue. Instead, its decision seemed to focus more on smoothing the road for consumer class actions. *See IKO Roofing*, 2014 WL 2958615, at *3 (expressing concern that a stricter approach would make "class actions about consumer products ... impossible").

The Seventh Circuit's ruling in *IKO* appears to trade one problem for another. The uniform-injury approach would do away with the need for issues classes and might solve the "problem" of generating settlement values that justify significant fees, but it would do so at the expense of contravening substantive law, at least in "most" states, which do not recognize such "overpayment" theories of injury based on defects that do not actually manifest in most products. *See Bridgestone/Firestone*, 288 F.3d at 1017 ("[M]ost states would not entertain the sort of theory that plaintiffs press."). It would also give rise to a potential conflict between the few class members with real defects on the one hand and the vast majority who would stand to receive a gratuitous discount for perfectly functioning products on the other. Presumably, any owner of actually defective roofing tiles would like to receive replacement value for those tiles rather than get some fraction of his or her money back for whatever "difference in market price" there is — if any — between a tile that does meet an indus-

[1] The Seventh Circuit threw out the settlement on a number of other grounds, including that lead counsel was the named plaintiff's son-in-law and was also involved in disciplinary proceedings with the Illinois Attorney Registration and Disciplinary Commission at the time the settlement was negotiated.

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try standard and one that does not. In short, the Seventh Circuit's proposed solution to its *Pella* problem appears to ask the handful of actually injured consumers to accept under-compensation in order to facilitate certification of a class and over-compensation for uninjured class members.

The evolving justifications for class treatment of overbroad consumer classes in the Seventh Circuit suggest a policy preference — more consumer class actions — that is still in search of a coherent legal theory. Notably, other courts have taken a more defense-friendly view, shutting down cases that present individualized damages issues and potential overbreadth problems.[2] Thus, although the Supreme Court has not yet taken up the question of overbreadth as presented in these cases, it seems likely that the issue will eventually return to it in some fashion.

[2] *See, e.g., Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 F. App'x 782, 791 (11th Cir. 2014) (holding in light of *Comcast* that district court abused its discretion in certifying class of electronic bingo players where damages were individualized); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013) (vacating grant of class certification under *Comcast* where district court failed to recognize that plaintiffs' damages model yielded the same results for shippers with legacy contracts as it did for others, even though those shippers could not have suffered any injuries).

CLASS CERTIFICATION DECISIONS

Decisions Granting Motions to Strike

***Hooks v. Landmark Industries*, No. H-12-0173, 2014 WL 2981229 (S.D. Tex. July 1, 2014), appeal pending.**

Judge Sim Lake of the U.S. District Court for the Southern District of Texas dismissed a putative class action challenging terminal fees charged by ATM machines and alleging violations of the Electronic Fund Transfer Act. The court held that the named plaintiff's claim became moot after he rejected a Rule 68 offer of judgment. In so holding, the court specifically considered whether the "relation-back" doctrine applied to the plaintiff's damages claims. That doctrine provides that, in some circumstances, the certification of a class will be deemed to relate back to the filing of a complaint, thus preserving the class claims even after the named plaintiff's claims become moot. In particular, the plaintiff contended that the defendant's use of an offer of judgment to "pick off" a named plaintiff before class certification warranted the application of the doctrine. The court rejected the plaintiff's argument, holding that the plaintiff's damages claims did not lend themselves to the application of the relation-back doctrine.

***Becnel v. Mercedes-Benz USA, LLC*, No. 14-0003, 2014 WL 2506506 (E.D. La. June 3, 2014).**

Judge Carl J. Barbier of the U.S. District Court for the Eastern District of Louisiana struck the plaintiff's class allegations in a case brought by a putative class of Mercedes-Benz purchasers against Mercedes-Benz, alleging that the vehicle's suspension system was defective and asserting claims for negligence, strict liability, breach of implied warranty, fraud and violation of the Louisiana Unfair Trade Practice Act. The court held that, because the plaintiff failed to provide the court with any kind of survey of the various state laws that would apply to the claims, the court could not consider the predominance or superiority elements of Rule 23. The court also noted potential manageability issues in litigating a class action that would conceivably involve drivers in, and the laws of, every state in the nation.

Decisions Denying Motions to Strike/ Dismiss Class Claims

***Galoski v. Stanley Black & Decker, Inc.*, No. 1:14 CV 553, 2014 U.S. Dist. LEXIS 113945 (N.D. Ohio Aug. 14, 2014).**

Judge Donald C. Nugent of the U.S. District Court for the Northern District of Ohio denied the defendant's motion to strike class allegations in a putative class action alleging that the defendant knowingly marketed and sold electronic "pest repellers" that do not repel pests. The court rejected the defendant's argument that the plaintiff only had standing to bring a class action on behalf of purchasers who bought the same model number pest repeller, reasoning that this argument should be raised as a question of typicality at the class certification stage, and that it was not a proper basis for a motion to dismiss or to strike class allegations. The court explained that the defendant had not demonstrated that the class allegations should be stricken because the plaintiff's allegations, if true, could be the basis for certifying a class action.

***Wagner v. CLC Resorts & Developments, Inc.*, No. 6:14-cv-281-Orl-31GJK, 2014 WL 3809130 (M.D. Fla. Aug. 1, 2014).**

Judge Gregory A. Presnell of the U.S. District Court for the Middle District of Florida denied the defendants' CLC Resorts and Developments, Inc. (CLC), Surrey Vacation Reports, Inc. (Surrey) and Passport Holidays, Inc. (Passport) motions to dismiss individual and class action claims brought against them for violations of the

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Telephone Consumer Protection Act (TCPA). The court held that the plaintiff had sufficiently alleged violations of TCPA Sections 227(b) and 227(c)(5) that stemmed from multiple, unsolicited calls placed to the plaintiff by Passport using an automatic telephone dial system as part of a contract with CLC and Surrey to market their respective resort and timeshare offers to potential customers, and denied the defendants' motions to dismiss these claims. The defendants also brought a motion to dismiss the plaintiff's complaint as an attempt to "improperly certify individualized claims for monetary relief" under Rule 23(b)(2). In denying the defendants' motion to dismiss as premature, the court stated that dismissal of class claims would be an "*extreme* remedy," appropriate only where the defendants could show that class certification was impossible. Because the plaintiff's allegations met the threshold for asserting a class action, the defendants' arguments were "better suited as challenges to a motion for class certification," rather than as the basis for a motion to dismiss.

Decisions Rejecting/Denying Class Certification

***Lakeland Regional Medical Center, Inc. v. Astellas US, LLC*, No. 13-12709, 2014 WL 3973390 (11th Cir. Aug. 15, 2014).**

A unanimous panel of the U.S. Court of Appeals for the Eleventh Circuit (Anderson, J., Ebel, circuit judge sitting by designation, and Ungaro, district judge sitting by designation) affirmed the district court's decision denying certification of a putative antitrust class action for purposes of declaratory and injunctive relief against the manufacturer of an unpatented pharmaceutical product. The appellant argued that the appellees violated Section 1 of the Sherman Act by unlawfully tying the patented right to perform a cardiac test (a myocardial perfusion imaging, MPI) to the purchase of their unpatented pharmaceutical product for use during the test, a process that allegedly allowed the manufacturer to charge 450 percent more for its product than other chemically identical products. The district court declined to certify a class of all health care providers who had purchased the product during a four-year period, finding that the appellant was not a viable class representative under the direct purchaser rule because the appellant had purchased the product from independent pharmaceutical distributors, and because the appellant's requests for declaratory and injunctive relief would soon be moot insofar as the FDA had approved a generic version of the product for use during MPIs. The Eleventh Circuit agreed that the direct purchaser rule barred the appellant's claim for treble damages under the Sherman Act, holding that the distributors, the actual initial purchasers, were the parties who suffered damages in the form of overcharging as a result of the alleged unlawful tying. The Eleventh Circuit also held that, *inter alia*, the district court did not abuse its discretion in refusing to certify the class because the appellant did not satisfy its burden of "affirmatively demonstrat[ing]" that class certification was appropriate under Rule 23(b)(2) insofar as it failed to identify exactly what injunctive or declaratory relief it was seeking.

***Arlington Video Productions, Inc. v. Fifth Third Bancorp*, No. 11-4077, 2014 WL 2724123 (6th Cir. June 17, 2014).**

After the U.S. Supreme Court vacated the U.S. Court of Appeals for the Sixth Circuit's prior reversal of a district court's denial of class certification for further consideration in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the Sixth Circuit (Rogers and Stranch, JJ., and Pearson, district judge sitting by designation) directed the district court to decide in the first instance whether the plaintiff had satisfied the Rule 23 prerequisites in light of the developments in class action law since the district court's underlying 2010 decision. The Sixth Circuit also clarified that although its earlier vacated opinion had offered reasons why the plaintiff may be able to satisfy the Rule 23 prerequisites, the order was not intended to certify the class for the first time on appeal, but rather "to provide guidance to the district court in making its decision on remand." (The Sixth Circuit also reversed the grant of summary judgment in favor of the defendant, holding that the district court had misconstrued the contractual obligations at issue.)

***Dunford v. American DataBank, LLC*, No. C 13-03829 WHA, 2014 WL 3956774 (N.D. Cal. Aug. 12, 2014).**

Judge William Alsup of the U.S. District Court for the Northern District of California refused to certify two classes seeking statutory penalties for willful violations of the Fair Credit Reporting Act relating to the provision of credit reports to community colleges for evaluating admission to clinical internships. As to the first class, which alleged wrongful disclosure, the court found that the lead plaintiff could not adequately represent the class because she had a long criminal history, which damaged her credibility as a witness and undermined her inability to satisfy her fiduciary duties to the class. The court also found that the second proposed class, which "would include victims of reports including prohibited bankruptcy data, civil suits and judgments, tax liens, accounts placed for collection and so on" was overbroad because the named plaintiff's "grievance has nothing to do with tax liens, civil cases, bankruptcy and so on." The court refused to "cut back th[at] class" because "Rule 23 motions are not a negotiation in which counsel ask for the moon while being willing to accept whatever is reasonable" as "[c]ounsel should be reasonable from the start."

***Southwell v. Mortgage Investors Corp. of Ohio*, No. C13-1289 MJP, 2014 WL 3956699 (W.D. Wash. Aug. 12, 2014).**

Chief Judge Marsha J. Pechman of the U.S. District Court for the Western District of Washington refused to certify three classes of recipients of telemarketing calls alleging violations of the Telephone Consumer Protection Act (TCPA) and Washington Telephone Solicitation Act. Judge Pechman found the plaintiffs had failed to establish numerosity, rejecting the evidence of the plaintiffs' expert because he had no expertise in the TCPA and essentially did what the plaintiffs told him to do with little vigor. Moreover, the expert did not account for such crucial factors as whether the owners of the telephone numbers in the data sets given to him by the plaintiffs had later consented to be called. "Absent this information, the Court [was] unable to say how many of the calls tabulated in [the expert's] calculations actually violated the TCPA." Finally, the court also found that for at least two of the proposed classes, issues of individualized consent would preclude certification under the predominance requirement of Rule 23(b)(3).

***Daniel F. v. Blue Shield of California*, No. C 09-2037 PJH, 2014 WL 3907150 (N.D. Cal. Aug. 11, 2014).**

Judge Phyllis J. Hamilton of the U.S. District Court for the Northern District of California refused to certify a class of insureds who were allegedly denied coverage for mental treatment in violation of the Employee Retirement Income Security Act (ERISA). The court held that the putative class was not adequately defined or clearly ascertainable. For example, the court found that it was unclear whether the class was limited to adolescents and children or whether it was limited to those who had "serious mental illness." Moreover, the class included members who were not similarly situated, as it included both "beneficiaries" who received the mental-health treatment and the "parents of the beneficiaries" who were financially responsible for those treatments. In so holding, the court rejected the plaintiffs' claim that the class could be ascertained from Blue Shield's records, explaining that Blue Shield would be required to conduct a series of individualized inquiries to determine whether ERISA governed each beneficiary's plan. Further, the court held that the plaintiffs had failed to establish that common issues predominated with respect to damages because there was no uniform method by which to calculate the benefits "due" to each claimant under his or her insurance plan. Thus, calculating damages would require a "manual review of each claimant's records, as well as discovery on what each claimant actually paid, what he/she still owes, the nature of the services provided" and other individualized facts.

***Herskowitz v. Apple, Inc.*, No. 12-CV-02131-LHK, 2014 WL 3919900 (N.D. Cal. Aug. 7, 2014).**

Judge Lucy H. Koh of the U.S. District Court for the Northern District of California denied certification to a putative class of iTunes customers alleging breach of contract and violation of California's consumer-protection statutes based on Apple's purportedly routine practice of charging consumers more than once for the same product. The court found that it would be required to examine "the factual circumstances of each customer's transaction" to determine whether each customer intended to purchase the product a second time — or, if not, whether the circumstances were such that a reasonable person may have believed "that the customer assented to a second purchase." In so doing, the court rejected the plaintiffs' proposal that it employ a "presumption of non-assent" for customers who downloaded the same product within a 15-minute timespan, explaining that such a presumption had no legal basis, was "deeply flawed" and would, in any event, require individualized inquiries because Apple could introduce evidence to rebut the presumption. Finally, the court refused to certify a Rule 23(b)(2) class seeking to enjoin Apple from enforcing its purported "no refund" policy because there was no evidence of a uniform refund policy or practice to enjoin.

***Rapp v. Green Tree Servicing, LLC*, No. 12-CV-2496 (PJS/FLN), 2014 WL 3846032 (D. Minn. Aug. 5, 2014).**

Judge Patrick J. Schiltz of the U.S. District Court for the District of Minnesota denied class certification in a case brought by a nationwide class of borrowers who entered into mortgage contracts with the defendant and who were required to pay for force-placed insurance. The plaintiff alleged that the defendant breached its mortgage contracts and was unjustly enriched by charging an amount in excess of the actual cost of the force-placed insurance that the defendant purchased on the plaintiff's behalf. The court concluded that "legal questions individual to class members would substantially predominate over legal questions common to the class" because each class member's claims would be governed by the law of the jurisdiction in which the mortgaged property was located. Thus, certification of a nationwide class would require application of the laws of all 50 states. The court further concluded that the laws of each state differed substantially on many questions, thus defeating the predominance requirement of Rule 23.

***Sandusky Wellness Center LLC v. Medtox Scientific, Inc.*, No. 12-2066(DSD/SER), 2014 WL 3846037 (D. Minn. Aug. 5, 2014).**

Judge David S. Doty of the U.S. District Court for the District of Minnesota denied class certification in a case brought under the Telephone Consumer Protection Act

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arising from unsolicited facsimile advertisements. The court observed that the proposed class definition centered on individuals who were sent faxes from the defendant. That terminology was problematic, however, because the plaintiff acknowledged that the recipient of each fax was not readily apparent. Thus, to determine the recipient of each fax, "the parties and the court would need to delve into the unique circumstances of each fax transmission." The court noted that the fax number was "just the starting point of the analysis" and required further exploration of "who owned, operated and used the fax machine associated with the fax number." Because it would take individualized discovery to ascertain the members of the class, the court concluded that class certification was improper.

***In re Clorox Consumer Litigation*, No. 12-00280 SC, 2014 WL 3728469 (N.D. Cal. July 28, 2014).**

The plaintiffs sought to certify five subclasses of purchasers in California, Florida, New Jersey, New York and Texas in connection with alleged false marketing and advertising of cat litter. Judge Samuel Conti of the U.S. District Court for the Northern District of California held that the class was unascertainable, adopting the reasoning of *Carrera v. Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013), and concluding that the plaintiffs had not produced sufficient evidence of receipts from purchases or retailer records to identify class members, and "[a]ffidavits from consumers alone are insufficient to identify members of the class." Thus, the court found that "there is no administratively feasible method of determining membership for the vast majority of potential members of Plaintiffs' proposed sub-classes," and denied the motion for class certification on that ground alone. Judge Conti also held that individual issues predominated, precluding certification of a class under Rule 23(b)(3) because the plaintiffs had failed to show that most members of the proposed classes saw, much less relied upon, the allegedly misleading claims. The court held that the television advertisements relied on in the amended complaint only reached a limited audience, and there was insufficient uniformity in the representations on the product packaging. Thus, "[r]egardless of the generosity of the various states' causation or reliance requirements, Plaintiffs simply cannot demonstrate that the proposed classes were uniformly exposed to the allegedly misleading messages."

***Williamson v. Prince George's County of Maryland*, No. DKC-14-1592, 2014 WL 3729818 (D. Md. July 25, 2014).**

The plaintiffs, residents of Prince George's County, Maryland, filed a putative class action alleging that a county ordinance establishing regulatory licensing requirements related to the operation of "dance halls" within the county violated various civil rights statutes. The defendants, including the county executive, council members and the chief of police, moved to dismiss the complaint. Judge Deborah K. Chasanow of the U.S. District Court for the District of Maryland granted the defendants' motion on the grounds that the defendants had not properly been served and that, even if service had been proper, the plaintiffs lacked standing to bring the case. The court also found that class certification would be denied because "[a]s self-represented litigants, Plaintiffs cannot represent others in a class action" and would, thus, fail to meet the adequate representation requirement of Rule 23.

***Blough v. Shea Homes, Inc.*, No. 2:12-cv-01493 RSM, 2014 WL 3694231 (W.D. Wash. July 23, 2014).**

Judge Ricardo S. Martinez of the U.S. District Court for the Western District of Washington denied an amended motion for class certification of nine overlapping subclasses of consumers seeking relief under the Washington Consumer Protection Act (CPA) for alleged construction defects in their homes based on alleged misrepresentations and omissions in the builders' marketing materials. The court held that the numerosity, typicality and adequacy requirements were satisfied, and that common questions existed as to the defendant's knowledge and duty to disclose defects, as well as whether the presence of defects "gives rise to compensable injury within the meaning of the CPA." However, the court held that the predominance and superiority requirements were not satisfied because a jury "would need to determine the extent to which each putative class member relied on deceptive advertising regarding the quality of home construction in making his or her purchase, whether the homeowner's purchases were predominantly based on representations about superior quality of construction, and whether and to what extent proposed class members knew about defects at the time of purchase." The court also noted a lack of uniformity in the advertising and injuries allegedly sustained by the plaintiffs, "diverse motivations" for each class member's purchasing decisions, and varying levels of "exposure to Shea advertisements, and level of knowledge of construction defects at the time of purchase."

***Eager v. Credit Bureau Collection Services, Inc.*, Nos. 1:13-CV-30, 1:13-CV-84, 1:13-CV-173, 1:13-CV-261, 2014 WL 3534949 (W.D. Mich. July 16, 2014).**

Judge Gordon J. Quist of the U.S. District Court for the Western District of Michigan denied class certification in four consolidated Fair Debt Collection Practices Act lawsuits, alleging that a debt collection agency and law firm attempted to collect medical debts that had not been assigned to their clients. Some of the consolidated lawsuits also alleged that the defendants filed Michigan state court collection actions in the names of nonexistent entities that were similar to the true creditors' names. The

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plaintiffs sought to certify classes of all persons against whom the defendants had brought collection actions in which the defendants either falsely stated that their client had taken assignment of claims from other medical providers (the Assignment Class) or represented that the alleged debtor owed a debt to a nonexistent entity (the Misnomer Class). The court held that the Assignment Class was not ascertainable because determining whether the alleged assignment existed would require an individualized, highly fact-intensive inquiry. The debt collection agency presented evidence that written assignments existed in some cases, and Michigan law also allowed oral or implied assignments of the debts at issue. Moreover, the Assignment Class was also an improper "fail safe" class because an individual would only be included in the class once it was determined that no assignment existed, which was the central issue in the case. Finally, the court denied certification of the Misnomer Class because the plaintiffs' class allegations were limited to the Assignment Class.

***Arkalon Grazing Association v. Chesapeake Operating, Inc.*, No. 09-1394-CM, 2014 WL 3089556 (D. Kan. July 7, 2014).**

Judge Carlos Murguia of the U.S. District Court for the District of Kansas decertified a class claiming underpayment or nonpayment of natural gas royalties pursuant to lease agreements in light of, *inter alia*, the U.S. Court of Appeals for the Tenth Circuit's decisions in *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213 (10th Cir. 2013), and *Chieftain Royalty Co. v. XTO Energy, Inc.*, 528 F. App'x 938 (10th Cir. 2013) (discussed in the Fall 2013 edition of *The Class Action Chronicle* at 4-5). The court held that the plaintiff had failed to satisfy the commonality requirement because individual inquiries into the language of each lease and the marketability of gas at each well would be required. Judge Murguia also found that the plaintiff's proposed "common payment" methodology was expressly rejected by the *Roderick* court as insufficient to establish predominance, and that "determining damages will require review of the applicable lease language and gas quality for each royalty owner."

***Warnick v. DISH Network LLC*, No. 12-cv-01952-WYD-MEH, 2014 WL 2922660 (D. Colo. June 27, 2014).**

Judge Wiley Y. Daniel of the U.S. District Court for the District of Colorado denied certification of a nationwide class of consumers alleging violations of the Telephone Consumer Protection Act (TCPA) for prerecorded "robocalls" that were made to their cellular telephones even though they were not DISH customers or were identified in DISH's records as requesting they not be called. The court had provisionally granted class certification pending approval of the motion, but after extensive briefing on the class definition, Judge Daniel concluded that identifying the members of the plaintiff's proposed class was not administratively feasible because it would require the review of all DISH call records and all its customer accounts, requiring DISH to obtain consent from its 25 million customers "to produce and allow Plaintiff's counsel and his experts to search through 600+ million calls and account records to try and find potential class members," an "enormous and disproportionate burden on DISH." Further, the court held that the noncustomer class was overbroad because households subscribe under one accountholder's name on behalf of families, friends and roommates, who may have given consent to be called. Finally, the court refused to attempt to revise the class definition to include only persons included in DISH's TCPA Tracker of complaints about the calls, because the plaintiff would not be a member of such a class.

***Bruton v. Gerber Products Co.*, No. 12-CV-02412-LHK, 2014 WL 2860995 (N.D. Cal. June 23, 2014).**

The plaintiff sought certification of a class asserting claims under California consumer-protection statutes arising from alleged misbranding of 69 different Gerber baby products. Gerber argued that the proposed class was not ascertainable for two reasons: (1) there was no feasible way to identify class members since Gerber did not sell its products directly to consumers and did not maintain consumer data; and (2) changes in product labeling during the class period would render any effort to identify class members through self-reporting infeasible. Judge Lucy H. Koh of the U.S. District Court for the Northern District of California rejected the first argument, holding that "if Plaintiff can prove an administratively feasible method of proving which members are part of the putative class, this Court will not deny certification based solely on Defendant's own lack of consumer data." However, Judge Koh accepted Gerber's second argument, finding that self-reporting affidavits were "unsatisfactory" because consumers would have "to recall much more than whether or not they purchased a Gerber 2nd Foods product," including whether they purchased a product in a flavor that was the subject of the action, in appropriate packaging, "with a challenged label statement while another purchaser of the same product did not." Thus, the class was not ascertainable and could not be certified.

***Henson v. Fidelity National Financial Inc.*, No. 2:14-cv-01240-ODW(RZx), 2014 WL 2765136 (C.D. Cal. June 18, 2014).**

Judge Otis D. Wright, II of the U.S. District Court for the Central District of California denied certification of a class of homeowners who had been charged fees for overnight

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delivery of escrow documents when refinancing their properties. The homeowners brought suit against Fidelity, alleging that it received kickbacks in exchange for referring its subsidiaries to certain overnight-delivery businesses in violation of the Real Estate Settlement Procedures Act (RESPA). Judge Wright denied the motion on multiple grounds, including its untimeliness. The local rules required a motion for class certification to be filed within 90 days of commencing a class action, but the plaintiff waited almost eight months before filing his. The court also held that while the plaintiff showed a common question sufficient to satisfy Rule 23(a) in "whether Fidelity violated RESPA through a marketing-fee arrangement in place at the time," individual issues predominated such as whether class members' individual loans were governed by RESPA or fell within seven RESPA exemptions. The court found that predominance and superiority requirements could not be satisfied, and the class was not ascertainable, because the "RESPA prerequisites will quickly swallow the litigation in a sea of class-member-specific inquiries."

***In re Hulu Privacy Litigation*, No. C 11-03764 LB, 2014 WL 2758598 (N.D. Cal. June 17, 2014).**

Magistrate Judge Laurel Beeler of the U.S. District Court for the Northern District of California denied without prejudice certification of a class of viewers of Hulu's online video content, who alleged that Hulu wrongfully disclosed video viewing selections and personal information to third parties (limited on summary judgment to information transmitted to Facebook), in violation of the Video Privacy Protection Act. The court held that the class was not ascertainable because the plaintiffs had not established a way to identify individual class members "other than broad notice and a self-reporting affidavit," which would be prone to "subjective memory problems."

***Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB, 2014 WL 2702726 (N.D. Cal. June 13, 2014), appeal of dismissal pending.**

The plaintiffs moved to certify three separate product classes alleging that the defendant's products — Hunt's tomato products, PAM cooking spray products, and Swiss Miss hot cocoa products — contained deceptive claims that the products were "natural" and/or contained "natural antioxidants." Judge Charles R. Breyer of the U.S. District Court for the Northern District of California denied all three pending motions. The defendant successfully challenged the standing, typicality and adequacy of the plaintiff who purchased the Swiss Miss product because she testified during her deposition that the challenged statement about antioxidants was not misleading. Further, due to extensive variety in the products, sizes and labels of the three product lines and a lack of receipts for low-cost purchases, the court found that consumers would be unlikely to accurately self-identify, making all three classes unascertainable. The court also found that, in the absence of evidence of the plaintiffs' intent to purchase the products going forward, the plaintiffs lacked standing under Rule 23(b)(2). Judge Breyer also held that individual inquiries predominated as to all three proposed classes due to a lack of cohesion among the proposed class members exposed to label statements that changed over time and from product to product, and the absence of a fixed meaning of the term "natural." The plaintiffs also failed to demonstrate materiality of "natural" labeling to reasonable consumers. Finally, individualized purchasing inquiries would be required to determine how many of the challenged products each class member bought, which kind of each product they bought, when they bought them and what label they bore. Judge Breyer also held that the plaintiffs did not present an adequate damages model for any of the three classes. The court later dismissed the case.

***Fox v. TransAm Leasing, Inc.*, No. 12-2706-CM, 2014 WL 2604035 (D. Kan. June 11, 2014).**

Judge Carlos Murguia of the U.S. District Court for the District of Kansas denied in part and granted in part the plaintiff truck drivers' motion for class certification. The truck drivers asserted claims against the defendants under the Kansas Consumer Protection Act (KCPA) for allegedly making false representations about the amount of compensation they would make as independent contractors. They also alleged that the defendants violated the Federal Motor Carrier Safety Administration's truth-in-leasing law by requiring them to pay a satellite communications system usage fee. The court denied the motion as to the KCPA claims because determining the defendants' liability would require individualized inquiries as to how much each plaintiff was promised, how many miles he or she drove, and how much he or she earned. Further, the court held that since individual claims would involve "substantial amounts of money," individual class members had an incentive to bring their own claims. As to the truth-in-leasing claim, the court granted the motion, finding that every independent contractor agreement contained the challenged satellite fee provision, and liability would not require an individualized inquiry.

***Whitton v. Deffenbaugh Industries, Inc.*, No. 12-2247-CM, 2014 WL 2602381 (D. Kan. June 11, 2014).**

The plaintiff sought to certify a nationwide class for a breach of contract claim and a statewide class asserting violations of the Kansas Consumer Protection Act (KCPA) based on the defendants' practice of charging an "environmental/fuel charge" and an "administrative fee." Judge Carlos Murguia of the U.S. District Court for the District of Kansas held that the plaintiff could not represent a KCPA

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class because he was a Missouri resident. The court also held that the breach of contract class could not be certified because the fee provision allowed the defendants to increase fees with the customer's consent, necessitating an individualized inquiry to determine whether each class member consented to the increased fee rate for the charges and fees at issue.

***Smith v. First American Title Insurance Co.*, No. C11-2173 TSZ, 2014 WL 2511621 (W.D. Wash. June 4, 2014).**

Judge Thomas S. Zilly of the U.S. District Court for the Western District of Washington denied certification of a class asserting claims for breach of contract, breach of fiduciary duty and violation of Washington's Consumer Protection Act for fees that were allegedly wrongfully charged in association with escrow services. Judge Zilly found that Rule 23(a)'s commonality requirement could not be met because assessing whether the defendant had a basis for billing the fees objected to by the plaintiff would require examinations of the individual transactions and the related files, as well as a determination as to whether an agent of the defendant prepared the transaction documents and what actions were taken with respect to reconveyance. Judge Zilly also found the typicality requirement was not met as to the plaintiff's claim that the defendant overcharged reconveyance fees for merely monitoring the transaction, because in the plaintiff's case, the defendant "did much more than track the post-closing activities of the beneficiary and trustee of the deed of trust granted by plaintiff" and thus the "Plaintiff simply does not have the type of claim that she pleaded on behalf of the putative class."

***Sturdy v. Medtrak Educational Services LLC*, No. 13-CV-3350, 2014 WL 2210379 (C.D. Ill. May 28, 2014), and *Sturdy v. A. F. Hauser Inc.*, No. 13-CV-3379, 2014 WL 2210391 (C.D. Ill. May 28, 2014).**

Judge Colin S. Bruce of the U.S. District Court for the Central District of Illinois denied class certification in two cases brought by the same plaintiff alleging that the defendants violated the Telephone Consumer Protection Act by sending unsolicited fax messages. The court concluded that the plaintiff's allegation that the proposed class must include more than 40 members because "it would make no economic sense to prepare and send [the subject] fax unless it is sent to more than 40 people" was speculative and not properly supported. In addition, the plaintiff had not established any way to ascertain the class members. The record did not indicate that the defendants had used a specific list or database when sending the faxes, and the plaintiff had not provided any documentation to support a finding that the defendants were in possession of evidence that could establish the recipients of the faxes. Accordingly, the court concluded that the plaintiff had not satisfied the numerosity requirement of Rule 23(a)(1).

***Marsh v. First Bank of Delaware*, No. 11-cv-05226-WHO, 2014 WL 2085199 (N.D. Cal. May 19, 2014).**

Judge William H. Orrick of the U.S. District Court for the Northern District of California denied a renewed motion for certification of nationwide classes of individuals injured through the use of remotely created checks drafted and deposited by the defendants. The court previously certified a class of California residents seeking relief under California negligence and conversion law only, but refused to certify a nationwide class applying California law to non-Californians. The court held that the plaintiff's renewed motion still failed to show sufficient contacts between the defendants and California to justify certifying a nationwide class under California law, and refused to certify a nationwide class under Texas law because, while Texas had sufficient contacts with the class members' claims to satisfy due process, the plaintiff failed to meet her burden under the required conflict-of-law analysis. "[S]ignificant differences" in the states' laws existed, and the plaintiff's arguments that "national policy interests outweigh any individual state's interest" were irrelevant, because "what matters in deciding whether one state's laws should be applied in favor of other states' laws are the interests of the states whose residents may be affected." Finally, Judge Orrick held that Rule 23's predominance requirement could not be met in a nationwide class applying the laws of 49 different states because "the Court would be forced to go through — and to have the jury go through — an individual analysis" of each state's law as to negligence and conversion to determine each defendant's liability.

Decisions Permitting/Granting Class Certification

***Suchanek v. Sturm Foods, Inc.*, No. 13-3843, 2014 U.S. App. LEXIS 16259 (7th Cir. Aug. 22, 2014).**

The U.S. Court of Appeals for the Seventh Circuit (Wood, C.J., Cudahy and Rovner, JJ.) unanimously reversed a lower court's order denying a motion for class certification in a case involving allegedly fraudulently advertised coffee pods that are used in the popular Keurig coffeemakers. The plaintiffs asserted consumer-fraud claims under the laws of eight states, alleging that the defendants fraudulently marketed the coffee pods as being premium coffee. However, the coffee in the pods was actually instant coffee — "not the kind of premium product that [the defendants'] customers" were promised. The district court denied the motion for class certification, concluding that, *inter alia*, the class encompassed a number of class members who could not have been injured by the

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defendants' alleged misconduct. On appeal, the Seventh Circuit reversed, holding that the lower court erred in its commonality and predominance analyses. With respect to commonality, the appellate court held that all that is required is the existence of a single common question — for example, whether the coffee packaging was likely to mislead a reasonable consumer. Further, the Seventh Circuit determined that the lower court's concern regarding "overbreadth" was misguided in light of the record evidence, including affidavits from the named plaintiffs, demonstrating that all of the plaintiffs received low-quality instant coffee instead of the premium coffee they were promised. The Seventh Circuit also resolved that the lower court's conclusion regarding predominance was in error — in particular, its conclusion that individual issues regarding causation and reliance overwhelmed common questions. According to the Seventh Circuit, "[e]very consumer fraud case involves individual elements of reliance or causation" and "a rule requiring 100% commonality would eviscerate consumer-fraud class actions." For all of these reasons, the Seventh Circuit reversed the lower court's ruling denying the motion for class certification.

***American Copper & Brass, Inc. v. Lake City Industrial Products, Inc.*, No. 13-2605, 2014 WL 3317736 (6th Cir. July 9, 2014).**

The U.S. Court of Appeals for the Sixth Circuit (Silber, Gilman and Gibbons, JJ.) affirmed a district court's certification of a class in a Telephone Consumer Protection Act (TCPA) "junk fax" lawsuit. The court rejected the defendant's argument that the class definition included class members who lacked standing to bring a TCPA claim, holding that the defendant's interpretation of the TCPA — that only owners of physical fax machines can assert the TCPA claim, and only then if they actually received and printed the fax advertisement at issue — was too narrow. The court also held that because the defendant did not argue to the district court that the class was not ascertainable, the defendant had forfeited that argument. The Sixth Circuit declined to excuse the defendant's failure because the fax numbers to which the faxes at issue were sent were objective data that could be used to determine class members. Finally, the court held that a state civil procedure rule that barred class actions where the minimum recovery amount was set by statute did not prevent such class actions from being heard in federal court in the same state. The TCPA had no provisions applying state procedural rules to TCPA actions in federal court, and the Federal Rules of Civil Procedure were valid whether or not they altered the outcome in a way that could induce forum shopping.

***In re IKO Roofing Shingle Products Liability Litigation*, No. 14-1532, 2014 WL 2958615 (7th Cir. July 2, 2014).**

A unanimous panel of the U.S. Court of Appeals for the Seventh Circuit (Wood, C.J., Easterbrook and Kanne, JJ.) vacated the district court's decision denying class certification in a lawsuit alleging that the defendant falsely told customers that its organic asphalt roofing shingles met a particular industry standard. The Seventh Circuit rejected the district court's holding that commonality of damages was essential to class certification. Rather, the court noted that the Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), "requires matching the theory of liability to the theory of damages." The Seventh Circuit then held that the plaintiffs in this case "have two theories of damages that match their theory of liability." The first theory of damages reflected the difference in market price between a shingle as represented and a shingle that did not satisfy the industry standard. This remedy, the court observed, "could be applied to every member of the class." Although the second theory of damages — actual damages for failure of the shingles — would "require buyer-specific hearings" and also would require confining any class certification to questions of liability, the court held that it still matched the plaintiffs' theory of liability and therefore did not defeat class certification.

***R.A.G. ex rel. R.B. v. Buffalo City School District Board of Education*, No. 13-3486-cv, 2014 WL 2722745 (2d Cir. June 17, 2014).**

A unanimous panel of the U.S. Court of Appeals for the Second Circuit (Pooler, Hall and Carney, JJ.) affirmed the district court's decision granting class certification to plaintiffs who alleged that the defendant school district had violated the Individuals With Disabilities Education Act (IDEA). The defendant appealed the grant of class certification on two grounds: (1) the court lacked jurisdiction because the plaintiffs did not raise their claims during the course of administrative hearings; and (2) the plaintiffs' claims did not satisfy the commonality requirement of Rule 23 in light of the decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). The appellate court rejected both arguments. The Second Circuit noted that although "it is a general requirement that claims under the IDEA be exhausted in administrative procedures before they can be heard in federal court," there is an exception to this requirement where a plaintiff alleges broad systemic violations. The Second Circuit found that the plaintiffs alleged systemic failures in the school district and were thus able to take advantage of this exception. As for the second argument, the Second Circuit held that because the "[p]laintiffs' entire case is predicated on a policy that is applied uniformly to all students that qualify for supplemental services under the IDEA," the commonality requirement of Rule 23 was met.

***Birchmeier v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2014 WL 3907048 (N.D. Ill. Aug. 11, 2014).**

Judge Matthew F. Kennelly of the U.S. District Court for the Northern District of Illinois granted the plaintiffs' motion for class certification in a case alleging that the defendants made unsolicited calls to individuals without their consent. The court observed that there was a "common injury, resulting from receipt of the allegedly offending calls, not to mention common questions regarding the liability of the defendants who did not themselves place the calls." In addition, "because the named plaintiffs received the same type of call as the other class members," the court concluded that their claims were typical of those of the class.

***Small v. BOKF, N.A.*, No. 13-cv-01125-REB-MJW, 2014 WL 3893052 (D. Colo. Aug. 8, 2014).**

Judge Robert E. Blackburn of the U.S. District Court for the District of Colorado certified a nationwide class seeking monetary relief for purported violations of the Truth in Lending Act (TILA) in association with FastLoan advances. Judge Blackburn limited the applicable time period in the class definition but found that numerosity, commonality, typicality and adequacy were easily satisfied because "[t]he disclosures on which this claim is based are contained within the Terms and Conditions of the program, which are identical as to all FastLoan advances," and common issues of liability predominated over individual issues sufficiently to satisfy Rule 23(b)(3). Further, superiority was also satisfied because there were no conflict-of-law issues raised by violation of a single federal statute, and the calculation of statutory damages under TILA "is straightforward and can be effectuated by resort to an appropriate algorithm."

***Velasco v. Sogro, Inc.*, No. 08-C-0244, 2014 WL 3737971 (E.D. Wis. July 30, 2014).**

Judge C.N. Clevert, Jr. of the U.S. District Court for the Eastern District of Wisconsin denied the defendant's motion to decertify the class in a class action brought under the Fair and Accurate Credit Transactions Act by individuals who had received an electronically printed receipt from the defendant displaying more than the last five digits of their credit or debit card number. The court observed that "[c]ommon to the claims of all class members is the central issue in this case: whether [the defendant's] conduct (identical as to each class member) was willful." Further, the plaintiffs had indicated that they would only seek statutory damages, which would not create individual issues as to damages.

***Hurt v. Commerce Energy, Inc.*, No. 1:12-CV-758, 2014 WL 3735460 (N.D. Ohio July 28, 2014).**

Judge James S. Gwin of the U.S. District Court for the Northern District of Ohio denied a motion to decertify the class in a wage-and-hour class action. Although there was testimony that some class members set their own schedules, the court found that this testimony did not undermine the plaintiffs' evidence that the defendants applied statewide policies to all class members. Thus, the court held, liability could be determined on a classwide basis, because it depended on the defendants' uniform treatment of the plaintiffs as exempt independent contractors, not on minor individual differences between class members. The court further held that the plaintiffs' proposed damages model (regardless of its validity) was based on the single theory of liability alleged by the plaintiffs, satisfying *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), even though the defendants claimed that the plaintiffs would be unable to prove damages on a classwide basis. However, in response to the defendants' arguments about individualized issues related to damages, the court bifurcated the issues of liability and damages, holding that the resolution of the common theory of liability on a classwide basis would efficiently advance the litigation. In so doing, the court endorsed individualized damages hearings that would follow a classwide determination of liability — also known as an issues class. As part of its analysis, the court cited *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838, 860 (6th Cir. 2013), which approved of such an approach to class certification.

***Ramirez v. Trans Union, LLC*, No. 12-cv-00632-JSC, 2014 WL 3734525 (N.D. Cal. July 24, 2014), 23(f) pet. pending.**

Magistrate Judge Jacqueline Scott Corley of the U.S. District Court for the Northern District of California certified a nationwide class of consumers alleging that a credit-reporting agency had violated the Fair Credit Reporting Act (FCRA) by failing to accurately disclose the information contained in consumers' files and by failing to follow reasonable procedures to assure the accuracy of information in its consumer reports. The court found that common questions predominated as to whether the defendant complied with FCRA disclosure requirements and whether its procedures assured the maximum accuracy of credit reports. In so doing, the court rejected the defendant's argument that any lack of actual injury among class members defeated predominance, explaining that plaintiffs were not required to show any actual injury to recover under the FCRA. Judge Corley refused to certify a California subclass seeking damages under the parallel California Consumer Credit Reporting Agencies Act (CCRAA) for failure to satisfy Rule 23(b)(3)'s predominance requirement, reasoning that the CCRAA, unlike the FCRA, requires a showing of actual harm to recover damages. The court did, however, certify an injunctive-relief subclass asserting that the defendant did not employ reasonable procedures under the CCRAA.

***Sandusky Wellness Center, LLC v. Wagner Wellness, Inc.*, No. 3:12 CV 2257, 2014 WL 3667916 (N.D. Ohio July 22, 2014).**

In a case involving allegedly unsolicited faxes in violation of the Telephone Consumer Protection Act (TCPA), Judge David A. Katz of the U.S. District Court for the Northern District of Ohio denied as moot a motion for reconsideration of his prior denial of class certification. The court had previously held that the proposed class of all recipients of a particular fax lacked commonality because liability under the TCPA only existed if the transmission was unsolicited and there was no prior business relationship with the recipient. Relying on *American Copper & Brass, Inc. v. Lake City Industrial Products, Inc.*, No. 13-2605, 2014 WL 3317736 (6th Cir. July 9, 2014), which was decided after the court's initial denial of class certification, the plaintiff argued that the alleged TCPA violations could be determined on a classwide basis because the faxes at issue contained a noncompliant opt-out notice, which was an independent TCPA violation. The court called for briefing on that issue, which it held must be resolved before it would reconsider granting class certification. (The Sixth Circuit's opinion in *American Copper & Brass, Inc.* is discussed on Page 10 of this issue.)

***Janetos v. Fulton Friedman & Gullace, LLP*, No. 12 C 1473, 2014 WL 3600518 (N.D. Ill. July 21, 2014).**

Judge Thomas M. Durkin of the U.S. District Court for the Northern District of Illinois granted class certification in a case alleging violations of the Fair Debt Collection Practices Act (FDCPA) arising out of a letter sent by the defendant to members of the putative class. The court noted that each of the letters sent to putative class members was "virtually identical and contain[ed] precisely the same language that the Plaintiffs allege violates the FDCPA." In addition, the court concluded that common legal questions predominated over individual issues. Specifically, "[a] ruling that the letters violate or do not violate the FDCPA would be applicable to all of the proposed class members."

***Moore v. Stellar Recovery, Inc.*, No. 13 C 2294, 2014 WL 3509729 (N.D. Ill. July 14, 2014).**

Judge Virginia M. Kendall of the U.S. District Court for the Northern District of Illinois granted class certification in a case alleging violations of the Fair Debt Collection Practices Act (FDCPA) arising out of a letter sent by the defendant to members of the putative class. The court concluded that the defendant's conduct — "sending letters or documents to members of the proposed class" — provided a common nucleus of operative fact and therefore satisfied Rule 23's commonality requirement. Further, the court concluded that common questions predominated over individual issues because each alleged violation of the FDCPA concerned the same letter sent to putative class members. In addition, the court rejected any argument that the plaintiff was not an adequate representative of the class, noting that "any experience [the plaintiff] may have as a plaintiff in actions alleging violations of the FDCPA does not preclude [the plaintiff] from representing the class in this action." Finally, the court held that a class action was superior to individual actions, noting that "there is no reason to believe that actual damages for individual members of the class would be sufficient to warrant an individual suit."

***Spine & Sports Chiropractic, Inc. v. ZirMed, Inc.*, No. 3:13-CV-00489-TBR, 2014 WL 2946421 (W.D. Ky. June 30, 2014).**

In a case claiming violations of the Telephone Consumer Protection Act (TCPA), Judge Thomas B. Russell of the U.S. District Court for the Western District of Kentucky certified a class of individuals who received a fax advertisement from ZirMed on two particular dates. The defendant argued that only owners of physical fax machines can assert a TCPA claim, and only if they actually received the fax advertisement at issue. On both points, the court surveyed the non-binding authority on the issues (the U.S. Court of Appeals for the Sixth Circuit had not yet ruled). The court concluded that fax line subscribers — individuals who do not own the fax machine that the fax number connects to — have standing to assert TCPA claims, because the statute speaks of "recipients," not fax machine owners. But agreeing with the defendant, the court found that the fax transmission had to be successful for there to be a TCPA claim, and therefore the plaintiff's proposed class definition was overbroad in including individuals who were intended recipients but who did not in fact receive the fax advertisement at issue. To resolve this issue, the court modified the class definition to only include those who were successfully sent the fax at issue. The court also concluded that common issues would predominate over individual ones because the opt-out notice in the fax did not comply with FCC regulations. This made ZirMed's two TCPA defenses that raised individual issues — whether it had an established business relationship with each recipient and whether each recipient had previously consented to receive the fax advertisement at issue — irrelevant because those defenses were only available if the fax included a compliant opt-out notice.

***Lee v. Enterprise Leasing Co.-West*, No. 3:10-CV-00326-LRH-WGC, 2014 WL 2873904 (D. Nev. June 25, 2014).**

Judge Larry R. Hicks of the U.S. District Court for the District of Nevada certified a class of rental car consumers who were charged a separate airport concession recovery fee that was not included in the base rental rate as advertised and quoted to customers purportedly in violation of Nevada law. The defendants conceded that the numerosity

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and commonality requirements were met, and the court found that typicality and adequacy were satisfied, even though the claims arose from rentals at various airports and involved different rental agreements and/or additional products and services, because the plaintiffs' claims "flow from the same standard practice and course of conduct that also gives rise to the claims of all other class members." The court also found that the Rule 23(b)(3) predominance and superiority requirements were satisfied because the amount of restitution for each class member flowed from the statutory violation and, since the defendants' conduct in the unlawful collection and retention of the fees was "identical in all instances," restitution can be calculated "by reference to the amount each class member paid for, and Defendants were enriched by, the improper ... charge."

***Dreher v. Experian Information Solutions, Inc.*, No. 3:11-cv-00624-JAG, 2014 WL 2800766 (E.D. Va. June 19, 2014), 1292(b) pet. for permission to appeal denied.**

Judge John A. Gibney, Jr. of the U.S. District Court for the Eastern District of Virginia certified a class of consumers who had received inaccurate information from the defendant credit-reporting service in violation of the Fair Credit Reporting Act. According to the plaintiff, the defendant furnished credit reports informing consumers that the source of the information in the report was Advanta Bank when in actuality, the report was based on information from another company, Cardworks. The plaintiff's suit centered on this discrepancy. In finding that typicality was satisfied, the court noted that the defendant "identically handled all requests for credit reports dealing with old Advanta accounts." The fact that the named plaintiff may have suffered actual injury, while absent members may have not, did not defeat typicality. The court also concluded that the requirements of Rule 23(b)(3) had been satisfied. In so doing, the court rejected the defendant's argument that a determination of statutory damages would be based on the amount of actual damages suffered by class members, which was inherently individualized. To the contrary, the court held that "the consumer's *actual* injuries must be *irrelevant* to the amount of statutory damages."

***Ortega v. Natural Balance, Inc.*, No. CV 13-5942 ABC (Ex), 2014 WL 2782329 (C.D. Cal. June 19, 2014).**

Judge Audrey B. Collins of the U.S. District Court for the Central District of California certified a class of California consumers of dietary supplement Cobra Sexual Energy, seeking relief under state consumer-protection statutes arising from alleged false claims as to Cobra's health benefits and aphrodisiac properties. The court held that the class was ascertainable, rejecting the defendant's claim that there were no records of purchase, because "identifying individual class members is not germane to ascertainability." The court found the numerosity, commonality, typicality and adequacy requirements were met because the plaintiffs claimed they were misled by Cobra's packaging to believe the product was beneficial when it was ineffective and posed health risks, even if the individual plaintiffs had "unrealistic expectations" about the product's virility-enhancing qualities. The court further held that because the packaging was uniform and nearly all of the statements on the packaging were challenged, the plaintiffs had sufficiently established classwide questions of materiality, likely entitling them to a presumption of reliance and causation under California law. Given their claim that the product provided no benefits and thus had no value, and the small size of their individual claims, the plaintiffs established a workable damages theory based on refund of the purchase price, which could be "readily calculated using Defendant's sales numbers and an average retail price." Thus, the predominance and superiority requirements were satisfied. However, the court held that the plaintiffs' claims were not typical of class members whose claims may be barred by the statute of limitations, and limited the class definition to claims within the limitations period.

***Ellsworth v. U.S. Bank, N.A.*, No. C 12-02506 LB, 2014 WL 2734953 (N.D. Cal. June 13, 2014), 23(f) pet. pending.**

Magistrate Judge Laurel Beeler of the U.S. District Court for the Northern District of California granted the plaintiffs' motion for class certification of multistate classes on breach of contract and other claims stemming from allegations that U.S. Bank unlawfully force-placed backdated flood insurance on their real property and received unlawful kickbacks from the insurer. The court held that numerosity was satisfied, given evidence that there were roughly 16,000 loans at issue, and that the plaintiffs identified sufficient common factual and legal questions — the plaintiffs had identical form contracts, policies were applied uniformly and they alleged a common scheme to force-place insurance on the borrowers to increase kickbacks. Despite variations in state law with respect to the contract claims, the court held that the states could be organized "into groups with similar legal regimes" so that common issues would predominate in each subclass. Similarly, the court held that differences in the states' parol evidence laws did not defeat predominance because the contracts at issue were form contracts. According to the court, it was "hard to see what extrinsic evidence would be relevant to interpreting the form contract terms or U.S. Bank's liability based on these theories," particularly where the defendant failed to identify any extrinsic evidence or ambiguous terms in the contracts.

***Gawarecki v. ATM Network, Inc.*, No. 11-cv-1923 (SRN/JJG), 2014 WL 2600056 (D. Minn. June 10, 2014), 23(f) pet. denied.**

Judge Susan Richard Nelson of the U.S. District Court for the District of Minnesota granted class certification in a case alleging that the defendant violated the Electronic Fund Transfer Act (EFTA) by charging a transaction fee for using its ATM without providing proper notice. The court concluded that there were common legal issues that predominated over any individual issues, including whether the defendant qualified as an ATM operator under the statute and whether the defendant complied with the notice requirements of the EFTA. In addition, the court concluded that "the putative class members' interests, if any, in individually controlling separate actions does not defeat superiority in this case."

***Brooks v. GAF Materials Corp.*, No. 8:11-cv-00983-JMC, 2014 WL 2548360 (D.S.C. June 6, 2014).**

Judge J. Michelle Childs of the U.S. District Court for the District of South Carolina denied a motion for decertification in a case involving allegedly defective roofing shingles. The manufacturer of the roofing shingles advanced multiple arguments in support of decertification, including that the class failed the commonality and predominance requirements in light of the recent decisions in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *In re IKO Roofing Shingle Products Liability Litigation*, No. 2:09-md-2104 (C.D. Ill. Jan. 28, 2014). The court found that neither decision warranted decertification. In *Comcast*, the Supreme Court held that courts should examine the proposed damages methodology at the certification stage to ensure that it is consistent with the theory of liability for the class and capable of measurement for the class as a whole. Here, Judge Childs found that the plaintiffs had satisfied the requirements of *Comcast* because the plaintiffs proposed a damages methodology that matched their classwide theory of liability. In *IKO*, the court denied certification of a class of owners of allegedly defective shingles because the class was overbroad — *i.e.*, it involved different lines of shingle products manufactured over a wide spectrum of time. The case at bar, the court explained, involved only a single line of products manufactured over a short period of time, which sufficiently distinguished the case from *IKO*. Finally, the court rejected the manufacturer's additional argument that the plaintiffs were inadequate class representatives based on their earlier refusal to accept an offer of judgment that would have made them whole. According to the court, such a refusal did not affect the question of adequacy of representation because offers of judgment "disappear" once the class is certified.

***Brazil v. Dole Packaged Foods, LLC*, No. 12-CV-01831-LHK, 2014 WL 2466559 (N.D. Cal. May 30, 2014); *Brazil v. Dole Packaged Foods, LLC*, No. 12-CV-01831-LHK, 2014 WL 2738179 (N.D. Cal. June 16, 2014), 23(f) pet. pending.**

Judge Lucy H. Koh of the U.S. District Court for the Northern District of California granted in part and denied in part the plaintiff's motion to certify a class. The proposed class challenged 10 products that were labeled "All Natural Fruit" even though the products included ascorbic acid and citric acid. Since the identified products bore the same alleged misstatements during the relatively short class period, the court found the plaintiff's proposed class sufficiently ascertainable. For similar reasons, the court also held that whether the label statement "All Natural Fruit" is material is a question common to the class. As to the Rule 23(b)(2) class, the court rejected the defendant's argument that the plaintiff no longer had standing because he stopped buying its products months ago, pointing to testimony that the plaintiff, while skeptical of what the packages said, would still be willing to buy Dole products. As to the Rule 23(b)(3) class, the court determined that common questions of law would not predominate if a nationwide class were certified, and narrowed the proposed class to exclusively California consumers. Finally, the court found that one of the plaintiff's damages model sufficiently provided a means of showing damages on a classwide basis through common proof and therefore rejected the defendant's argument that individual issues as to damages would predominate.

The defendant then moved for reconsideration of the court's class certification order, in light of the California Supreme Court decision in *Duran v. U.S. Bank National Association*, 325 P.3d 916 (Cal. 2014). The court denied the motion, finding that *Duran* had no relevance to the case since it was a wage-and-hour suit focusing entirely on substantive labor laws. The defendant tried to argue more generally that *Duran* prohibited class certification where a defendant had no liability toward a significant portion of the class, and pointed to the fact that some consumers in the class did not rely on "all natural" statements on the products at issue. The court held that under California's Unfair Competition Law, the claims turned on whether a misrepresentation would mislead a reasonable consumer, and therefore proof of individualized reliance and injury was unnecessary. The court likewise rejected the defendant's argument that reconsideration was necessary because the court relied on incorrect facts in concluding that the plaintiff's regression-based damages model was capable of showing damages on a classwide basis. The court acknowledged the defendant's legitimate challenge to errors in the damages methodology but concluded that a motion for reconsideration was not appropriate for addressing these concerns. Should the model turn out to

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be unable to adequately assess damages on a classwide basis, then the defendant would have a basis to move for decertification.

***Kaye v. Amicus Mediation & Arbitration Group, Inc.*, No. 3:13-CV-347 (JCH), 2014 WL 2207431 (D. Conn. May 28, 2014).**

Judge Janet C. Hall of the U.S. District Court for the District of Connecticut granted certification to three classes alleging violations of federal and state law relating to a defendant mediation services provider's sending of faxed advertisements. Class A plaintiffs alleged that they had received faxes with opt-out notices that were deficient under the Telephone Consumer Protection Act (TCPA); Class B plaintiffs alleged receipt of unsolicited faxes, in violation of the TCPA; and Class C plaintiffs alleged that the defendants sent faxes without express consent, a violation of Connecticut state law. The court held that the classes were readily ascertainable, despite the defendants' claim that identifying class members would "require mini-trials on the merits." The court then found that Class A readily satisfied the numerosity, commonality, typicality and adequacy requirements of Rule 23(a) and the predominance requirement of Rule 23(b)(3). In contrast, the claims of Classes B and C turned largely on the issue of consent, which would vary based on how the defendants obtained the plaintiffs' fax numbers. In order to satisfy commonality, typicality and adequacy, therefore, Judge Hall redefined Classes B and C to include only plaintiffs whose numbers were obtained through the Connecticut Trial Lawyers Association directory, which made consent issues "amenable to class-wide resolution." The court also held that class resolution was superior to individual resolution primarily because: (1) the plaintiffs' individual statutory damages would have been too small to spur litigation; and (2) a series of individual actions would have wasted judicial resources. Judge Hall did note a potential "due process issue" with the aggregation of small statutory damages claims into a class action resulting in a large damages award against the defendants, but stated that "the remedy is not to decertify the class but to reduce the award."

***Werdebaugh v. Blue Diamond Growers*, No. 12-CV-2724-LHK, 2014 WL 2191901 (N.D. Cal. May 23, 2014), 23(f) pet. denied.**

Judge Lucy H. Koh of the U.S. District Court for the Northern District of California granted in part and denied in part the plaintiff's motion to certify a nationwide class of consumers alleging that certain almond milk products violated California consumer-protection statutes because their labels stated "evaporated cane juice" instead of sugar and "All Natural" despite containing synthetic ingredients. Judge Koh found that the plaintiff did not know that "evaporated cane juice" meant sugar and had sufficiently shown reliance on the "All Natural" labels to have standing to seek monetary damages, but because the plaintiff did not allege or prove he would purchase the products in the future, he could not seek injunctive relief on a classwide basis under Rule 23(b)(2). The court further held that the Rule 23(b)(3) class was ascertainable because the class was defined as purchasers of products with allegedly misleading representations on the packaging. The court rejected the defendant's argument that class members would not be able to actually prove membership in the class, appearing to allow class members to do so based on their own say-so. The court also held that common questions existed as to the materiality of the common alleged misrepresentations, which did "not depend on the subjective motivations of individual purchasers," and that the typicality and adequacy requirements were met even though the plaintiff purchased only one of the 18 almond milk products at issue because the alleged misrepresentations on the product labels were the same. However, the court refused to certify a nationwide class because other states' consumer-protection laws differed from California's. The court also rejected the plaintiff's proposed damages of a full refund of purchase price because the "consumers received benefits in the form of calories, nutrition, vitamins, and minerals," and also rejected the plaintiff's attempt to calculate the price premium attributable to the label due to differences in the allegedly comparable products and the plaintiff's failure to consider "any factors that may cause consumers to prefer the accused Blue Diamond products over other identical products[.]" The court did accept the plaintiff's "regression" analysis addressing the differences in product sales before and after the allegedly misleading labeling as proper classwide proof of damages.

***Kingery v. Quicken Loans, Inc.*, No. 2:12-cv-01353, 2014 WL 2117096 (S.D. W. Va. May 21, 2014).**

Judge Joseph R. Goodwin of the U.S. District Court for the Southern District of West Virginia certified a class of consumers who applied for mortgage loans secured by residential property. The plaintiff alleged that the defendant lender failed to provide credit score disclosures as soon as reasonably practicable in violation of the Fair Credit Reporting Act. The court held that the class was ascertainable because while some effort would be required to sift through the defendant's consumer data to identify class members, the existence of data warehouses made the process objectively feasible. The court also held that predominance was satisfied because the defendant used uniform procedures in providing credit score.

CLASS ACTION FAIRNESS ACT (CAFA) DECISIONS

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

***Wurtz v. Rawlings Co.*, No. 13-1695-cv, 2014 WL 3746801 (2d Cir. July 31, 2014).**

A unanimous panel of the U.S. Court of Appeals for the Second Circuit (Walker, Cabranes and Parker, JJ.) ruled that, under CAFA, a federal court could hear the plaintiffs' state law claims to enjoin the defendant insurers from obtaining reimbursement of medical benefits from the plaintiffs' tort settlements. The plaintiffs originally brought their case in state court under N.Y. Gen. Oblig. Law § 5-335, but the defendants removed to the U.S. District Court for the Eastern District of New York on the theory that the plaintiffs' state law claims were completely and expressly preempted by the Employee Retirement Income Security Act (ERISA). The district court agreed that ERISA preempted the plaintiffs' claims and granted the defendants' motion to dismiss for failure to state a claim. The Second Circuit, in an opinion by Judge John M. Walker, Jr., vacated and reversed, holding that the plaintiffs' claims were neither completely nor expressly preempted, making removal under ERISA improper. Instead, the panel ruled that federal subject-matter jurisdiction existed under CAFA because the proposed class had at least 100 members, minimal diversity was met and there was well over $5 million in controversy. The panel further noted that, although CAFA contains "express exceptions" to jurisdiction, the plaintiffs had not contested jurisdiction; therefore, the court felt it "need not comment" on which party bears the burden with regard to CAFA's jurisdictional exceptions, despite the fact that the "Second Circuit has declined to reach th[at] issue."

***Cooper v. Charter Communications Entertainments I, LLC*, Nos. 13-1726, 13-1736, 2014 WL 3623594 (1st Cir. July 23, 2014).**

A unanimous panel of the U.S. Court of Appeals for the First Circuit (Thompson, Stahl and Kayatta, JJ.) affirmed a district court's order exercising CAFA jurisdiction over claims for damages arising from service outages from a substantial winter storm. Both parties agreed that the plaintiffs sought at least $75 for each putative class member, and that the putative class comprises approximately 95,000 Charter customers; therefore, the court explained, the case presented a matter in controversy of at least $7,125,000, exceeding CAFA's matter-in-controversy threshold. Further, although Charter had provided credits to three of the four named plaintiffs, the court held that their claims (and that of the fourth named plaintiff) were not moot: In addition to requesting damages, the plaintiffs sought a declaration that Charter was required by Massachusetts law and its licensing agreements to provide credits to its customers for weather-related service loss. And the request for declaratory relief was neither moot nor unripe: The court found that it would not "appear unlikely that the New England weather will produce another severe winter storm, as evidenced by the fact that Massachusetts passed a law to address the situation in the first place." (In addition, the First Circuit reversed the district court's order dismissing the plaintiffs' claims.)

***McDaniel v. Fifth Third Bank*, No. 14-11615, 2014 U.S. App. LEXIS 10489 (11th Cir. June 5, 2014) (*per curiam*).**

A unanimous panel of the U.S. Court of Appeals for the Eleventh Circuit (Wilson, Pryor and Martin, JJ.) vacated the district court's decision remanding to state court the plaintiff's putative class action alleging violations of the Florida Consumer Collection Practices Act (FCCPA), unjust enrichment, fraud and fraud in the inducement stemming from the defendant's check-cashing fees. The court held that the district court erred in refusing to consider the amount of punitive damages the plaintiff requested in connection with his fraud claims based on the court's premature determination that those claims failed as a matter of law. According to the Eleventh Circuit, courts analyzing the amount in controversy under CAFA should not inquire into the amount a plaintiff is likely to receive on the merits — a plaintiff must only prove that damages in excess of $5,000 *could* be awarded. Because the plaintiff sought compensatory damages for the entire amount of the defendant's check-cashing fees ($2,488,335) and maximum compensatory and punitive damages under the FCCPA ($501,000 and $1,503,000 respectively), as well as punitive damages for his fraud claims ($7,465,005), CAFA's jurisdictional threshold had been met, and the case was remanded to the federal district court for adjudication on the merits.

***Black v. Crowe, Paradis, & Albren, LLC*, No. 5:14-187-KKCB, 2014 WL 3965043 (E.D. Ky. Aug. 13, 2014).**

Chief Judge Karen K. Caldwell of the U.S. District Court for the Eastern District of Kentucky denied a motion to remand a putative class action asserting legal malpractice and consumer-protection claims against a law firm. The suit was brought on behalf of Social Security Disability (SSD) applicants whose insurer, MetLife, referred them to the defendant law firm to assist in filing for SSD benefits. The plaintiff alleged that the firm failed to disclose the existence of a material conflict of interest between MetLife

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and the law firm based on the payment of fees by MetLife to the firm proportional to the amount of money the SSD clients repay MetLife as a result of prior overpayment. The complaint alleged that the plaintiff's individual claim exceeded the $5,000 minimum requirement for filing in the state's circuit court and that the proposed class included "hundreds of members." The court concluded that CAFA's $5 million matter-in-controversy threshold was satisfied because the defendant (through a declaration) stated that it assisted with more than 1,300 SSD claims, and 1,300 multiplied by the lowest estimate of the plaintiff's individual claim ($5,000) was more than $5 million.

***Johnson v. Pushpin Holdings, LLC*, No. 13 C 7468, 2014 WL 3953451 (N.D. Ill. Aug. 13, 2014).**

Judge Charles P. Kocoras of the U.S. District Court for the Northern District of Illinois denied the plaintiff's motion to remand and held CAFA jurisdiction existed over a class action alleging that the defendants violated the Illinois Consumer Fraud and Deceptive Business Act by filing lawsuits against putative class members without being properly registered as a foreign company or debt collection agency. Although the plaintiff argued that the complaint sought damages below CAFA's $5 million requirement, the court noted that the plaintiff's "expansive complaint is greatly contrasted by his present posture." Accordingly, the court held that the plaintiff had not demonstrated that it was legally impossible for him to recover an amount over the $5 million threshold for CAFA jurisdiction.

***Fields v. Sony Corp. of America*, No. 13 Civ. 6520(GBD), 2014 WL 3877431 (S.D.N.Y. Aug. 4, 2014).**

Judge George B. Daniels of the U.S. District Court for the Southern District of New York denied the plaintiff's motion to remand a class action asserting violations of New York state labor law on behalf of herself and other individuals who were allegedly mischaracterized as interns and thus paid below minimum wage and denied overtime pay benefits. Judge Daniels found that, although the plaintiff had not specified an amount in controversy, CAFA's $5 million floor was satisfied by approximately $4.2 million in unpaid wages and $1.4 million in attorney's fees, which counted toward the CAFA threshold. The $4.2 million figure regarding unpaid wages was based on the assumption that the 2,444 individuals employed by the defendant as "interns" during the relevant period worked 24 hours/week for 10 weeks at the minimum wage of $7.20/hour (as plaintiff herself had). Because minimal diversity was met and the putative class contained well more than the 100 members mandated by CAFA, the court found that the defendants had satisfied CAFA's jurisdictional requirements and "it [was] Plaintiff's burden to show that remand is mandatory or proper under one of the statutory exceptions." The court then rejected the plaintiff's claims that any of the CAFA exceptions — the mandatory "local controversy" and "home state" exceptions or the discretionary "interests of justice" exception — applied. With respect to the "home state" and "local controversy" exceptions, Judge Daniels noted that although the Second Circuit had not determined whether a preponderance of the evidence or "reasonably likely" standard applied to the plaintiff's need to show that two-thirds of the putative class members were New York citizens, the plaintiff was "not able to offer any evidence" and thus could not "meet [her] burden under either standard." With respect to the "interests of justice" exception, the court held that the factors for judicial consideration in 28 U.S.C. § 1332(d)(3), on balance, favored the defendants. Although the distinct nexus between New York and the plaintiff's claims, the fact that the parties agreed that New York citizens made up the majority of the class, and the fact that no class action on the same issues had been filed in the three years prior on behalf of the same or other persons supported remand to state court, the remaining factors "weigh[ed] heavily in [the] Defendants' favor." In particular, the dispute over unpaid interns was of national importance, and there was "significant evidence" that the legal procedure in bringing the motion to remand was designed to avoid federal jurisdiction, based on the plaintiff's counsel's filing a similar action in federal court under federal labor law just nine days after the instant action was filed in state court. Thus, Judge Daniels declined to exercise his discretion to remand.

***Roppo v. Travelers Insurance Co.*, No. 13 C 05569, 2014 WL 3810580 (N.D. Ill. Aug. 1, 2014), pet. for permission to appeal denied.**

Judge Edmond E. Chang of the U.S. District Court for the Northern District of Illinois denied the plaintiff's motion to remand and held that removal was proper under CAFA in a class action alleging that the defendants intentionally concealed insurance policy limits by failing to disclose an excess umbrella policy. The court noted that the plaintiff herself had described the size of the class to be approximately 500 individuals — "approximately five times that necessary to meet the size requirement" of CAFA. Moreover, the plaintiff had not shown that $5 million was a legally impossible amount of recovery. The court also rejected the plaintiff's argument that CAFA's local controversy exception applied. Even assuming that more than two-thirds of the putative class members were Illinois citizens, the plaintiff had not sufficiently shown that either of the Illinois defendants were defendants from whom "significant relief" was sought as required by 28 U.S.C. § 1332(d)(4)(A)(i)(II). Finally, the court concluded that CAFA's discretionary home-state exception also did not apply, because the Illinois defendants were not the "primary" defendants as required by 28 U.S.C. § 1332(d)(3).

***Abdale v. North Shore-Long Island Jewish Health Systems, Inc.*, No. 13-CV-1238 (JS)(WDW), 2014 WL 2945741 (E.D.N.Y. June 30, 2014).**

Judge Joanna Seybert of the U.S. District Court for the Eastern District of New York denied the plaintiffs' motion for remand in a class action alleging that the defendant hospitals "fail[ed] to adequately protect the confidential personal and medical information of their current and former patients, conduct that ultimately resulted in identity and medical identity data breaches." A group of patients who received medical services at facilities owned by the defendants had commenced a putative class action in the Supreme Court of the State of New York, Queens County. The defendants removed, arguing that federal-question jurisdiction existed and removal was appropriate under CAFA. The court held there was no federal-question jurisdiction but the CAFA prerequisites had been met. The court also held that the plaintiffs had presented enough evidence regarding the applicability of CAFA's "local controversy," "home state" and "interests of justice" exceptions that expedited discovery into those issues was required. The court found that the New York connections in the action made it likely that two-thirds of the putative class would consist of New York citizens. This fact, if shown, would satisfy the home state and local controversy exceptions under CAFA.

***Arens v. Popcorn, Indiana, LLC*, No. 14-cv-1323-SC, 2014 WL 2737412 (N.D. Cal. June 16, 2014), pet. for permission to appeal pending.**

Judge Samuel Conti of the U.S. District Court for the Northern District of California denied the plaintiff's motion for remand in a consumer class action asserting false labeling of snack food. The plaintiff conceded that CAFA's numerosity and diversity requirements were met but disputed that the amount in controversy exceeded $5 million. The parties agreed that the cost of correcting the labeling and refunding the purchase price would be $3.4 million. However, because the plaintiff sought injunctive relief, the court applied the "either viewpoint" rule which holds, in cases where injunctive relief is sought, that if "the potential cost to the defendant of complying with the injunction exceeds that amount, it is the latter that represents the amount in controversy for jurisdictional purposes." Because the plaintiff was demanding not only label revisions, but also that the defendant pull mislabeled products from store shelves and destroy them, the total cost to the defendant of restitution and complying with the sought-after injunction would be $7.2 million. Thus the amount in controversy exceeded $5 million and removal under CAFA was appropriate.

***Stewart v. Ruston Louisiana Hospital Co.*, No. 14-0083, 2014 WL 2574508 (W.D. La. June 9, 2014).**

Judge Robert G. James of the U.S. District Court for the Western District of Louisiana deferred ruling on an appeal of a magistrate judge's denial of a motion to remand based on CAFA's local controversy exception. The court noted that the defendants were in possession of the information the plaintiffs required to establish that more than two-thirds of the prospective class members were citizens of Louisiana. Accordingly, the court deferred its ruling for 60 days so that the parties could conduct limited discovery on the local controversy exception's greater-than-two-thirds citizenship requirement. In late July, the plaintiffs filed supplemental briefing in support of their motion to remand, which the defendants opposed. A decision on the plaintiffs' appeal of the magistrate judge's order denying remand is still pending.

Decisions Granting Motions to Remand/ Finding No CAFA Jurisdiction

***Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C.*, No. 14-30514, 2014 WL 3632589 (5th Cir. July 23, 2014).**

A unanimous panel of the U.S. Court of Appeals for the Fifth Circuit (Jolly, Smith and Clement, JJ.) affirmed the district court's order remanding the case to Louisiana state court under CAFA. A group of oil and gas leaseholders filed a complaint in Louisiana state court alleging that the defendants breached their duty to act as a reasonable and prudent operator as a result of a well failure. The defendants removed under CAFA's mass action provision. The plaintiffs alleged that CAFA jurisdiction did not exist because the case was primarily local and arose from a single event or occurrence — the failure of a well. The defendants argued that the plaintiffs actually alleged five separate incidents of negligence, all of which came together to culminate in the failure of the well. The Fifth Circuit agreed with the plaintiffs, holding that the single event exception applied. The court reasoned that there was an ongoing pattern of conduct that was contextually connected, which, when completed, constituted one event consistent with the legislative history of CAFA's single event exclusion.

***Ferrara v. 21st Century North America Insurance Co.*, No. CV-13-01695-TUC-RCC, 2014 WL 3889470 (D. Ariz. Aug. 7, 2014).**

Chief Judge Raner C. Collins of the U.S. District Court for the District of Arizona adopted Magistrate Judge D. Thomas Ferraro's report and recommendation that a class action seeking to recover medical expense coverage be remanded to state court because it did not meet CAFA's $5 million amount in controversy threshold. Judge Ferraro rejected the defendant's argument that the amount in

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controversy was satisfied because the policy limits were $5,000, and there were more than 1,000 members in the class, because "there is no allegation or evidence to support an assumption that all [class members'] claims reach the policy limits," and further rejected the defendant's claim that punitive damages were available and should be counted, because the plaintiff did not seek punitive damages in her complaint.

***Wagner v. Team Health Holdings, Inc.*, No. 5:14-cv-176-JMH, 2014 WL 3586265 (E.D. Ky. July 21, 2014).**

Judge Joseph M. Hood of the U.S. District Court for the Eastern District of Kentucky remanded a putative class action involving claims for breach of contract, conversion, fraud and negligence, with respect to wages that were allegedly improperly withheld from paychecks. The defendant had removed on the basis of federal-question and CAFA diversity jurisdiction. With respect to federal-question jurisdiction, the defendant argued that the plaintiff was essentially "seeking to recover excessive federal tax withholdings" — and that federal law preempted state law claims seeking a tax refund. The court disagreed, finding that there was no evidence that the plaintiff was seeking to recover excessively withheld taxes. Rather, the filings made clear that the plaintiff sought recovery based on the allegation that the "wage being taxed was lower than that contractually agreed upon." Thus, the suit was a "breach of contract action properly governed by state law." As to CAFA diversity jurisdiction, the court determined that the defendant had not proven that there was more than $5 million in controversy because the sole evidence was a declaration sworn in 2013, but the claim was for events after March 24, 2014.

***Vagle v. Archstone Communities, LLC*, No. 14-03476 RGK (AJWx), 2014 WL 2979201 (C.D. Cal. July 1, 2014).**

Judge R. Gary Klausner of the U.S. District Court for the Central District of California granted remand of a class action brought by tenants who leased an apartment managed by the defendants, claiming violations of California Civil Code § 1950.5, unjust enrichment, and violation of California's Unfair Competition Law. The court held that the removal effort (the second in the suit) was untimely because the declaration used for the second removal had been available more than 30 days earlier and because the court had indicated in an earlier remand order — also more than 30 days earlier — that "the Court would have had removal jurisdiction if [the second removing defendant] had removed."

***Board of Commissioners of the Southeast Louisiana Flood Protection Authority — East v. Tennessee Gas Pipeline Co.*, No. 13-5410, 2014 WL 2943602 (E.D. La. June 27, 2014).**

Judge Nannette Jolivette Brown of the U.S. District Court for the Eastern District of Louisiana denied a motion to remand in a suit brought by a state flood authority seeking damages and injunctive relief, alleging that oil and gas operations of 92 companies caused erosion of coastal lands that resulted in increased risk of severe weather and flooding due to violent wave action and storm surge during tropical storms and hurricanes. The defendants removed the case on multiple grounds, including the "mass action" provision of CAFA. The plaintiffs argued that the suit was not a "mass action" because the case was brought on behalf of the general public as opposed to specific individual claimants. The defendants urged the court to "pierce the pleadings" and find that the real parties in interest were the residents and businesses within the flood zone. The court rejected the defendants' argument, relying on the Supreme Court's recent decision in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), which made clear that suits brought by a state are not removable as "mass actions." The court nonetheless denied the motion to remand, reasoning that the lawsuit implicated various federal statutes, including the Clean Water Act, and therefore necessarily raised a substantial question of federal law.

***Weight v. Active Network, Inc.*, No. 14-CV-790 JLS (KSC), 2014 WL 2919307 (S.D. Cal. June 26, 2014).**

The plaintiff asserted consumer-fraud claims on behalf of California *residents* under California law arising from their alleged automatic enrollment in a discount program when registering online for various sports events. The defendant removed the suit under CAFA, arguing that the class definition necessarily included many California residents who were domiciled outside California. Rather than move to remand, the plaintiff filed an amended complaint to clarify that the class definition was limited to California *citizens*. Only after filing the amended complaint did the plaintiff move to remand the suit to state court. Judge Janis L. Sammartino of the U.S. District Court for the Southern District of California granted the motion to remand. The court explained that while generally, "post-removal pleadings have no bearing on whether the removal was proper," the amended complaint could be considered because it was "amended to clarify the original complaint rather than manipulate the forum." The court found that the plaintiff's revision simply clarified that his original intent was to litigate on behalf of California citizens only. Because the court lacked subject-matter jurisdiction over the action at the time of removal, the court granted the motion to remand.

MySpine, PS v. USAA Casualty Insurance Co.,
No. C13-2179, 2014 WL 2860682
(W.D. Wash. June 23, 2014).

The plaintiff brought a class action on behalf of Washington medical providers claiming that the defendant insurers failed to make payments to medical providers who treat their insureds. After failing to successfully remove once due to an inability to establish that the amount in controversy exceeded CAFA's $5 million jurisdictional threshold, the defendants tried again, after five months of litigation in state court, claiming that discovery briefing indicated that the plaintiff had expanded its claimed damages to more than $5 million. In particular, the defendants argued that the plaintiff had announced a "new category of damages" based on reduced payments from claims made to another insurer, USAA, which was not a party to the suit. Judge Richard A. Jones of the U.S. District Court for the Western District of Washington rejected this argument and granted remand. The court did not reach the issue of timeliness of removal because "[n]o reasonable attorney could have believed that MySpine's motion to compel announced a new category of damages" given that USAA was not a defendant in the action. The court also awarded attorneys' fees to the plaintiff and imposed a sanction of $5,000 payable to the court because "counsel knowingly filed a frivolous notice of removal for reasons other than ultimately having this dispute decided in federal court."

Riceland Foods, Inc. v. Gray, Ritter & Graham, P.C.,
No. 4:14 CV 81 CDP, 2014 WL 2804980
(E.D. Mo. June 20, 2014),
pet. for permission to appeal denied.

Judge Catherine D. Perry of the U.S. District Court for the Eastern District of Missouri granted the plaintiff's motion to remand and held that a defendant may not remove an action to federal court under CAFA based upon its own class action counterclaim. The court observed that the propriety of removal under CAFA is gauged by the status of the case at the time it was filed — before any defendant has filed its answer. In addition, under the interpretation proposed by the defendants, "defendants to an otherwise non-removable claim could create federal jurisdiction by bringing spurious class counterclaims."

Seasons Homeowners Association v. Richmond American Homes of Nevada, Inc.,
No. 2-14-cv-00428-APG-CWH, 2014 WL 2772298
(D. Nev. June 18, 2014).

The plaintiffs sought to remand two consolidated class actions asserting construction defects. After the state court consolidated the cases, the defendants removed, asserting that while neither complaint on its face met CAFA's amount in controversy requirement, the consolidated class action asserted claims of more than $5 million based on average costs of repair and attorneys' fees awarded in a similar action. Judge Andrew P. Gordon of the U.S. District Court for the District of Nevada concluded that the order consolidating the cases "did not merge the two class actions into one" action, and that "Plaintiffs had a colorable basis for filing separate class actions, and ... did not divide their claims into separate lawsuits to expand recovery." Thus, the court weighed whether "either action, standing alone, provides an amount in controversy sufficient to meet the jurisdictional requirement." The court held that the projected repairs to the homes and expert fees did not meet the requirement, and disregarded the defendants' projected amounts of attorney's fees as "far too speculative to meet the preponderance of evidence standard."

National Consumers League v. Bimbo Bakeries USA,
No. 1:13-cv-01674 (RCL), 2014 WL 2536795
(D.D.C. June 4, 2014).

The National Consumer League (NCL) brought this action alleging that the defendant Bimbo Bakeries USA (BBUSA) violated the District of Columbia Consumer Protection Procedures Act (DCCPPA) by engaging in improper labeling and marketing practices with respect to the labeling of certain products containing wheat. BBUSA opposed remand on the basis that the district court had CAFA jurisdiction. Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia found that the action was neither a class action nor a mass action removable under CAFA. First, the court held that it was not a class action, reasoning that: (1) the relevant DCCPPA provision, Section 28-3905(k)(1)(D), lacked the procedural requirements for class certification; (2) private attorney general actions are not class actions; and (3) Section 28-3905(k)(1)(D) only enables, and does not require, class actions. Second, the court held that the action was not a mass action because the NCL was the only named plaintiff and no other party had been identified or joined. Thus, it did not satisfy CAFA's mass action "plaintiffs" requirement.

In re Standard & Poor's Rating Agency Litigation,
No. 13-MD-2446 (JMF), 2014 WL 2481906
(S.D.N.Y. June 3, 2014).

Judge Jesse M. Furman of the U.S. District Court for the Southern District of New York granted plaintiff Mississippi's motion to remand a putative class action by 17 state attorneys general, alleging violations of state consumer-protection and deceptive trade practice laws against sellers of credit ratings. The defendants had removed the Mississippi attorney general's action under CAFA, but the court found that the defendants had failed to meet CAFA's numerosity requirement of at least 100 plaintiffs. The court reasoned that the defendants' theory that the suit by the

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Mississippi attorney general may have involved 100 or more unnamed persons who were real parties in interest (as beneficiaries of the attorney general's claims) was expressly rejected by the Supreme Court in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), and was thus "unquestionably invalid." The court also rejected the defendants' alternate argument for removal based on general diversity of citizenship. Analyzing the complaint as a whole, rather than proceeding claim-by-claim, the court determined that Mississippi — not some group of its citizens — was the real party in interest, because: (1) Mississippi had a "manifest" stake in the litigation; (2) the state had asserted a "quasisovereign" interest; and (3) Mississippi sought civil penalties and a statewide injunction, remedies unavailable to consumers. Because states are not citizens for the purpose of general diversity, the defendants had failed to show complete diversity, and Judge Furman remanded the case to the Mississippi state court in which it was initially filed.

***Romulus v. CVS Pharmacy, Inc.*, No. 13-10305-RWZ, 2014 WL 2435089 (D. Mass. May 30, 2014), appeal pending.**

In response to an order from the U.S. Court of Appeals for the First Circuit asking that she clarify her March 27, 2014, order remanding a putative wage-and-hour class action to state court, Judge Rya W. Zobel of the U.S. District Court for the District of Massachusetts explained that removal was untimely because it was not filed within 30 days of receipt of a pleading, motion or "other paper" from which it first became apparent that the case was removable, as required under 28 U.S.C. § 1446(b)(3). The court had originally remanded the case to state court for failing to exceed CAFA's $5 million matter-in-controversy threshold. After some preliminary discovery, the defendant again sought to remove the case to federal court based on an email from the plaintiffs that included their calculation of the number of violations within a certain subset of the class period. The court explained that, because the calculations were based entirely on information provided by the defendant, the email "provided no 'new' information regarding removability that would allow use of the date of the e-mail as the starting date for determining timeliness." Therefore, the proper date for calculating timeliness was the date of return of service of the operative complaint. (Judge Zobel's initial order remanding the action is discussed in the Summer 2014 edition of *The Class Action Chronicle*.)

***Pauley v. Hertz Global Holdings, Inc.*, No. 3:13-31273, 2014 WL 2112920 (S.D. W. Va. May 19, 2014).**

Chief Judge Robert C. Chambers of the U.S. District Court for the Southern District of West Virginia granted the plaintiff's motion to remand a putative class action asserting breach of contract, unjust enrichment and conversion arising out of the defendant car rental company's allegedly improper $30 handling fees in connection with parking citations. The handling fee was supposed to cover the company's cost of facilitating the payment of parking citations. The gravamen of the suit was that the defendant improperly charged the fee after customers had already paid the underlying parking citations. The plaintiff filed a putative class action in state court, and the defendant removed under CAFA. The plaintiff moved for remand, arguing that the defendant had not proven by a preponderance of the evidence that the amount in controversy exceeded the required $5 million. The defendant argued that the amount was met because during the relevant period it had collected at least $5.6 million in "handling fees." The court sided with the plaintiff, holding that this figure was over-inclusive because it included all such fees paid rather than the amount improperly charged — *i.e.*, fees charged after parking citations had already been paid. The court therefore remanded the action to state court.

***In re Avandia Marketing, Sales Practices & Products Liability Litigation*, No. 07-md-1871, 2014 WL 2011597 (E.D. Pa. May 15, 2014).**

The plaintiffs filed multiple suits involving Avandia, each with less than 100 plaintiffs to avoid removal under CAFA's mass action provision. Each case named at least one California plaintiff and McKesson, a California-based distributor of prescription medications; eight of the cases contained one Delaware plaintiff. All of the cases named GSK, a Delaware corporation, as a defendant. Judge Cynthia M. Rufe of the U.S. District Court for the Eastern District of Pennsylvania refused to remand the vast majority of the suits (45 of 53) on the basis of fraudulent joinder, holding that the plaintiffs had named McKesson, a California corporation, as a defendant solely for the purposes of destroying federal diversity jurisdiction but without any actual intention of prosecuting a claim against it. However, as to the eight cases that contained Delaware plaintiffs (in which case diversity would not exist, as GSK is a Delaware corporation), the court held that the cases were not removable unless "the plaintiffs, explicitly or implicitly, propose a joint trial." Because the defendants did not satisfy their burden of showing that the plaintiffs proposed a joint trial, the court granted the plaintiffs' motion to remand as to those eight cases.

CONTRIBUTORS

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

Practice Leader

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

Contributing Partners

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

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

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

Karen Hoffman Lent
New York
212.735.3276
karen.lent@skadden.com

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

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

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

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

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

Contributing Counsel

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

Contributing Associates

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

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

Mondi Basmenji
Washington, D.C.
202.371.7179
mondi.basmenji@skadden.com

Gail L. Ellis
Chicago
312.407.0519
gail.ellis@skadden.com

Catherine Fisher
Boston
617.573.4867
catherine.fisher@skadden.com

Tim Grayson
New York
212.735.3392
timothy.grayson@skadden.com

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

Milli Kanani Hansen
Washington, D.C.
202.371.7324
milli.hansen@skadden.com

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

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

Christopher J. Santoli
New York
212.735.2665
christopher.santoli@skadden.com

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

Matthew Stein
Boston
617.573.4892
matthew.stein@skadden.com

Caroline Van Ness
Los Angeles
213.687.5133
caroline.vanness@skadden.com

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

Contributing Legal Assistant

Katrina L. Loffelman
Washington, D.C.
202.371.7484
katrina.loffelman@skadden.com

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