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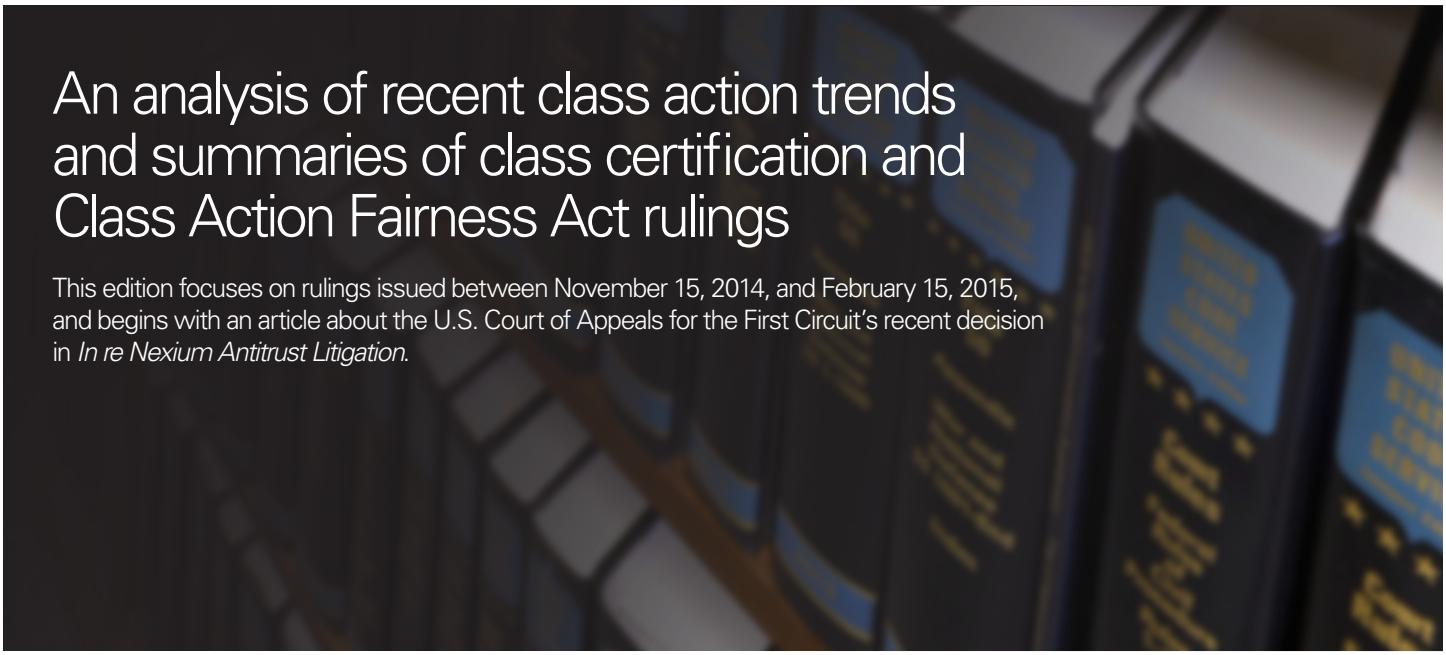

An analysis of recent class action trends and summaries of class certification and Class Action Fairness Act rulings

This edition focuses on rulings issued between November 15, 2014, and February 15, 2015, and begins with an article about the U.S. Court of Appeals for the First Circuit's recent decision in *In re Nexium Antitrust Litigation*.

Nexium and the Problems of Overbroad Class Actions

As we have noted in previous editions of the *Chronicle*, a number of federal courts have ignored the problems inherent in overbroad class actions. For example, the U.S. Court of Appeals for the Seventh Circuit has approved certification of consumer classes largely consisting of absent class members who never encountered the alleged defect in certain products, such as washing machines, windows and roofing tiles. The Seventh Circuit and other courts have justified this approach with a promise that the uninjured could be sorted out in later proceedings if necessary — specifically, in individual damages trials following a plaintiff verdict on liability. We have questioned the viability of this approach, noting that class participation is typically quite low in consumer suits even when submitting a claim is as simple as completing a form, and thus the notion that any significant number could be expected to participate in actual damages trials is wishful at best.

These issues were front and center in the U.S. Court of Appeals for the First Circuit's recent decision in *In re Nexium Antitrust Litigation*, Nos. 14-1521, 14-1522, 2015 WL 265548 (1st Cir. Jan. 21, 2015). Although a majority of the court failed to grapple with these important practical questions, they were the focus of a well-reasoned dissent that is likely to promote further exploration of these issues in future decisions. (Normally, the presence of a dissent would seem to have made the case ripe for *en banc* treatment, but further action on the class-certification question is unlikely at this point because the case proceeded to a defense verdict on the merits while the appeal was pending. *Nexium*, 2015 WL 265548, at *20 (Kayatta, J., dissenting).)

Nexium was an alleged "pay for delay" suit. In the context of prescription drugs, pay-for-delay suits typically charge that a manufacturer of a brand drug has artificially extended its market exclusivity by getting generic manufacturers to agree not to challenge the validity of the brand manufacturer's patents. These agreements arise out of suits brought by the

brand manufacturer against the generic manufacturer to enforce the patents after the generic manufacturer indicates through a submission to the Food and Drug Administration that it intends to market a generic drug on the ground that the brand manufacturer's patents are invalid. *Id*. at *2-4. Although it is the brand manufacturer that initiates suit, it is also the brand manufacturer that typically pays to settle in the pay-for-delay context, resulting in a "reverse payment settlement." *See id*.

In *Nexium*, AstraZeneca was alleged to have paid for the delay of generic equivalents of Nexium, the manufacturer's heartburn drug, through a series of reverse-payment settlements with three generic manufacturers. *See id*. Union health and welfare funds ("third-party payors," or TPPs) that reimburse plan members for Nexium and other prescription drugs brought suit, alleging that they paid more than they otherwise would have for the drug because, if the generic manufacturers had brought their Nexium-equivalent drugs to market earlier, a substantial number of the prescriptions they reimbursed would have involved the cheaper, generic versions of the drug.

The appeal involved AstraZeneca and the generics' challenge to the district court's ruling that the plaintiffs could proceed as a class. Among other things, the defendants argued that the class was overbroad because it failed to account for "brand loyalists" — in essence, patients who refuse to take generic drugs. *Id*. at *5. The First Circuit rejected the argument. Writing for a two-judge majority, Judge Timothy Dyk, sitting by designation from the U.S. Court of Appeals for the Federal Circuit, began by explaining that the question of overbreadth involves three overlapping class-certification principles: (1) the plaintiffs' damages theory must match its liability theory so that the defendant cannot be required to pay for "'damages that are not the result of the wrong,'" *id*. (quoting *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1434 (2013)); (2) the class is ascertainable; and (3) "where an individual claims process is conducted at the liability and damages stage of the litigation, the payout of the amount for which the defendants were held liable must be limited to injured parties." *Nexium*, 2015 WL 265548, at *5-6. With respect to this third principle, the First Circuit elaborated: "At the class certification stage, the court must be satisfied that, prior to judgment, it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members" and that the mechanism is "'administratively feasible'" and "protective of defendants' Seventh Amendment and due process rights." *Id*. at *6 (citation omitted).

Judge Dyk focused on the third of these principles. He acknowledged that "a proper mechanism for exclusion of brand-loyalist consumers has not yet been proposed," but believed that absent class members could "establish injury through testimony by the consumer that, given the choice, he or she would have purchased the generic" and that such testimony could be provided "in the form of an affidavit or declaration." *Id*. at *6-7. Judge Dyk therefore concluded that the defendants "have merely speculated that a mechanism for exclusion cannot be developed later," which "is not enough to overcome plaintiffs' case for having met the requirements of Rule 23 [of the Federal Rules of Civil Procedure]." *Id*. Judge Dyk was particularly convinced that class treatment was appropriate in light of record evidence suggesting that the uninjured class members would constitute only a "de minimis number" — something like "the '2.4 percent'" number in a Seventh Circuit case that had approved certification despite an overbreadth challenge. *Id*. at *15-17 (quoting *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 824, 826 (7th Cir. 2012)). According to Judge Dyk, the mere presence of a "de minimis" number of uninjured class members should not be allowed to derail class treatment because "it is simply not possible to entirely separate the injured from the uninjured at the class certification stage … in many cases." *Id*. at *9.

Judge William J. Kayatta, Jr. dissented. In his view, the district court and the majority had improperly "kicked the can down the road" by assuming that the identity of up to 24,000 uninjured class members could simply be sorted out later. *Id*. at *18 (Kayatta, J., dissenting). He took issue in particular with Judge Dyk's assumption that affidavits could be used to accomplish this task. As he explained, "at least one sister circuit has twice noted the limitations of using affidavits in the manner proposed" — limitations that the majority had not explored. *Id*. (citing, among other cases, *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), which we addressed in detail on this point in the Winter 2013 edition of the Chronicle). Specifically, Judge Kayatta asked,

> Will [resort to affidavits] require two forms of notice to class members — one to TPPs and one to consumers? What happens to those consumers who do not return an affidavit (of whom there may be many, given the low dollar amount of any potential recovery)? Will they be deemed to have opted out of the class? Or will they be deemed to have remained in, but lost their claims due to lack of injury? Even more daunting, what happens if tens or hundreds of thousands of Nexium purchasers file affidavits? How exactly will defendants exercise their acknowledged right to 'challenge individual damage claims at trial'? Will the defendants seek to depose everyone who has returned an affidavit,

> effectively challenging plaintiffs' counsel to a discovery game of chicken?

Nexium, 2015 WL 265548 at *19.[1] Relatedly, Judge Kayatta took aim at Judge Dyk's characterization of the number of uninjured class members as "de minimis." As he explained, "a percentage-based rule" does not realistically grapple with the practical problems posed by having to identify and remove uninjured class members. *Id*. at *20. After all, if "2.4% is okay, why not 5.7%? Or any number under 50%? The percentage tells one almost nothing about the functional sufficiency of the method. ... It may be relatively easy to cull 5% out of a class of 30. Culling out 5% of 1 million is almost certainly not." *Id*.

Although his views did not carry the day in this case, Judge Kayatta provided strong support for defendants faced with overbroad class actions in the future — particularly those in the consumer-fraud context, where the uninjured class members are often far more than a "de minimis" portion of the class. In such cases, defendants should press plaintiffs to articulate and courts to rigorously analyze proposed methods for "culling" uninjured members out of the class in the event of a plaintiff verdict regarding any proposed "common" trial on liability issues. As even the *Nexium* majority acknowledged (despite ultimately forgiving the plaintiffs' failure to comply with the requirement), this proposal must be vetted "[a]t the class certification stage" and proven administratively feasible and protective of a defendant's due-process and Seventh Amendment rights. *Id*. at *5-6.

On the issue of administrative feasibility, defendants should emphasize the fact that prior experience has already shown that the affidavit approach has serious problems. Judge Kayatta enumerated some of the problems that might attend the use of affidavits in his dissent, as has the U.S. Court of Appeals for the Third Circuit in *Carrera* and *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3d Cir. 2012). And the Seventh Circuit's experience with its ill-advised use of issues classes underscores the fact that consumer classes with large numbers of uninjured class members are likely to suffer from poor participation rates, as was the case in *Eubank v. Pella Corp.*, 753 F.3d 718, 726 (7th Cir. 2014) (noting that "only 1,276 claims" were filed "out of the more than 225,000 notices that had been sent to" members of a class involving allegedly defective windows) (we examined *Pella* in detail in the Fall 2014 issue of the *Chronicle*). Indeed, in a class involving largely uninjured members, the failure of the affidavit approach is inevitable and insurmountable: after all, who would bother to send in an affidavit or claim form if they did *not* have a problem with their product?

On the constitutional issues, defendants should continue to assert their rights to raise their defenses to liability. Although neither the majority nor the dissent in *Nexium* focused on this issue, any process that involves phasing or affidavits must preserve the defendant's due-process right to challenge claims of injury and class membership. In addition, such a process must also avoid re-examination of liability issues decided in the "common" class trial by factfinders in subsequent individual proceedings to protect defendants' Seventh Amendment rights.

In short, despite its approval of an arguably overbroad class, *Nexium* put the spotlight on some difficult issues that many other courts have been avoiding. It remains to be seen whether other courts will develop these points further, but defendants should continue to press the issue in resisting the growth of overbroad classes.

Class Certification Decisions

In this issue of the *Chronicle*, we cover four decisions granting motion to strike/dismiss class claims, two decisions denying such motions, 25 decisions denying class certification or reversing grants of class certification, 22 decisions granting or upholding class certification, eight decisions denying motions to remand or reversing remand orders pursuant to the Class Action Fairness Act, and 16 decisions granting motions to remand or finding no jurisdiction under CAFA.

Decisions Granting Motions to Strike/Dismiss Class Claims

***Schumacher v. State Automobile Mutual Insurance Co.*, No. 1:13-cv-00232, 2015 WL 421688 (S.D. Ohio Feb. 2, 2015).** In a lawsuit alleging that an insurance company intentionally overestimated the cost to replace insured homes, Judge Timothy S. Black of the U.S. District Court for the Southern District of Ohio granted the company's motion to strike class allegations. The lawsuit claimed that by overestimating the replacement cost for the homes the insurance company could require higher policy limits and therefore collect higher premiums from policyholders. The complaint sought to certify a class of policyholders whose homeowner policy limits and premiums had been increased on that basis. The court held that this class was not ascertainable: there was no objective method to determine if the policy limit increase could be explained by a genuine change to an insured's property (rather than in response to the company's alleged scheme), and the plaintiffs had not identified a classwide manner to determine the appropriate policy limit for each

[1] Judge Kayatta also took issue with Judge Dyk's "suggestion that when a proposed class includes some uninjured members who will have to be removed post-certification, it is the defendants who bear the burden of demonstrating that it cannot be done," noting the Supreme Court's "clear" message that "the party seeking certification bears the burden of demonstrating that the requirements of Rule 23 are satisfied." *Nexium*, 2015 WL 265548, at *20 (Kayatta, J., dissenting).

property. The court also held that commonality and predominance were not satisfied because the defendant's liability would hinge on individualized inquiries into whether a policy's coverage limits were appropriately set or inflated. Finally, the court concluded that the fraud claims raised individualized issues regarding reliance: the statements at issue were made during consultations with the company's representatives to document the insured's property's value and not through uniform materials sent to each class member.

***Bell v. Cheswick Generating Station*, No. 12-929, 2015 WL 401443 (W.D. Pa. Jan. 28, 2015).** Judge Cathy Bissoon of the U.S. District Court for the Western District of Pennsylvania granted the defendant's motion to strike class allegations from a complaint seeking damages and injunctive relief for a putative class of individuals who own or inhabit residential property within a one-mile radius of the defendant's coal-fired electrical generating station "whose property was damaged by noxious odors, fallout, pollutants and contaminants" originating from the facility. The court held that the proposed class definition was "fail-safe" and therefore improper because, in order to determine class membership, the court would have to decide whether: (1) the individual lived within one mile of the plant; (2) he/she suffered "similar damages" to property that resulted from the "invasion" of his or her property by particulates, chemicals and gases; and (3) those particulates, chemicals and gases originated from the defendant's plant. However, the court noted that amendment to the class definition could cure the defects and struck the class allegations without prejudice to a future motion by the plaintiffs for leave to amend the complaint.

***Zarichny v. Complete Payment Recovery Services, Inc.*, No. 14-3197, 2015 WL 249853 (E.D. Pa. Jan. 21, 2015).** Judge Stewart Dalzell of the U.S. District Court for the Eastern District of Pennsylvania granted in part and denied in part the defendants' motion to dismiss the plaintiff's complaint and strike putative class action claims brought under the Fair Debt Collection Practices Act (FDCPA) and the Telephone Consumer Protection Act (TCPA). The classes were defined to include people who received telephone calls without the recipient's prior express consent in violation of the TCPA or receipt of written notice under the FDCPA. The court recognized that in putative class action cases a court should only grant a motion to strike class allegations if class treatment is "evidently inappropriate from the face of the complaint." Here, the class definition was facially inappropriate because it proposed a "fail-safe" class, *i.e.*, a class that is "defined so that whether a person qualifies as a member depends on whether the person has a valid claim."

***Huff v. Telecheck Services, Inc.*, No. 3-14-1832, 2015 WL 136303 (M.D. Tenn. Jan. 9, 2015).** Judge Todd J. Campbell of the U.S. District Court for the Middle District of Tennessee granted in part the defendants' motion to strike class allegations in a putative class action alleging Fair Credit Reporting Act (FCRA) violations. The court had ruled that there is no private right of action under the FCRA for injunctive relief and therefore dismissed the plaintiffs' Rule 23(b)(2) class allegations for injunctive relief. However, the court denied the defendants' request that the Rule 23(b)(3) class allegations be struck as well. The defendants had argued that the proposed class definition required individualized inquiries into when a class member discovered the FCRA violation to determine whether a class member's claim was timely. In response, the plaintiffs proposed a modified class definition that covered a shorter period, which the court accepted.

Decisions Denying Motions to Strike/Dismiss Class Claims

***Hill v. Wells Fargo Bank, N.A.*, No. 12 C 7240, 2015 WL 232127 (N.D. Ill. Jan. 16, 2015).** Judge Gary Feinerman of the U.S. District Court for the Northern District of Illinois denied a motion to strike class allegations from a complaint alleging violations of the Fair Debt Collection Practices Act (FDCPA) and the Illinois Consumer Fraud and Deceptive Business Practices Act. The plaintiffs' complaint listed four classes. Class A proposed a Rule 23(b)(2) and 23(b)(3) class, respectively, of individuals on whose homes the defendants posted a vacancy notice that threated disablement/dispossession of the property, allegedly in violation of the FDCPA. Class B proposed a Rule 23(b)(2) class of those same individuals. The defendants argued that the court should strike both classes' allegations because the underlying conduct on which their definitions were based — the posting of the vacancy notice — was not actionable under the FDCPA. The court disagreed, pointing to Seventh Circuit precedent holding that the "chance, even the certainty, that a class will lose on the merits does not prevent its certification." Class C proposed a Rule 23(b)(3) class of individuals whose homes the defendants had entered unlawfully to lockout, trash out, rekey and/or winterize the property in connection with mortgage debts. The defendants argued, *inter alia*, that this class failed on its face because different homeowners experienced different practices, eliminating any common question of whether the alleged conduct was unlawful. The court again disagreed, holding that it could not "be said at the pleading stage that alleging non-overlapping combinations of practices preclude[d] the possibility that a certain combination [could] predominate." As to Class D, a Rule 23(b)(2) class of those same individuals, the defendants challenged the appropriateness of injunctive relief because the complaint alleged only past conduct, not activities that were likely to occur in the future. The court sustained the argument as to two of the named plaintiffs who had already transferred their entire interest in their home to another bank, leav-

ing them nothing to gain from an injunction against the defendants. As to the other two plaintiffs, however, the court held injunctive relief may still be appropriate in light of their allegation that the defendants were still subjecting them to unauthorized entrances.

***Hussein v. Coinabul, LLC*, No. 14 C 5735, 2014 WL 7261240 (N.D. Ill. Dec. 19, 2014).** Judge James B. Zagel of the U.S. District Court for the Northern District of Illinois denied the defendants' motion to strike the class allegations based on a failure to meet the numerosity and typicality requirements of Rule 23, holding that the parties would need to conduct further discovery before the defendants could object on those grounds. The complaint alleged that the defendants defrauded consumers by accepting payments in the form of bitcoins — a new form of digital currency — for gold or silver that its customers ordered online but never received. Although his complaint did not specify the exact number of class members, it indicated that the defendant company had received more than one thousand orders for gold and silver during the class period. The court determined that even if there was neither a one-to-one relationship between the number of orders received and the number of customers who placed the orders, nor between the number of customers who placed orders and the number of customers who failed to receive any goods, it was nonetheless very likely that the number of class members would make joinder impracticable, thus satisfying the numerosity requirement. With respect to the typicality requirement, the court found that the parties would need to conduct discovery to determine whether the orders placed during the time period in question would significantly vary in size, and whether the defendants thus would have a valid objection to the typicality of the named plaintiff's claims. Although it denied the defendants' motion to strike the class allegations on these grounds, the court indicated that it would revisit the objections if and when the defendants opposed the plaintiff's motion to certify the class.

Decisions Rejecting/Denying Class Certification

***Powers v. Credit Management Services, Inc.*, No. 13-2831, 2015 WL 160285 (8th Cir. Jan. 13, 2015).** A unanimous panel of the U.S. Court of Appeals for the Eighth Circuit (Wollman, Loken and Murphy, JJ.) reversed the district court's certification of four classes of consumers alleging that Credit Management Services (CMS), a debt collector, issued standard collection complaints and discovery requests that violated the Fair Debt Collection Practices Act (FDCPA) and Nebraska Consumer Protection Act (NCPA). The district court's certification turned on the notion that a predominant common question was whether the defendants sent each class member standard collection complaints and discovery requests that violated the FDCPA and NCPA. But the Eighth Circuit explained that such a question would only be common if the complaints and discovery requests violated the statutes on their face. The plaintiffs claimed that the standard form complaints, for example, were facially invalid because they sought prejudgment interest under two Nebraska statutes that did not in fact permit such interest. The Eighth Circuit recognized, however, that even if the plaintiffs' interpretation was accurate, every state court collection suit would have to be reviewed to determine: (1) whether CMS actually claimed prejudgment interest; (2) if so, whether CMS recovered prejudgment interest, making the alleged violation of the FDCPA material; (3) for every potentially material violation, whether the underlying consumer transaction reflected that CMS had a legitimate claim under the relevant statute; and (4) whether the plaintiffs' legal theory was litigated by the class member and resolved by the state court for issue preclusion purposes. As such, the classes failed the commonality, predominance and superiority requirements.

***Ticknor v. Rouse's Enterprises, L.L.C.*, 592 F. App'x 276 (5th Cir. 2014) (*per curiam*).** A unanimous panel of the U.S. Court of Appeals for the Fifth Circuit (Reavley, Elrod and Southwick, JJ.) affirmed the district court's denial of class certification to a group of plaintiffs alleging that a grocery store had violated the Fair and Accurate Credit Transactions Act (FACTA). The denial was based on two grounds. First, questions of law and fact common to class members did not predominate over questions affecting individual class members. For each transaction, the court would have to make "transaction-by-transaction" determinations regarding whether the individual purchasers: (1) were cardholders; (2) were consumers rather than business purchasers; and (3) took their receipts. Second, as another independent basis to deny certification, the court ruled that a class action was not the superior means by which to adjudicate this case. Because FACTA provides for statutory damages, punitive damages and attorney's fees, the district court did not err in ruling that proceeding as a class action was not superior. The court ended its opinion by highlighting that any apparent inconsistency between this decision and others stems from the broad discretion given to the district court in class certification decisions.

***Cox v. TeleTech@Home, Inc.*, No. 1:14-CV-00993, 2015 WL 500593 (N.D. Ohio Feb. 5, 2015), *modified*, No. 1:14-CV-00993, 2015 WL 668988 (N.D. Ohio Feb. 17, 2015).** Judge James S. Gwin of the U.S. District Court for the Northern District of Ohio denied class certification in a lawsuit alleging that the defendant violated the Fair Credit Reporting Act (FCRA). The lawsuit claimed that the defendant violated the FCRA by sending an automated email rescinding job offers based on pre-employment screening before providing the required FCRA disclosures, which were sent by mail. The court

held that Rule 23's commonality requirement was satisfied, because the defendant's liability to the entire class would be determined by adjudicating whether the defendant failed to provide the required disclosures before rescinding job offers and whether the violation was willful. The court, however, concluded that the named plaintiff was not typical of the class, because he had been reoffered the job after receiving the email and then allegedly had the new offer rescinded for reasons unrelated to the FCRA background check. The court also held that the named plaintiff was an inadequate representative because he sought only statutory damages (requiring a showing of a willful FCRA violation), but the court reversed that part of the ruling on reconsideration.

***Rosen Family Chiropractic, S.C. v. Chi-Town Pizza on Division Street, Inc.*, No. 11 C 6753, 2015 WL 638522 (N.D. Ill. Feb. 13, 2015).** Judge John J. Tharp, Jr. of the U.S. District Court for the Northern District of Illinois denied the plaintiff's motion for class certification in an action alleging that defendant Chi-Town Pizza on Division Street, Inc. sent an unsolicited fax to him in violation of the Telephone Consumer Protection Act. The defendant insisted that the fax advertised Chi Town Pizza Express, a separate legal entity. The plaintiff's discovery purportedly revealed that the owner of the two companies hired RFG Marketing (RFG) to send 3,000 faxes to 106 fax numbers on behalf of the defendant. Thus, the plaintiff sought to certify a class of plaintiffs whose fax numbers were listed on the RFG fax log. But that log did not include the plaintiff's fax number, and the template used by RFG to send faxes to the numbers on that log differed from the fax the plaintiff actually received. In denying certification, the court found these issues "[m]ost problematic" for the plaintiff as to Rule 23(a)'s typicality and adequacy requirements. In addition, the court found numerosity and ascertainability lacking. There were "no members of the putative class," because none of the recipients on the fax log received an advertisement promoting the defendant's catering services; instead, they received an advertisement based on a template that had no discernible connection to the defendant. Moreover, if the named plaintiff was "to be considered a class member despite his number's absence from the log," the court held that the log said "little about what other absent recipients are nevertheless class members, rendering the class indefinite."

***Lary v. Rexall Sundown, Inc.*, No. 13-CV-5769 (SJF), 2015 WL 590301 (E.D.N.Y. Feb. 10, 2015).** Judge Sandra J. Feuerstein of the U.S. District Court for the Eastern District of New York denied certification for a class asserting that the defendant, in violation of the Telephone Consumer Protection Act, sent the plaintiff and 40 other recipients an unsolicited fax offering a free sample of a dietary supplement. The court held that the defendant's Rule 68 offer to the named plaintiff, which provided more relief than the plaintiff could otherwise recover, mooted the plaintiff's claims. The court found the fact that unnamed plaintiffs could still bring their own lawsuits individually particularly persuasive in deciding whether the pre-certification Rule 68 offer mooted the case. The plaintiff's motion to certify the proposed class was therefore denied because, in the absence of a claim against the defendant, the plaintiff could not adequately represent the purported class.

***Ademiluyi v. PennyMac Mortgage Investment Trust Holdings I, LLC*, No. ELH-12-0752, 2015 WL 575362 (D. Md. Feb. 10, 2015).** Judge Ellen Lipton Hollander of the U.S. District Court for the District of Maryland denied the plaintiffs' motion for class certification in a putative class action alleging that the defendants' unlicensed debt collection activity violated various provisions of the Fair Debt Collection Practices Act and the Maryland Mortgage Fraud Protection Act. The court explained that Rule 23 was not satisfied because the proposed class counsel would not adequately represent the interests of the putative class. Proposed class counsel, a solo practitioner and the lead plaintiff's daughter, did not have the necessary experience in handling class actions, and there was an apparent conflict of interest between counsel and putative class members because of counsel's familial relationship to the lead plaintiff.

***Combs v. Cordish Cos.*, No. 14-0227-CV-W-ODS, 2015 WL 438154 (W.D. Mo. Feb. 3, 2015).** Judge Ortrie D. Smith of the U.S. District Court for the Western District of Missouri denied the plaintiffs' motion for class certification in a case alleging that the defendants limited African Americans' access to a downtown area called "the District" in violation of 42 U.S.C. § 1981. The plaintiffs proposed a class of all persons of African-American descent who were "excluded, ejected, harassed, or suffered other discriminatory treatment" by the defendants at any time after March 10, 2010. The court found that the proposed class was too ambiguous because: (1) it was not limited to those who were ejected or excluded based solely on their race, as would be required to succeed on a claim under § 1981; and (2) the term "other discriminatory treatment" was too broad to identify the nature of the claims asserted. Moreover, the class failed many of Rule 23's requirements, including commonality, because even if the plaintiffs could convince a jury that the defendants maintained discriminatory policies, that would not necessarily entitle any class member to relief. For example, even if the defendants had a practice of picking fights with African Americans to fabricate an excuse to evict such patrons, that would not resolve whether any particular ejected individual was actually subjected to that practice.

Because the plaintiffs lacked any "significant proof" that could "bridge the gap" — such as statistical evidence regarding the extent to which these practices were employed — they failed to demonstrate the commonality necessary for certification.

***Vincent v. Money Store*, No. 11 Cv. 7685 (JGK), 2015 WL 412895 (S.D.N.Y. Feb. 2, 2015).** Judge John G. Koeltl of the U.S. District Court for the Southern District of New York denied certification of a class asserting common law fraud against mortgage lenders for allegedly charging borrowers for attorneys' fees that were never paid to attorneys. The court held that the plaintiffs failed to establish commonality under Rule 23(a)(2) and predominance under Rule 23(b) because they did not prove by a preponderance of the evidence that the defendants were engaged in a common policy or practice. Moreover, the predominance requirement was not satisfied because "evaluating the fraud claim would require looking to what was sent to each individual borrower." Finally, the plaintiffs failed to satisfy the adequacy requirement under Rule 23(a)(4) because the named plaintiffs had filed six bankruptcies in a span of four years and had several dismissed as "bad faith filings." The court determined that the plaintiffs would be inadequate class representatives because the bad-faith filings would create serious concerns about their credibility at a trial alleging fraud.

***Friedman v. Dollar Thrifty Automotive Group, Inc.*, No. 12-cv-02432-WYD-KMT, 2015 WL 361232 (D. Colo. Jan. 27, 2015).** The plaintiffs sought to certify a nationwide class of consumers asserting claims against rental car companies for violations of Colorado and Florida consumer protection laws and breach of contract-related claims arising from misleading add-on products, like additional insurance, which the plaintiffs declined or were charged for without proper consent. Judge Wiley Y. Daniel of the U.S. District Court for the District of Colorado found the proposed class of renters was sufficiently numerous and ascertainable but overbroad, because it included renters who "were not deceived in connection with the purchase of the products, received a benefit from purchasing the products" and renters who received refunds. Analyzing the defendant's evidence, the court further concluded that commonality was not satisfied because the claims involved "face-to-face individualized transactions in which customers with varying circumstances, preferences, and levels of knowledge about the Add-On Products engaged with thousands of Dollar agents and purchased one of three different products" at various locations and time periods. Typicality and adequacy were likewise not satisfied because the named plaintiffs' claims were in conflict with the class claims. For example, one plaintiff received a refund and also admitted not reading any disclosures, and therefore could not have been deceived by them, and neither named plaintiff bought all three of the add-ons at issue, raising questions of standing. The court refused to certify monetary or injunctive relief classes based on the individualized transactions and found certifying a Rule 23(a)(4) class to resolve only liability issues was improper because "there are not just individualized damage inquiries, but individualized liability issues" as well.

***Cabrera v. Government Employees Insurance Co.*, No. 12-61390-CIV, 2015 WL 464237 (S.D. Fla. Jan. 16, 2015).** Judge Kathleen M. Williams of the U.S. District Court for the Southern District of Florida denied the plaintiff's renewed motion for class certification — the plaintiff's third motion for class certification and fourth proposed class definition. In this putative class action, the plaintiff originally sought to represent four different classes — a cellular telephone class of persons who received calls on their cellphones from GEICO related to a subrogation claim; a GEICO "robocall class"; a Bell cellular telephone class; and a Bell robocall class. Later, the plaintiff amended the motion for certification to certify only two nationwide classes, combining the cellular and robocall classes. After the court denied class certification in September 2014, the plaintiff did not appeal that decision, but rather filed the renewed motion for certification at issue. While a court may "revisit a prior denial of a class certification motion if there is a change in the circumstances or facts since the prior denial," a court must consider whether there are compelling reasons such as a change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice. Finding none of those conditions applicable, the court "should not condone a series of rearguments on the class issues ... in the guise of motions to reconsider class rulings." The court's ruling that the plaintiff did not have standing to pursue claims on behalf of persons who received calls on their residential lines did not amount to "changed circumstances"; the plaintiff clearly anticipated the need to distinguish between calls placed to residential lines and those placed to cellphones, as evidenced by his initial proposed classes and citation of relevant case law in his briefings. Particularly given the drawn-out nature of the litigation, the court found that all factors weighed against amending its prior order denying class certification and denied the plaintiff's renewed motion.

***In re Express Scripts, Inc.*, No. 4:05MD01672HEA, 2015 WL 128073 (E.D. Mo. Jan. 8, 2015).** Judge Henry Edward Autrey of the U.S. District Court for the Eastern District of Missouri denied class certification in a case alleging that Express Scripts, Inc. (ESI), the pharmacy benefits manager for Local 153 Health Fund, retained undisclosed rebates from drug manufacturers and thereby enriched itself at the expense of the beneficiaries of the fund. The plaintiff brought claims for breach of fiduciary duty, deceptive business practices, breach of contract, conversion, breach of the covenant of good

faith and fair dealing, and unjust enrichment. The plaintiff sought to certify a class under Rule 23(b)(3) consisting of "[a]ll self-funded ERISA employee benefit plans" whose pharmacy benefits initially were managed by National Prescription Administrators, Inc. (NPA), a company that ESI had acquired in 2002. In denying certification, the court held that commonality and predominance were lacking because the plaintiff failed to prove that all class members were subject to the same standardized contract. To the contrary, ESI and NPA had engaged in individualized negotiations and formed individualized contractual relationships with each plan. Thus, the court would have to analyze each of the contracts separately to resolve the class claims. Finally, the court found that affirmative defenses such as the statute of limitations, mitigation or affirmative release of claims would require an individualized determination for each class member as well because these defenses turn in large part on each class member's knowledge and conduct.

***Littleton v. State Farm Mutual Automobile Insurance Co.*, No. 5:14-CV-05007, 2015 WL 128577 (W.D. Ark. Jan. 8, 2015).** Judge Timothy L. Brooks of the U.S. District Court for the Western District of Arkansas denied certification in a putative class action against automobile insurer State Farm. After an accident, the plaintiff relied on his State Farm policy to reimburse his medical care providers up to its $5,000 limit. The plaintiff alleged that State Farm improperly paid a lesser amount for the medical care based on a PPO discount rate it was not entitled to, leaving the plaintiff to cover the difference even though State Farm did not exhaust the $5,000 limit. Based on these allegations, the plaintiff asserted breach of contract and sought to certify a class of State Farm insureds who had a policy that included "med pay" coverage; submitted a claim for which State Farm paid a lesser amount on a billed item; and were paid (or their medical providers were paid) an amount less than the policy limit. In ruling on class certification, the court determined, inter alia, that the proposed class was not ascertainable through State Farm's records. It could not assume that, because an insured received a bill for medical services and State Farm paid a discounted amount on the bill, the insured suffered an injury. Rather, the court would have to determine whether the medical providers ever attempted to collect the difference — an inquiry that would make ascertaining class members excessively burdensome.

***Village of Bedford Park v. Expedia, Inc.*, No. 13 C 5633, 2015 WL 94851 (N.D. Ill. Jan. 6, 2015).** Judge Matthew F. Kennelly of the U.S. District Court for the Northern District of Illinois denied class certification in a putative class action brought by Illinois municipalities against a number of online travel companies for unpaid taxes. The plaintiffs alleged that the defendants failed to remit taxes owed under 276 ordinances that could be grouped into four categories, which they offered as possible subclasses: (1) the use and privilege of a hotel room; (2) the rental of hotel accommodations; (3) persons engaged in the business of renting hotel rooms; and (4) consideration received for renting a hotel room. The plaintiffs moved for class certification pursuant to Rules 23(b)(1) and 23(b)(3). With respect to Rule 23(b)(3) certification, the court accepted the defendants' argument that predominance was not satisfied because the ordinances all varied widely as to "who" and "what" was taxed, even within one category. In addition, the court denied the application for certification under Rule 23(b)(1) because that rule only "contemplates ... lawsuit[s] based on a single tax law or, at the very least, tax laws with materially identical legal requirements." Here, by contrast, the plaintiffs had sued under 276 different tax ordinances, which may impose entirely different legal requirements.

***Shamsnia v. Anaco*, No. 2:14-cv-01431-ODW (VBKx), 2014 WL 7405757 (C.D. Cal. Dec. 30, 2014).** Judge Otis D. Wright, II of the U.S. District Court for the Central District of California refused to certify a class of condominium owners bringing products liability claims for damages from allegedly defective sewer pipes because the named plaintiff and his counsel failed to comply with "basic class action procedures" as well as the court's local rules. The plaintiff failed to file a motion for class certification within 90 days after service of the complaint, sought an extension after the court issued an order to show cause why a motion for class certification was not filed in accordance with the rules, and then filed a motion for certification that was struck because counsel failed to notice a hearing date. The plaintiff's second motion for class certification was "nothing more than a recitation of the pleadings and contain[ed] no evidentiary support," and then the plaintiff did not file a timely reply. His subsequent *ex parte* motion for leave to file reply was denied as procedurally improper under the rules and "substantively meritless." Finding that the "repeated and pervasive failure to comply with basic procedural rules is the opposite of vigorous prosecution" under Rule 23(a)(4), the court did not reach the other Rule 23 factors and denied the motion for class certification.

***Randolph v. J.M. Smucker Co.*, No. 13-CIV-80581, 2014 WL 7330430 (S.D. Fla. Dec. 22, 2014).** Judge Beth Bloom of the U.S. District Court for the Southern District of Florida denied class certification in this action alleging violations of Florida's Deceptive and Unfair Trade Practices Act, false and misleading advertising, unjust enrichment and breach of express warranty against the producer of various cooking oils containing an "All Natural" label. Judge Bloom held that the putative class was not ascertainable because the consumer plaintiff had not offered a feasible mechanism for determining all other purchasers of the oils at issue that would comprise the class, noting that the variations in Crisco products

combined with the fact that consumers likely would not retain significant memory or proof of purchase for such a low-priced consumer item made accurate self-identification by consumers nearly impossible. The court went on to hold that, while the plaintiff satisfied the commonality and typicality requirements, she failed to present sufficient evidence of a viable damages model that would be capable of estimating damages on a classwide basis that would be necessary to establish predominance under Rule 23(b)(3). The court also denied certification of a class under Rule 23(b)(2) on the ground that neither party had demonstrated that money damages were merely incidental to injunctive relief.

***Holton v. Cajun Operating Co.*, No. 8:14-cv-2703-T-33AEP, 2014 WL 7274818 (M.D. Fla. Dec. 22, 2014).** Judge Virginia M. Hernandez Covington of the U.S. District Court for the Middle District of Florida denied class certification without prejudice in a case alleging that the defendant violated the terms of the Fair Credit Reporting Act by procuring customer reports on the plaintiff and other putative class members for employment purposes without first making the statutorily required disclosures. Because the case was in its infancy — the plaintiff had just filed an amended complaint and discovery had just begun a few days prior — the court found that addressing the merits of the motion at this point would be "superfluous as the parties have not yet had the opportunity to develop the factual and legal issues of this case."

***Cooper v. Kliebert*, No. 14-507-SDD-SCR, 2014 WL 7338846 (M.D. La. Dec. 22, 2014).** Judge Shelly D. Dick of the U.S. District Court for the Middle District of Louisiana denied class certification to a group of plaintiffs in a case arising from the continued incarceration of plaintiffs found not guilty by reason of insanity (NGRI). The plaintiffs sought to certify a class of individuals who had been adjudicated NGRI but were incarcerated while awaiting bed space at the Eastern Louisiana Mental Health System. Because the Department of Health & Hospitals maintains a registry of individuals adjudicated NGRI, potential plaintiffs could easily be identified and located. Thus, the court denied the motion for class certification because joinder was not impracticable.

***Saavedra v. Eli Lilly & Co.*, No. 2:12-cv-9366-SVW (MANx), 2014 WL 7338930 (C.D. Cal. Dec. 18, 2014).** Judge Stephen V. Wilson of the U.S. District Court for the Central District of California denied certification in a case brought on behalf of a proposed class of purchasers of the antidepressant Cymbalta, claiming that the manufacturer violated those states' consumer protection laws in misrepresenting the risk of withdrawal symptoms. The court rejected the plaintiffs' "novel" damages theory that they were harmed not by personal injury but because the drug they received had a significantly higher risk of withdrawal side effects and was thus worth less than the drug as represented (what the consumers expected to receive). According to the court, the plaintiffs' expert's calculations failed to take into account, *inter alia*, that the heavily regulated prescription drug market is not an efficiently functioning market, particularly in light of the effect of insurance prescription plans and pricing that "sever the relationship between price and value." The court also found that classwide proof of injury, materiality/reliance and causation were not reconcilable with the plaintiffs' theory of damages, due to differences between each individual's (and his or her physician's) weighing of the withdrawal symptom risks as compared to the benefits to each individual's depression symptoms, and refused to certify a Rule 23(b)(3) class. Judge Wilson also refused to certify an issue class under Rule 23(c)(4) with respect to whether the alleged omissions were materially misleading under the relevant state laws because materiality and damages could not be evaluated on a classwide basis and thus certifying a liability-only issue class "would not advance the resolution of this litigation."

***Lanovaz v. Twinings North America, Inc.*, No. C-12-02646-RMW, 2014 WL 7204757 (N.D. Cal. Dec. 17, 2014).** Judge Ronald M. Whyte of the U.S. District Court for the Northern District of California denied the plaintiff's motion for reconsideration of the court's class certification order, declining to certify a class under Rule 23(b)(3). The plaintiff had brought claims on behalf of a purported class of tea purchasers based on the alleged misbranding of teas by Twinings. The court had certified an injunctive class under Rule 23(b)(2) but declined to certify a class under Rule 23(b)(3) because the plaintiff had not presented a viable damages model. The basis for the motion for reconsideration was that the plaintiff's expert had concluded that he could use a hedonic regression analysis to calculate damages for the class. However, the court denied the motion, since the proposed model for damages was not based on new facts or facts that the plaintiff could not reasonably have discovered at the time she moved for class certification. Indeed, the plaintiff's expert had submitted declarations in two earlier cases testifying that a hedonic regression was a possible damages model, and the information needed to support the model was available to the plaintiff at the time of her original motion.

***Werdebaugh v. Blue Diamond Growers*, No. 12-CV-02724-LHK, 2014 WL 7148923 (N.D. Cal. Dec. 15, 2014).** Judge Lucy H. Koh of the U.S. District Court for the Northern District of California granted the defendant's motion to decertify a damages class of California purchasers of almond milk products manufactured, distributed and/or sold by Blue Diamond Growers containing the allegedly misleading label statements "evaporated cane juice" and/or "All Natural" in violation of California consumer protection laws. Judge Koh had

previously approved a proposed regression model as an acceptable damages model under *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Judge Koh's previous decision was summarized in the Fall 2014 Chronicle. In its motion to decertify, however, the defendant contended that the plaintiff's damages models suffered from "incurable deficiencies" incapable of satisfying *Comcast*, because they conflated the effect of the alleged mislabeling with the value of Blue Diamond's brand and failed to control for other key factors affecting price, such as advertising. According to the court, the expert's continued failure to ensure the accuracy of his assumptions in developing his damages model was "not merely a problem of erroneous data, but ... a fundamental flaw with [the expert's] methodology," requiring decertification.

***Yeoman v. Ikea U.S.A. West, Inc.*, No. 11-cv-00701-BAS (BGS), 2014 WL 7176401 (S.D. Cal. Dec. 4, 2014).** Judge Cynthia Bashant of the U.S. District Court for the Southern District of California granted the defendant's motion to decertify a class of California consumers claiming violations of the Song-Beverly Credit Card Act (the Act) when Ikea requested and recorded a ZIP code in conjunction with credit card transactions after a trial on liability issues. The court found that the plaintiff could only show that the Act was violated in her individual transactions, because the law required, *inter alia*, the elimination from the class of any transaction involving corporate credit cards, signature debit cards, people who provided a ZIP code for home delivery or other legitimate purpose, or people who gave a false ZIP code. The court further found that the predominance requirement was not satisfied because the evidence showed no common answer as to whether requests for ZIP codes were made to each customer, or the existence of a uniform policy of requesting and recording ZIP codes, and "none of the other issues is sufficiently important to convince the Court that the most efficient method of determining the rights of the parties is the continuation of this action as a class action."

***Rahman v. Mott's LLP*, No. 13-cv-03482-SI, 2014 WL 6815779 (N.D. Cal. Dec. 3, 2014), 23(f) pet. pending.** Judge Susan Illston of the U.S. District Court for the Northern District of California denied certification of a proposed class defined as " '[a]ll California residents who, from June 13, 2009, until the date of the preliminary approval order, purchased Mott's 100% Apple Juice bearing the statement "No Sugar Added" on the label or package,' " alleging that the juice was mislabeled under California law and FDA regulations. The court held that the plaintiff met all requirements under Rule 23(a), rejecting Mott's arguments that the proposed class was not ascertainable because purchasers could not easily be identified and that since the label did not appear throughout the defined class period, the plaintiff could not isolate consumers who purchased the product with the challenged label. The court declined to follow the holding in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), which rejected affidavits to identify class members as unascertainable, and held that the labeling timing issue could be resolved by defining the class period to exclude individuals who purchased the product when the label did not state "No Sugar Added." However, the plaintiff failed to satisfy the predominance requirement under Rule 23(b) as to damages because he did not introduce any evidence showing that restitution damages could be feasibly and efficiently calculated. Moreover, the court rejected a bifurcated proceeding and declined to certify a liability only class under Rule 23(c)(4), which would not be "reasonable or efficient," given that the average class member incurred less than $100 in damages.

***Taylor v. Universal Auto Group I, Inc.*, No. 3:13-cv-05245-KLS, 2014 WL 6654270 (W.D. Wash. Nov. 24, 2014).** Magistrate Judge Karen L. Strombom of the U.S. District Court for the Western District of Washington denied certification of a class of cellphone users who received a call with a prerecorded message from the defendant without the recipient's prior express consent in alleged violation of the Telephone Consumer Protection Act and Washington state consumer protection laws. Judge Strombom found that the commonality, predominance and typicality requirements were met for certain calls received by the plaintiff in 2009 but not met for calls received in 2011, given the individualized issues as to what messages the other putative class members received and whether those messages differed from the messages the plaintiff received. Additionally, the court found that the plaintiff did not allege sufficient facts about the first phone call, and defined his proposed classes such that the time period in the definitions did not cover the period of time when the phone calls occurred. Finally, Judge Strombom noted that the inclusion of the "without prior consent" language in the class definition made the class an improper "fail-safe" class.

***In re Avandia Marketing, Sales Practices & Products Liability Litigation*, No. 07-MD-1871, 2014 WL 6684343 (E.D. Pa. Nov. 24, 2014).** Judge Cynthia M. Rufe of the U.S. District Court for the Eastern District of Pennsylvania denied a motion for class certification in a suit brought by Humana Medical Plan, Inc., a Medicare Advantage Organization (MAO), against defendant GlaxoSmithKline (GSK) on behalf of other similarly situated MAOs. Under the Medicare Secondary Payor Act (MSP Act), a product-liability tortfeasor becomes a "primary plan" responsible for insurance payments when it pays settlement funds for injuries arising from an alleged tort, which is usually satisfied by placing an MAO lien on the settlement fund. As a result of prior litigation involving the drug Avandia, GSK had established voluntary private lien resolution programs (PLRPs) to resolve MAO liens arising from GSK's settlement of Avandia

personal injury suits. Citing MAO liens that had not been resolved through the PLRPs, Humana sought to represent a class of MAOs with such outstanding liens on the theory that GSK's efforts were categorically insufficient to satisfy its responsibilities under the MSP Act. The court rejected certification, concluding that the commonality, typicality, adequacy of representation and predominance requirements were not met. In the main, the court concluded that individualized questions would predominate because GSK had been setting aside funds in each settlement pending resolution of the liens and that some of the set-aside money would be adequate to satisfy the liens should the settling personal injury plaintiff fail to resolve the liens, meaning that GSK's liability would have to be determined on a case-by-case basis. Relatedly, the court pointed out that the different MAOs had enjoyed different resolution rates and that Humana's very favorable track record to date might make it unfit to represent other MAOs' interests.

***Balschmiter v. TD Auto Finance LLC*, No. 13-CV-1186-JPS, 2014 WL 6611008 (E.D. Wis. Nov. 20, 2014), 23(f) pet. pending.** Judge J.P. Stadtmueller of the U.S. District Court for the Eastern District of Wisconsin denied class certification in a case involving alleged violations of the Telephone Consumer Protection Act (TCPA) by TD Auto Finance LLC (TDAF). The plaintiff's complaint alleged that TDAF routinely placed auto-dialed debt-collection calls to her cellphone — and, presumably, to the cellphones of other non-customers — and sought relief on behalf of " '[a]ll persons within the United States who, [within the class period] … received a nonemergency telephone call from or on behalf of TDAF to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice, who did not have a contractual relationship with TDAF.' " The plaintiff moved for certification under Rule 23(b)(3) and 23(b)(2), or, in the alternative, for certification of the " 'equitable portion ... of the case under Rule 23(b)(2) and the damages portion of the case under Rule 23(b)(3).' " The court rejected the request for Rule 23(b)(2) certification at the outset, citing the Supreme Court's ruling in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), for the proposition that Rule 23(b)(2) does not authorize class certification when each class member would be entitled to individualized monetary relief, such as the statutory damages provided by the TCPA. The court thus went on to hold that the proposed class was not sufficiently ascertainable because the only method that the plaintiff had proposed for identifying class members was the use of reverse phone number lookup providers, which experts agreed were unreliable given their inability to provide subscriber information at a specified date in the past. In addition, although the court found that the case presented certain common, classwide questions, the individualized questions regarding each class member's prior express consent to receive the auto-dialed calls would predominate over any individualized questions at trial. Although the court acknowledged that it would be difficult to conceive of a non-debtor who would give consent to receive auto-dialed debt-collection calls regarding another person's debt, it refused to hold that this could never occur. Moreover, the court refused to hold that a debtor who provided his phone number to a creditor at a time other than during the origination of the debt could never be considered to have given express consent to receive auto-dialed calls about his debt. Accordingly, the class did not satisfy Rule 23(b)(3)'s predominance requirement. Finally, because each class member would have to prove lack of consent in order to succeed on any claim, the court found that an "issues class" under Rule 23(c)(4) was inappropriate.

Decisions Permitting/Granting Class Certification

***Sykes v. Mel S. Harris & Associates LLC*, Nos. 13-2742-cv, 13-2747-cv, 13-2748-cv, 2015 WL 525904 (2d Cir. Feb. 10, 2015).** A panel of the U.S. Court of Appeals for the Second Circuit (Calabresi and Pooler, JJ., Jacobs, J. (dissenting)) concluded that the district court did not abuse its discretion in granting certification for a class asserting that debt collectors engaged in a systematic and fraudulent default judgment scheme in purported violation of the Racketeer Influenced and Corrupt Organizations Act and the Fair Debt Collection Practices Act. The court held that there was no abuse of discretion in the district court's determination that Rule 23(a)'s commonality prerequisite was satisfied because a fraudulently obtained state court judgment that depended on the filing of a false affidavit of merit could serve as a common issue. In addition, although the court acknowledged that the issues were individualized in certain respects, including damages, timeliness and service, the court held that these issues did not predominate over class issues, and, therefore, the district court did not abuse its discretion in finding that the predominance requirement of Rule 23(b) was satisfied.

***In re VHS of Michigan, Inc.*, No. 14-0107, 2015 WL 424486 (6th Cir. Feb. 3, 2015).** A unanimous panel of the U.S. Court of Appeals for the Sixth Circuit (Stranch and Donald, JJ., and Economus, district judge sitting by designation) denied the defendant's petition for permission to appeal an order certifying a class of nurses in an antitrust class action alleging that local hospitals had conspired to suppress nurses' wages. After dismissing one of the plaintiffs' two theories of liability, the district court had certified a class based on the remaining theory. The panel agreed with the district court's conclusion that the plaintiffs' damages methodology was consistent with their theory of liability, and, therefore, class certification was appropriate under *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). In addition, the panel rejected the defendant's argument that

plaintiffs' damages theory was insufficient because it provided only an "approximate" classwide damages figure. (The district court's class certification order is discussed in the Summer 2014 edition of the *Chronicle*.)

***In re Nexium Antitrust Litigation*, Nos. 14-1521, 14-1522, 2015 WL 265548 (1st Cir. Jan. 21, 2015).** In a split decision, a panel of the U.S. Court of Appeals for the First Circuit (Torruella, J., Dyk, Federal Circuit judge sitting by designation, and Kayatta, J. (dissenting)) affirmed certification of a class of indirect purchasers in an antitrust class action alleging that pharmaceutical drug manufacturers had conspired to delay entry of a generic version of the drug Nexium. (This decision is discussed in detail in the article at the beginning of this edition.)

***CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076 (10th Cir. 2014).** A unanimous panel of the U.S. Court of Appeals for the Tenth Circuit (Kelly, Tymkovich and Phillips, JJ.) affirmed, on modified grounds, the district court's decision certifying a class of real estate borrowers pursuing claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) against lenders alleged to have engaged in a fraudulent scheme to collect nonrefundable fees in exchange for loan commitments that the lenders never intended to fulfill. The lenders argued that the district court abused its discretion by certifying the class because individual issues, including motive, levels of knowledge, diligence, and financial status of the borrowers, would inundate the district court with individual inquiries. The Tenth Circuit reviewed the district court's predominance inquiry under Rule 23(b) to determine whether reliance, serving as a proxy for causation in the RICO context, was susceptible to general and class-wide proof. The court held that evidence of the upfront payment for the loan commitment was sufficient to present a predominating question relating to reliance, which would "resolve a central issue of this litigation in one swoop." The court affirmed that predominance was satisfied, but held that the district court erred in holding that there was a presumption of reliance, a legal conclusion that would alter the plaintiffs' burden of proof on the merits, rather than "crediting an inference of causation," which could be used to satisfy Rule 23(b).

***Kamakahi v. American Society for Reproductive Medicine*, No. 11-cv-01781-JCS, 2015 WL 510109 (N.D. Cal. Feb. 3, 2015).** Magistrate Judge Joseph C. Spero of the U.S. District Court for the Northern District of California granted in part and denied in part a motion to certify a nationwide class of egg donors for reproductive assistance purposes, certifying a class on the issue of the defendants' ethical guidelines limiting compensation to $5,000 to $10,000, finding that a common question existed as to whether the ethical guidelines constituted an unlawful horizontal price fixing agreement in violation of the Sherman and Clayton Acts. The court rejected the defendants' argument that the agreement the plaintiff signed included an arbitration clause and was thus not typical, because the defendants did not show that her claim was "subject to her arbitration agreement with the non-party clinic" or that "any class representative or member signed an agreement *with the Defendants* compelling arbitration of their claims." The court also rejected arguments that the class members had differing opinions as to whether a donor's traits should affect the amount of compensation each donor received, because "[m]ere speculation as to conflicts that may develop at the remedy stage is insufficient to support denial of initial class certification." However, the court refused to certify a damages class. Addressing the defendants' damages and standing arguments, the court concluded the rule in *Leyva v. Medline Industries, Inc.*, 716 F.3d 510 (9th Cir. 2013), requires class certification for liability purposes where the calculation of damages is not feasible on a class-wide basis, even where individual determinations of damages may ultimately show that some class members suffered none, and found no reason why antitrust cases would impose a higher standard for injury-in-fact. The court further rejected as speculative the defendants' "substitution effect" argument — that some class members benefited from the low compensation levels, as higher compensation may have attracted donors with preferred attributes thus displacing certain class members. The court also denied certification of a subclass seeking injunctive relief, since neither plaintiff intended to donate again.

***Walker v. Greenspoon Marder, P.A.*, No. 13-CV-14487, 2015 WL 233472 (S.D. Fla. Jan. 5, 2015).** Judge Kenneth A. Marra of the U.S. District Court for the Southern District of Florida granted the plaintiffs' unopposed motion for class certification. The plaintiffs alleged that the defendant, a law firm, violated the Fair Debt Collection Practices Act (FDCPA) in connection with collecting debts for client banks by attaching notices to foreclosure complaints that were misleading under the FDCPA. The court found that all requirements of Rule 23(a) and Rule 23(b)(3) were satisfied by the plaintiffs' proposed class. The court found unavailing the defendant's argument, later withdrawn, that other pending litigation concerning the notice would preclude certification and defeat the superiority requirement. Because the other pending litigation had not progressed through discovery and no class-certification motion had been filed, the court found that allowing the current case to proceed as a class action was appropriate.

***McCarter v. Kovitz Shifrin Nesbit*, No. 13 C 3909, 2015 WL 74069 (N.D. Ill. Jan. 5, 2015).** Judge Amy J. St. Eve of the U.S. District

Court for the Northern District of Illinois granted plaintiff's motion to certify one of the two classes described in the complaint in a putative class action against a law firm, Kovitz Shifrin Nesbit (Kovitz), for allegedly violating the Fair Debt Collection Practices Act (FDCPA). In her complaint, the plaintiff alleged that a debt-collection letter she received from Kovitz demanded payment in a way that "overshadow[ed]" the FDCPA-required notice that federal law provides 30 days to dispute the validity of the debt. The plaintiff identified two classes in her complaint but only sought to certify one class under Rule 23(b)(3), of all persons who received a form collection letter with similar language. Kovitz argued, *inter alia*, that the plaintiff's claim was atypical because Kovitz would assert defenses peculiar to her, including that she: (1) only "skimmed" the debt collection letter and (2) went on the Internet to obtain a form validation demand after receiving the letter, suggesting that she understood her rights. The court rejected these arguments because neither supported defenses to FDCPA claims, which are evaluated under the objective "unsophisticated consumer" standard.

***Kalkstein v. Collecto, Inc.*, No. 13-cv-2621 (ADS)(AKT), 2015 WL 59246 (E.D.N.Y. Jan. 2, 2015).** Judge Arthur D. Spatt of the U.S. District Court for the Eastern District of New York granted certification of a class of individuals seeking statutory damages for alleged violations of the Fair Debt Collection Practices Act, asserting that the defendant sent collection letters regarding tuition debt that was either outside the permissible credit reporting period or contained an improperly inflated collection fee that had not been previously authorized by agreement. The court held that even though the exact number of class members was not ascertainable, the plaintiffs satisfied the numerosity requirement of Rule 23(a) because the defendant's admission that it sent 360 identical letters to individuals provided a reasonable estimate of the size of the class. The proposed class met the typicality and commonality requirements because each class member's claim arose from the same letter mailed by the defendant. The court rejected the defendant's argument that class members could not be readily identified without an individualized consideration of the facts, stating that it would not be particularly arduous for the court to determine eligibility for the class by reviewing relevant documents. Additionally, the plaintiffs satisfied the predominance standard of Rule 23(b)(3) because the main issue in dispute, whether form letters were sent to the class members, was a common issue. Finally, the superiority requirement was satisfied because the court found the instant case "to be analogous to a 'negative value case' in that the likely amount of individual recovery appears to be slight when compared with the costs required to bring an individual case."

***Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC*, No. 12-22330-CIV, 2014 WL 7366255 (S.D. Fla. Dec. 24, 2014).** Judge Patricia A. Seitz of the U.S. District Court for the Southern District of Florida certified a class consisting of recipients of a fax that the defendants allegedly sent in violation of the Telephone Consumer Protection Act (TCPA). The court had previously denied approval of a settlement in this case because the settlement provided the class with too uncertain a recovery. In examining the adequacy of the named plaintiff under Rule 23(a), the court noted that the plaintiff was a professional class-action plaintiff who regularly works with counsel to file TCPA cases. Though stating that there was generally nothing wrong with being a professional plaintiff, the court noted that the plaintiff's lack of diligence in this particular case raised concern; for example, failing to file the case until a week before the end of a four-year limitations period, allowing the defendants' assets to dwindle during this period; failing to conduct any pre-suit investigation; and not reviewing the motion for class certification before it was filed. Nonetheless, the court ultimately found the plaintiff to be an adequate class representative, noting that "while Plaintiff's lack of knowledge about the case is troubling, the threshold of knowledge required to qualify a class representative is low." In addressing the issue of superiority under Rule 23(b)(3), the defendants argued that a class action would "subject them to potentially ruinous liability on the basis of an unintentional, technical violation of a confusing regulation that caused no economic harm to the class." Although the court shared such misgivings, it ultimately concluded that they are "not appropriate considerations" in assessing class certification requirements.

***Blandina v. Midland Funding, LLC*, 303 F.R.D. 245 (E.D. Pa. Dec. 23, 2014).** Judge Nitza I. Quiñones Alejandro of the U.S. District Court for the Eastern District of Pennsylvania granted the plaintiff's motion for class certification in this action claiming that the defendant debt collectors violated various provisions of the Fair Debt Collection Practices Act (FDCPA) by allegedly sending her and purported class members collection letters misrepresenting that interest was accruing on debts owed (when in fact it was not). The defendants challenged the ascertainability of the class because it was defined to include all consumers who were sent letters "substantially in the form" of the letter the plaintiff received — a subjective requirement. The court found this argument "disingenuous," as the defendants had already demonstrated their ability to identify members of the proposed class defined by the plaintiff through a search of their records. Additionally, while the defendants argued that the proposed class lacked commonality and typicality because liability would turn on individualized inquiries regarding the type and terms of the account, the court rejected this argument, noting that establishing that transactions involved consumer (rather than

commercial) accounts was inherent in every FDCPA class action and did not defeat class certification. The defendants made similar arguments with respect to predominance under Rule 23(b)(3) that were likewise rejected by the court.

***Fraser v. Wal-Mart Stores, Inc.*, No. 2:13-cv-00520-TLN-DAD, 2014 WL 7336673 (E.D. Cal. Dec. 23, 2014).** Judge Troy L. Nunley of the U.S. District Court for the Eastern District of California certified a class claiming violations of the Song-Beverly Credit Card Act arising from the defendant's purportedly requesting and recording customers' ZIP codes in conjunction with credit card transactions. The court found the proposed class was ascertainable, met the numerosity requirement, and shared the common question of the legality of the defendant's practice of requesting and recording ZIP codes. Judge Nunley also found the typicality requirement was met, as the class representatives alleged exposure to the defendant's common practice, and their claims were therefore identical to the class claims. The defendant sought to defeat the predominance requirement by arguing, *inter alia*, that the defendant was contractually obligated to transmit personal information to complete certain credit card transactions that would vary by transaction, but the court noted that this defense would apply to all card users and thus would not defeat predominance. Judge Nunley acknowledged the decision decertifying a similar class in *Yeoman v. Ikea U.S.A. West, Inc.*, No. 11-cv-00701-BAS (BGS), 2014 WL 7176401 (S.D. Cal. Dec. 4, 2014) (discussed above), but found that the individual factors present in *Yeoman* were not in the present case, where there was nothing to suggest that individual transactions were dissimilar from each other. The court also determined that a class action was the superior method for handling the claim, despite the plaintiffs' lack of a detailed plan for managing the class action.

***Sateriale v. RJ Reynolds Tobacco Co.*, No. 2:09-cv-08394-CAS(SSx), 2014 WL 7338877 (C.D. Cal. Dec. 19, 2014).** Judge Christina A. Snyder of the U.S. District Court for the Central District of California granted in part and denied in part the motion to certify a class of adult smokers who registered with RJ Reynolds and collected and held Camel Cash as of October 1, 2006, for claims of breach of contract and promissory estoppel. Judge Snyder found the class to be ascertainable based on a corporate database of smokers sufficient to identify class members and that the plaintiffs had each suffered an injury-in-fact as they were unable to redeem the Camel Cash for non-tobacco merchandise during the last six months of the program. The commonality and typicality requirements were met based on the central question of whether RJ Reynolds breached the implied duty of good-faith performance when it only made available cigarettes and coupons at the end of the program. The court found that common questions predominate for the breach-of-contract claim, and that damages could be measured on a classwide basis using information about the value of Camel Cash at the time of the breach. Judge Snyder acknowledged that RJ Reynolds had pointed to material differences in state contract law, and therefore limited the class for the breach-of-contract claim to California residents. In examining the promissory estoppel claim, the court found that individualized questions predominate due to the reliance requirement of the claim. The court therefore denied the motion to certify a class based on the promissory estoppel claim.

***Reyes v. Julia Place Condominiums Homeowners Association*, No. 12-2043, 2014 WL 7330602 (E.D. La. Dec. 18, 2014).** In a case arising between condominium owners, their condominium associations and those associations' counsel, Judge Helen G. Berrigan of the U.S. District Court for the Eastern District of Louisiana denied in part and granted in part the plaintiffs' motion for class certification. The plaintiffs' motion sought to certify three classes of condominium owners: those seeking injunctive and monetary relief under the Fair Debt Collection Practices Act (FDCPA); those seeking relief under Louisiana's usury law for excessive late fees; and those seeking relief under the Louisiana Condominium Act (LCA) for unreasonable late fees. The court granted certification with respect to the FDCPA monetary-relief class, who sued based on the receipt of letters from the defendant improperly threatening legal action and fees. In so holding, the court noted that the class was limited to the "narrow class definition" of condo owners "who received letters identical to or substantially similar to those attached" to the complaint. The court denied certification to the plaintiffs seeking injunctive relief because such relief is unavailable under the FDCPA. As to the plaintiffs suing under Louisiana usury laws, the court ordered supplemental briefing on the issue of whether the court had subject matter jurisdiction to adjudicate the case where the plaintiffs had not yet paid the allegedly usurious fees. The court denied certification to the LCA plaintiffs because they failed to show commonality: multiple defendants were charging varying fees to various plaintiffs.

***Schojan v. Papa John's International, Inc.*, No. 8:14-cv-1218-T-33MAP, 2014 WL 7178102 (M.D. Fla. Dec. 16, 2014).** Judge Virginia M. Hernandez Covington of the U.S. District Court for the Middle District of Florida granted class certification in a case alleging that the pizza restaurant improperly charged and collected sales tax on delivery fees. While the plaintiffs sought certification under Rule 23(b)(1), (2), and (3), the court decided to only address Rule 23(b)(3) after it found "that Plaintiffs satisf[ied] this requirement" and that it was "the predominant issue and point of contention between the parties." The plaintiffs claimed that predominance existed because, in establishing reliance on their claim of negligent misrepresenta-

tion, it was enough that class members paid money based on the defendants' misrepresentation that the money was due for a particular purpose, when in fact it was not. Papa John's argued in response that its affirmative defenses of voluntary payment, exhaustion of administrative remedies, assumption of risk, and comparative fault presented individualized questions that weighed against class certification. The court rejected these concerns, holding that "[u]nique affirmative defenses rarely predominate where a common course of conduct is established."

***Premier Health Center, P.C. v. UnitedHealth Group,* No. 11-425 (ES), 2014 WL 7073439 (D.N.J. Dec. 15, 2014).** The plaintiffs in this class action challenged the methods by which the defendants recouped benefit overpayments from health care providers. Senior Judge Dickinson R. Debevoise of the U.S. District Court for the District of New Jersey denied as moot the defendants' motion for reconsideration of the court's prior certification of the "ONET Repayment Demand Class" on a conditional basis. In its prior order conditionally certifying the class, the court had held that the class satisfied the numerosity and commonality requirements of Rule 23(a), but not the typicality and adequacy requirements since none of the named plaintiffs at the time fell within the scope of the class definition. The court granted certification on the condition that the plaintiffs present additional evidence that the named plaintiffs fell within the class definition. The defendants sought reconsideration, arguing that the U.S. Court of Appeals for the Third Circuit precedent held that conditional class certification was impermissible. The plaintiffs argued that the court should deny the motion for reconsideration as moot in light of the plaintiffs' recent compliance with the conditional class certification order. Although the court did agree with the defendants that its conditional certification had contravened Third Circuit precedent, it agreed with the plaintiffs that the error was rendered moot by the plaintiffs' substitution of a named plaintiff that fell within the class definition.

***Brown v. City of Detroit,* No. 10-cv-12162, 2014 WL 7074259 (E.D. Mich. Dec. 12, 2014).** Judge Thomas L. Ludington of the U.S. District Court for the Eastern District of Michigan denied a motion to decertify two liability-only classes in a class action alleging that the city's detention practices were unconstitutional. In 2011, the court had bifurcated the issues of damages and liability and certified two classes of arrestees for liability purposes only. In its motion to decertify these classes, the city argued that the court could not bifurcate liability from damages when deciding whether to certify a class and required a showing of classwide measurable damages that the plaintiff could not meet, based on *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). But the court held that under *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014), bifurcating liability and damages remains viable after *Comcast*. According to the court, damages issues could be resolved through appointment of a special master, sample trials, or post-liability decertification of the class with notice to the plaintiffs as to how they could proceed to prove damages.

***Roundtree v. Bush Ross,* P.A., No. 8:14-cv-357-T-27AEP, 2014 WL 6969570 (M.D. Fla. Feb. 18, 2015).** Judge James D. Whittemore of the U.S. District Court for the Middle District of Florida adopted, except to the extent stated in his order, the report of Magistrate Judge Anthony E. Porcelli recommending that the plaintiff's motion to certify three distinct classes (an "Overshadowing Class," a "Fee Class" and the "Lawsuit Class") be granted in connection with the defendant's alleged violations of the Fair Debt Collection Practices Act. The defendant argued that individual issues predominated over common questions of law and fact, including issues such as whether the putative class member was a consumer or a landlord, whether certain putative class members lacked standing to bring suit, computation of each putative class member's actual damages and inclusion of unidentifiable persons. The court held, however, that commonality was established because the defendant allegedly engaged in a standard course of conduct, practice and procedure (including issuing standardized initial debt collection letters) that presented a legal question common to all members of the putative class and required proof of the same material facts. These common issues predominated over any individualized issues related to the class member's type of debt, individual defenses or actual damages, making certification proper under Rule 23(b)(3).

***Casso v. LVNV Funding, LLC,* No. 12-CV-7328, 2014 WL 7005032 (N.D. Ill. Dec. 10, 2014).** Judge John W. Darrah of the U.S. District Court for the Northern District of Illinois granted class certification in an action involving alleged violations of the Fair Debt Collection Practices Act (FDCPA) by defendants LVNV Funding, LLC, Resurgent Capital Services LP and Alegis Group LLC. The named plaintiff alleged that the defendants had engaged in deceptive debt collection practices by filing a lawsuit against her to collect debts she allegedly owed to them and submitting a fraudulent affidavit indicating that they had documentary proof to support their claims. In opposing class certification, the defendants argued that individual questions necessarily would predominate over classwide issues because, in order to determine whether an affidavit submitted to any plaintiff was fraudulent, a factfinder would at least have to determine what records the defendants had in their databases at the time they prepared the affidavit, what records the affiant reviewed, and the accuracy of the account information provided by each class member's bank. The court, however, rejected that argument because it determined that if the trier of fact found that the defendants' stan-

dardized practices violated the FDCPA, the class would prevail on the question of liability, regardless of whether each individual class member owed a debt or not. Since resolution of this common legal question would decide each putative class member's claim, the court found that the proposed class satisfied the predominance requirement of Rule 23(b)(3) and class certification was appropriate.

***Sandusky Wellness Center, LLC v. Wagner Wellness, Inc.*, No. 3:12 CV 2257, 2014 WL 6750690 (N.D. Ohio Dec. 1, 2014).** Judge David A. Katz of the U.S. District Court for the Northern District of Ohio certified a class of individuals who received allegedly unsolicited faxes sent on behalf of the defendant that contained improper opt-out language, in violation of the Telephone Consumer Protection Act (TCPA). The U.S. Court of Appeals for the Sixth Circuit had vacated an earlier order denying class certification and directed Judge Katz to consider whether commonality was satisfied if the TCPA-required opt-out notices were missing. After doing so, the court held that class certification was now appropriate. According to Judge Katz, commonality and typicality were satisfied because all class members' claims were based on the same facts and legal theory (receiving a fax with an opt-out notice that allegedly violated the TCPA). The court further held that this common question also satisfied Rule 23(b)'s predominance requirement and that proceeding as a class action was a superior method of resolution, because the TCPA limits the maximum recovery for each class member and does not allow fee shifting, making individual actions unlikely.

***In re Apple iPod iTunes Antitrust Litigation*, No. 05-CV-0037 YGR, 2014 WL 6783763 (N.D. Cal. Nov. 25, 2014).** Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California denied the defendant's motion to decertify — in part — a class of individuals and businesses who purchased iPods directly from Apple and asserted antitrust claims arising from Apple's iTunes 7.0 and 7.4 updates. Apple contended that large "resellers" like Best Buy and Target were not adequately represented by the end users serving as consumer class representatives and therefore should be excluded from the class. Noting that Apple had already presented many of these arguments in opposing earlier certification motions, the court refused "to revisit this previously resolved issue so soon before trial especially where no intervening events have led to changed circumstances." Moreover, the court concluded that, if evidence at trial warranted decertification of the reseller portion of the class, there was no prejudice in considering the issue post-trial because the parties had undertaken separate damages analyses for the two portions of the class.

***Brown v. Hain Celestial Group, Inc.*, No. C 11-03082 LB, 2014 WL 6483216 (N.D. Cal. Nov. 18, 2014).** Judge Laurel Beeler of the U.S. District Court for the Northern District of California certified two Rule 23(b)(3) classes of purchasers of cosmetic products manufactured and marketed by Hain. The plaintiffs brought six claims under California consumer protection laws, alleging that Hain advertised, marketed and sold the products as organic, when they did not contain enough organic ingredients to lawfully make such claims. Hain challenged the proposed class definitions in plaintiffs' motion, arguing that: (1) they differed materially from the definitions alleged in the operative complaint, which would have included products that were not misrepresented as being organic; and (2) the class was not ascertainable because consumers could only self-identify and likely would not have receipts. The court rejected both arguments, noting first that it is "unremarkable ... that class definitions are refined to reflect the developing realities of a given suit." As such, the class period could be redefined to exclude purchasers of products without the challenged tagline. Moreover, self-identification would not defeat ascertainability since consumers could accurately recall their purchase and courts have permitted this "in small-ticket consumer-mislabeling suits." The court also held that the case presented several common questions, including whether the products labeled "organic" contained less than 70 percent organic content and whether the claims were likely to mislead ordinary consumers. Moreover, under California law, materiality, reliance and causation in consumer-deception cases were amenable to common proof under the objective "reasonable consumer" test.

***In re Polyurethane Foam Antitrust Litigation*, No. 1:10 MD 2196, 2014 WL 6461355 (N.D. Ohio Nov. 17, 2014), 23(f) pet. denied.** After the U.S. Court of Appeals for the Sixth Circuit denied the defendants' petition for leave to appeal the district court's sealed class certification order, Judge Jack Zouhary of the U.S. District Court for the Northern District of Ohio partially unsealed his opinion certifying two classes of purchasers in an antitrust class action alleging that the dominant manufacturers of polyurethane foam had engaged in a multiyear price-fixing conspiracy. The plaintiffs sought to certify two classes: people who had purchased foam directly from the defendants, and people who purchased certain categories of products that incorporated foam produced by the defendants (*i.e.*, indirect purchasers). The defendants argued that certain named direct-purchaser plaintiffs were inadequate class representatives because they directly competed with the defendants for some foam products and thus benefited from any alleged price-fixing that raised the price of those products. The court rejected this argument, noting past precedent holding that whether a class representative in an antitrust class action benefited from the challenged behavior is irrelevant as a matter of law. The court also found that the plaintiffs satisfied the predominance requirement by demonstrating that liability, antitrust injury and damages were susceptible to proof on a

classwide basis. As to the direct purchasers, the court concluded that the plaintiffs' evidence showed that proof of conspiracy and antitrust injury would be on a classwide basis and that the defendants' challenges went only to the merits of whether the evidence proved a conspiracy. The court reached the same conclusion as to the indirect purchasers. Although the indirect purchasers sought relief under the laws of 29 states and the District of Columbia, the court concluded that they had sufficiently demonstrated that the essential elements of their claims were susceptible to proof on a classwide basis and that there were only minimal differences between the various state statutes. With respect to damages for the indirect purchasers, the court concluded that the proposed damages models were consistent with the plaintiffs' theory of liability, as required by *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

Other Class Action Decisions

***In re Checking Account Overdraft Litigation*, No. 13-12082, 2015 WL 534657 (11th Cir. Feb. 10, 2015).** A unanimous panel of the U.S. Court of Appeals for the Eleventh Circuit (Tjoflat and Carnes, JJ., and DuBose, district judge sitting by designation) vacated the district court's order on appeal, finding that the lower court lacked jurisdiction to rule on the arbitration obligations of unnamed putative class members and that the named plaintiffs lacked standing to raise any arguments on behalf of the unnamed putative class members. This case arose from five separate putative class actions alleging that Wells Fargo unlawfully charged consumers overdraft fees for their checking accounts, which are governed by agreements providing for arbitration of any disputes. The lower court held that Wells Fargo waived its right to compel arbitration of the named plaintiffs' claims. Prior to class certification, Wells Fargo made a conditional motion to compel arbitration of any unnamed class members' claims in the event of class certification, which the district court denied without comment. Because a class had not been certified at the time of the defendant's motion, there was no live claim or cognizable plaintiff, and the district court lacked Article III standing to rule on the motion. Furthermore, the named plaintiffs lacked standing to advance the argument that Wells Fargo had also waived its arbitration rights as to the unnamed plaintiffs.

***Barr v. Harvard Drug Group, LLC*, No. 14-13138, 2015 WL 364363 (11th Cir. Jan. 29, 2015) (*per curiam*).** A unanimous panel of the U.S. Court of Appeals for the Eleventh Circuit (Jordan, Kravitch and Black, JJ.) reversed the district court dismissal of the plaintiff's putative class action. The plaintiff had filed the putative class action against the defendant for alleged violations of the Telephone Consumer Protection Act (Act). Before the plaintiff moved for class certification, the defendant made a Rule 68 offer of judgment for the maximum monetary damages for the plaintiff's individual cause of action, an injunction to prevent further violations of the Act and an entry of judgment, which the plaintiff did not accept. On appeal, the Eleventh Circuit held that a putative class action does not become moot when a defendant offers a judgment to only the named plaintiff and class representative and the plaintiff declines the offer.

***Stein v. Buccaneers Ltd. Partnership*, 772 F.3d 698 (11th Cir. 2014).** The plaintiffs, recipients of unsolicited faxes, commenced this putative class action against the defendant alleging violations of the Telephone Consumer Protection Act. The district court dismissed the action as moot after the defendant made an offer of complete relief to the plaintiffs, the plaintiffs appealed and a unanimous panel of the U.S. Court of Appeals for the Eleventh Circuit (Martin, J., Eaton, U.S. Court of International Trade judge sitting by designation, and Hinkle, district judge sitting by designation) reversed. Judge Hinkle authored the decision, holding that the named plaintiffs' individual claims were not mooted by an unaccepted offer of judgment. Rather, after the offer expired, it was considered withdrawn as the "plaintiffs still had their claims, and [the defendant] still had its defenses," and no one had been paid. Additionally, even if the individual claims were somehow deemed moot, the class claims remained alive, and the named plaintiffs retained the ability to pursue them. Judge Hinkle noted that most other circuits, including the Third, Fifth, Ninth and Tenth Circuits, had reached the same result. The same panel issued a similar ruling the same day in *Keim v. ADF Midatlantic, LLC*, 586 F. App'x 573 (11th Cir. 2014).

***Barr v. International Dental Supply Co.*, 586 F. App'x 580 (11th Cir. 2014) (*per curiam*).** The U.S. Court of Appeals for the Eleventh Circuit (Pryor and Jordan, JJ., and Jones, district judge sitting by designation) reversed and remanded the district court's decision granting the defendant's motion to dismiss the plaintiff's complaint as moot in this action arising from violations of the Telephone Consumer Protection Act (TCPA). Prior to the plaintiff moving for class certification, the defendant had made a Rule 68 offer of judgment for the maximum monetary damages for the plaintiff's individual cause of action, an injunction to prevent future violations of the TCPA and an entry of judgment. The plaintiff allowed the offer to expire without accepting. Based on the intervening controlling precedent of *Stein v. Buccaneers Ltd. Partnership*, 772 F.3d 698 (11th Cir. 2014) (discussed above), the court held that an unaccepted offer of judgment under Rule 68 did not render the named plaintiff's complaint moot.

***Webster v. Bayview Loan Servicing, LLC*, No. 1:13-cv-01975-TWP-DML, 2015 WL 470523 (S.D. Ind. Feb. 3, 2015).** Judge Tanya Walton Pratt of the U.S. District Court for the Southern District of

Indiana granted the defendant's motion to dismiss a putative class action alleging violations of the Telephone Consumer Protection Act and the Fair Debt Collection Practices Act. After filing her initial complaint asserting individual claims under the statutes, the plaintiff moved for leave to file an amended complaint adding class allegations, and simultaneously moved to certify the class at that early juncture, so that she could "avoid being 'picked off' through a Rule 68 offer of judgment or individual settlement offer." Before those two motions became ripe for review, the defendant offered to tender to the plaintiff the full amount of relief sought in her complaint. Four days later, the defendant moved to dismiss the case for lack of subject matter jurisdiction. Even though the plaintiff rejected the defendant's offer of judgment, the court agreed that the offer of judgment mooted her case. It relied on U.S. Court of Appeals for the Seventh Circuit law that "a plaintiff cannot avoid mootness by moving for class certification after receiving an offer of full relief." Although the plaintiff moved for class certification before the defendant tendered its offer of judgment, there was, at the time, no class complaint on file. The defendant's offer of full relief was therefore based on the operative complaint for individual relief.

***Smith v. Specified Credit Association, Inc.*, No. 14 C 06496, 2015 WL 468871 (N.D. Ill. Jan. 30, 2015).** Judge John J. Tharp, Jr. of the U.S. District Court for the Northern District of Illinois denied the defendant's motion to dismiss for lack of subject matter jurisdiction, holding that although the defendant's pre-class certification settlement offer would have provided full monetary relief to the plaintiff, the offer did not moot the cause of action because it did not encompass the plaintiff's implied claim for injunctive relief. The plaintiff's class action complaint alleged that defendant Specified Credit Associates, Inc. (SCA) sent an unlawful debt collection letter to her and others that failed to disclose required information about the accrual of interest on the alleged debt, in violation of the Fair Debt Collection Practices Act. Prior to filing the complaint, however, the plaintiff's counsel had sent a draft complaint to SCA, which prompted SCA to offer to pay the plaintiff's full damages and attorney's fees. The plaintiff's counsel responded with a much higher counteroffer, and when that offer was not accepted, counsel filed a complaint that was materially identical to the draft complaint sent to counsel. The plaintiff also simultaneously moved for class certification, apparently in an attempt to heed the advice of the U.S. Court of Appeals for the Seventh Circuit precedent that holds that "a complete offer of settlement made prior to the filing for class certification moots the plaintiff's claim." However, in ruling on the defendant's motion to dismiss for lack of subject matter jurisdiction, the court determined that if the pre-filing offer of settlement had offered to provide the individual plaintiff with full relief, then the cause of action would have been mooted even before any complaint was filed. As the court noted, "[i]f there is no ... dispute, because the putative defendant has offered to give the putative plaintiff all of the relief the plaintiff would be entitled to from a judgment in her favor, then the claim is moot, whether or not the legal claim has already been filed." Nonetheless, in this instance the court found that the plaintiff's case was not moot because SCA's settlement offer did not offer to satisfy the claim for injunctive relief contemplated by the plaintiff's allegation in the complaint that the defendant had "acted or refused to act on grounds generally applicable to the class members, making final declaratory or injunctive relief appropriate."

***Lafollette v. Liberty Mutual Fire Insurance Co.*, No. 2:14-CV-04147-NKL, 2015 WL 132670 (W.D. Mo. Jan. 9, 2015).** Judge Nanette K. Laughrey of the U.S. District Court for the Western District of Missouri granted the plaintiffs' motion to strike the defendant's offer of judgment and denied the defendant's motion to dismiss, holding that the defendant's unaccepted Rule 68 offer of judgment did not moot the plaintiffs' pending putative class action. Plaintiffs alleged that the defendant violated the terms of their and the putative class members' homeowner's insurance policies. After the plaintiffs filed their class complaint, the defendant tendered offers of judgment to each of the named plaintiffs pursuant to Rule 68 of the Federal Rules of Civil Procedure. The offers did not address the putative class members' claims. The plaintiffs subsequently filed a motion to strike the defendant's offers of judgment, and the defendant filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the offers mooted the entire action. In ruling on these motions, the court noted a circuit split on the issue of whether pre-class certification offers of judgment may serve to moot a putative class action. The court ultimately agreed with those courts that have held that they do not. In so holding, the court noted that the defendant's offers did not encompass the entirety of the relief sought by the class complaint because they were addressed only to the named plaintiffs. Since the defendant's offers of judgment provided no relief for the putative class members' claims, a justiciable controversy continued to exist. Accordingly, the court held that the offers of judgment had not mooted the case.

***Romig v. Pella Corp.*, No. 2:14-cv-00433-DCN, 2014 WL 7264388 (D.S.C. Dec. 18, 2014); *accord Lewis v. Pella Corp.*, No. 2:14-cv-00549-DCN, 2014 WL 7264893 (D.S.C. Dec. 18, 2014).** The plaintiff filed this lawsuit against a window manufacturer after noticing leaks and rot in his home from a window he purchased. Judge David C. Norton of the U.S. District Court for the District of South Carolina granted in part the defendant's motion to dismiss, dismissing all of the plaintiff's causes of action except for his breach of express warranty claim. The court held that the dismissed claims were time-barred and, in so doing, rejected the plaintiff's contention

that the filing of a previous class action in another federal district court tolled the statute of limitations for his claims. The court explained that the "Fourth Circuit has been reluctant to read cross-jurisdictional tolling into state law where it is otherwise silent." New York law applied, and there was no indication that New York recognizes cross-jurisdictional class action tolling. The court declined to establish such a rule in the first instance.

***In re Target Corp. Customer Data Security Breach Litigation*, No. 14-2522 (PAM/JJK), 2014 WL 7192478 (D. Minn. Dec. 18, 2014).** Judge Paul A. Magnuson of the U.S. District Court for the District of Minnesota granted in part and denied in part defendant Target Corporation's motion to dismiss the plaintiffs' first amended consolidated class action complaint in a case involving one of the largest breaches of payment-card security in U.S. retail history. Among other claims, the plaintiffs contended that Target violated the consumer protection laws of 49 states and the District of Columbia. Target eventually moved to dismiss the consumers' class action complaint under Rule 12(b)(6). Target argued that the plaintiffs were barred from bringing a federal class action under the consumer protection statutes in Alabama, Georgia, Kentucky, Louisiana, Mississippi, Montana, Ohio, South Carolina, Tennessee and Utah because these states prohibit class action treatment of consumer protection claims. Target relied on Justice Stevens' concurring opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), to argue that federal class treatment of a state law that bars class actions is prohibited if the state law is substantive, rather than procedural. Target urged the court to find that the consumer protection statutes at issue were "substantive" laws and that class actions raising claims under those laws thus must be dismissed. The court agreed with Target and concluded that the plaintiffs could not maintain a class action as to the alleged violations of the consumer protection statutes in eight of the 10 states that prohibit class action treatment outright. The court then turned to the plaintiffs' claims under the consumer protection laws of the remaining two states, Utah and Ohio, which allow class treatment only if the challenged act has been declared deceptive by a final court judgment or the state's attorney general. Because the plaintiffs failed to address this requirement with respect to Utah's consumer protection law, the court dismissed the claims under that statute. With respect to Ohio, the court noted that the complaint cataloged a number of cases holding allegedly similar conduct to be deceptive within the meaning of Ohio's consumer protection statute and concluded that it lacked sufficient information as to whether any Ohio case had held similar conduct to violate Ohio's consumer protection statute; however, since it was required to view the allegations in the light most favorable to the plaintiffs, the court denied Target's motion to dismiss the claims under Ohio's consumer protection law.

***Mey v. North American Bancard, LLC*, No. 14-CV-11331, 2014 U.S. Dist. LEXIS 165453 (E.D. Mich. Nov. 26, 2014).** Judge Denise Page Hood of the U.S. District Court for the Eastern District of Michigan dismissed a putative class action for lack of subject matter jurisdiction after the defendant submitted a Rule 68 offer to the named plaintiff, which the plaintiff admitted satisfied her individual claim. The court rejected the plaintiff's argument that her previously filed "placeholder" motion for class certification (filed with her complaint) prevented the Rule 68 offer from mooting the putative class claims, because that motion had already been dismissed as premature (the defendant had not been served when it was filed). Thus, no motion for class certification was outstanding when the Rule 68 offer mooted the named plaintiff's individual claims. The court therefore dismissed the class action based on prior U.S. Supreme Court and U.S. Court of Appeals for the Sixth Circuit precedent establishing that, if a named plaintiff's claim becomes moot through a Rule 68 offer before class certification, dismissal of the putative class action is required.

***Shamblin v. Obama for America*, No. 8:13-cv-2428-T-33TBM, 2014 WL 6686328 (M.D. Fla. Nov. 26, 2014).** The plaintiff filed a putative class action against defendant Obama for America, later adding additional related defendants, alleging that she received unsolicited auto-dial phone calls in violation of the Telephone Consumer Protection Act (TCPA). After the plaintiff filed a second amended complaint adding defendant New Partners Consulting, Inc. (New Partners), New Partners made an offer of judgment under Rule 68 offering $7,500 in damages arising from the TCPA claim, as well as entry of an injunction against New Partners. Judge Virginia M. Hernandez Covington of the U.S. District Court for the Middle District of Florida denied New Partners' motion to dismiss for lack of subject matter jurisdiction, holding that its offer of judgment failed to provide "maximum allowable relief" to the plaintiff. Because the plaintiff's complaint sought to enjoin *all* defendants in the action, an offer of judgment from one defendant did not and could not include an injunction against the other defendants in the action.

Class Action Fairness Act (CAFA) Decisions

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

***Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218 (9th Cir. 2014).** An *en banc* panel of the U.S. Court of Appeals for the Ninth Circuit (Kozinski, C.J., Silverman, Graber, Gould, Tallman, Clifton, Murguia, Christen and Hurwitz, JJ.) reversed the three-judge panel in *Romo v. Teva Pharmaceuticals USA, Inc.*, 731 F.3d 918 (9th Cir. 2013) and the district court's order granting remand of several

coordinated class actions alleging injuries related to the ingestion of propoxyphene, an ingredient found in pain relievers. This *en banc* decision arose from a pair of cases, *Romo v. Teva Pharmaceuticals USA, Inc.*, and *Corber v. Xanodyne Pharmaceuticals, Inc.*, 540 F. App'x 650 (9th Cir. 2013), in which a divided panel approved the remand of 40 just-under-100 plaintiff cases as to which plaintiffs had invoked a California procedural rule that authorizes coordination of complex civil actions "for all purposes." The plaintiffs did not specifically limit their coordination request to pretrial proceedings, and the panel majority held that the plaintiffs' request did not satisfy the "joint trial" requirement for mass actions under CAFA. Judge Gould dissented, urging the court to look at the practical result of the plaintiffs' proposal rather than whether the plaintiffs had used the magic words of asking for a joint trial. The Ninth Circuit granted rehearing *en banc* in both *Romo* and *Corber*. Writing for the court this time around, Judge Gould explained that although a rule requiring the plaintiffs to invoke the magic words "joint trial" "would be easy to administer," such a rule "would ignore the real substance" of the plaintiffs' proposals. As a practical matter, the plaintiffs' request to coordinate all of the cases "for all purposes" — and their arguments before the state court that coordination was needed to avoid "the danger of inconsistent judgments and conflicting determinations of liability" — was a request for a joint trial. The court sided with the U.S. Courts of Appeals for the Seventh and Eighth Circuits in determining that a proposal for a joint trial may be made implicitly as well as explicitly. Judge Berzon joined in a dissenting opinion authored by Judge Rawlinson, in which Judge Rawlinson noted that it was "a stretch to parse a proposal for a joint trial" from the language in plaintiff's coordination petition. According to the dissent, the "conclusion that Plaintiffs implicitly requested a joint trial is not supported by the language of CAFA or by the cases from the Seventh and Eighth Circuits so heavily relied upon by the majority." Further, the dissent noted that the majority's position "is inconsistent with precedent from the Supreme Court and this circuit that Plaintiffs are the masters of their Complaints, that removal statutes (including CAFA) are to be construed narrowly, that any ambiguity is to be construed against removal, and that the plain language of the statute controls."

***Robinson v. Avanquest North America Inc.*, No. 14 C 8015, 2015 WL 196343 (N.D. Ill. Jan. 13, 2015).** Judge Charles P. Kocoras of the U.S. District Court for the Northern District of Illinois denied the plaintiff's motion to remand his case to state court, holding that the defendants had properly removed the case under CAFA. In his class action complaint, originally filed in the Circuit Court of Cook County, Illinois, the plaintiff alleged that the defendant software development companies deceptively marketed certain software and failed to deliver the level of utility advertised, thereby violating various Illinois laws. While the notice of removal did not explicitly mention CAFA, various exhibits attached to the defendants' opposition to the motion to remand included correspondence between the parties, in which the defendants identified CAFA as a ground for removal. The court treated the notice of removal as if had been amended to include the information contained in the parties' correspondence. Turning to the merits of the motion to remand, the court noted that the plaintiff had alleged compensatory damages in the amount of $780,754 and that the defendants had correctly argued that the court could legally award up to six times that amount in punitive damages, thereby bringing the amount in controversy over CAFA's $5 million threshold. Although the plaintiff argued that the "appropriate ratio" for actual to punitive damages was 3-to-1, the court nonetheless found CAFA jurisdiction appropriate because the defendants had plausibly shown that a 6-1 ratio was not legally impossible. Accordingly, the court retained jurisdiction under CAFA and denied the plaintiff's motion to remand.

***Baron v. Johnson & Johnson*, No. SACV 14-1531 JGB (SPx), 2014 WL 7272229 (C.D. Cal. Dec. 17, 2014); *Heredia v. Johnson & Johnson*, No. SACV 14-1530 JGB (SPx), 2014 WL 7272234 (C.D. Cal. Dec. 17, 2014); *Rappuchi v. Johnson & Johnson*, No. CV 14-7392 JGB (SPx), 2014 WL 7272426 (C.D. Cal. Dec. 17, 2014); *Vasquez v. Johnson & Johnson*, No. CV 14-7391 JGB (SPx), 2014 WL 7272242 (C.D. Cal. Dec. 17, 2014).** Judge Jesus G. Bernal of the U.S. District Court for the Central District of California granted the defendants' motions for reconsideration and denied motions to remand four related actions brought in California Superior Court alleging a variety of injuries from the surgical implantation of pelvic mesh devices manufactured and distributed by the defendants. After the plaintiffs petitioned the California Superior Court to coordinate the four actions in August, the defendants removed all four actions pursuant to CAFA. The four actions were remanded on November 13 because the court found that the plaintiffs sought "coordination only for pretrial purposes; thus the four related cases fell within the exception to CAFA jurisdiction for claims that have been consolidated solely for pretrial proceedings." The defendants moved for reconsideration of the order shortly thereafter, in light of the U.S. Court of Appeals for the Ninth Circuit *en banc* opinion in *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218, 1220 (9th Cir. 2014), which, as described above, held that a request by plaintiffs for coordination can implicitly seek a joint trial for purposes of triggering the "mass action" provision of CAFA. Judge Bernal reasoned that, just like the plaintiffs in *Corber*, the plaintiffs here sought coordination "for all purposes," which meant more than 100 plaintiffs were seeking joint trial.

***Lenell v. Advanced Mining Technology, Inc.*, No. 14-cv-01924, 2014 WL 7008609 (E.D. Pa. Dec. 11, 2014).** Judge Legrome D. Davis of the U.S. District Court for the Eastern District of Pennsylvania denied the defendants' motion to dismiss the plaintiffs' claims for lack of jurisdiction under CAFA. The plaintiffs alleged that the defendants failed to deliver specialized computers, known as "miners," to customers as ordered and that the computers delivered did not perform as advertised. The defendants argued that the amount in controversy was not satisfied. The court held that the defendants failed to show to a legal certainty that the plaintiffs could not recover at least $5 million in damages because the plaintiffs' request for punitive damages alone could reach $5 million.

***Walker v. Old Reliable Casualty Co.*, No. 4:13-CV-04122, 2014 WL 6872903 (W.D. Ark. Dec. 4, 2014).** Judge Susan O. Hickey of the U.S. District Court for the Western District of Arkansas denied the plaintiff's motion to remand his action to state court, holding that the defendant had alleged sufficient facts to satisfy CAFA's amount in controversy requirement. The plaintiff's complaint, originally filed in Arkansas state court, alleged that the defendant property insurance company had materially breached its duty to indemnify its insureds by depreciating labor costs associated with repairs to their property, thereby paying them less than what they were owed under the terms of their insurance contracts. The defendant removed the action to state court, asserting that the plaintiff himself had placed a total of $7.5 million into controversy and conceding that, based on its own calculations, the company had depreciated $1.6 million or more in connection with claims for which it made "actual cash value" payments. To support these contentions, the defendant submitted an affidavit from its assistant vice president of Property Claims, who asserted that the company had paid out more than $7.9 million on claims on an "actual cash value" basis, which was the replacement value of the property at the time of the loss, less depreciation. Even though the defendant's estimate of $7.5 million ultimately might prove to be overly inclusive, the court found that the defendant's affidavit provided sufficient factual evidence from which a reasonable fact finder could conclude that the amount in controversy exceeded CAFA's $5 million threshold. In addition, the court noted that the plaintiff class could recover statutory penalties, punitive damages and attorneys' fees, all of which brought the amount in controversy well in excess of $5 million.

***Brooks v. Atlas Roofing Corp. (In re Atlas Roofing Corp. Chalet Shingle Products Liability Litigation)*, MDL No. 2495, 2014 WL 6775255 (N.D. Ga. Dec. 2, 2014).** Judge Thomas W. Thrash, Jr. of the U.S. District Court for the Northern District of Georgia denied the defendant's motion to dismiss for lack of jurisdiction under CAFA and dismissed the plaintiff's unjust enrichment claim. This multi-district litigation involved allegations of deceptive marketing and sale of defective roofing shingles. The defendant alleged that, based on the allegations in the plaintiff's amended complaint, there was no minimal diversity for purposes of satisfying CAFA. CAFA holds that the minimal diversity requirement may be met when " 'only one member of the plaintiff class — named or unnamed — … [is] diverse from any one defendant' " (alterations in original). Though both the plaintiff and the defendant were citizens of Mississippi, the plaintiff's requested class was not limited to Mississippi citizens. Rather, the class was limited to owners of residences " 'physically located in' " Mississippi that contain the subject shingles. As the court explained, it was "plausible" that some of the owners of the homes, while located in Mississippi, were citizens of another state. Construing the complaint in a way most favorable to the plaintiff, the court found that the minimal diversity requirement of CAFA had been satisfied and therefore refused to dismiss the case on that basis.

***Claxton v. Kum & Go, L.C.*, No. 6:14-cv-03385-MDH, 2014 WL 6685816 (W.D. Mo. Nov. 26, 2014).** Judge Douglas Harpool of the U.S. District Court for the Western District of Missouri denied the plaintiff's motion to remand to state court in a case removed to federal court under CAFA. The plaintiff initially filed his action in Missouri state court, alleging that the defendant sold unleaded gasoline that improperly contained diesel fuel. The defendant filed a notice of removal to federal court, alleging that both diversity and CAFA jurisdiction existed, and plaintiff moved to remand. With respect to CAFA jurisdiction, the court found that the class allegations in the complaint satisfied CAFA's requirements. To arrive at that conclusion, the court used the $4,840 in actual damages that the plaintiff had pleaded as a measure of average class member damages. Based on the plaintiff's indication that there would be approximately 800 class members, the court estimated the total actual damages at issue to be $3,872,000. The court then relied on cases cited by the defendant suggesting that this amount of actual damages, when combined with reasonable attorneys' fees and punitive damages, could exceed $5 million. Accordingly, even if the plaintiff's individual claims had not satisfied the amount-in-controversy threshold of 28 U.S.C. § 1332(a), the court found that it would have jurisdiction under CAFA.

***Kotsur v. Goodman Global, Inc.*, No. 14-1147, 2014 WL 6388432 (E.D. Pa. Nov. 17, 2014).** The plaintiff brought this class action on behalf of individuals who purchased a Goodman air conditioning unit for personal or household purposes, alleging breach of warranty, violation of Pennsylvania Unfair Trade Practices and Consumer Protection Law, and unjust enrichment. The defendants removed the action under CAFA; after the plaintiff withdrew his objection to federal jurisdiction, Judge Norma L. Shapiro of the U.S.

District Court for the Eastern District of Pennsylvania considered *sua sponte* whether there was jurisdiction under CAFA. The court found that the plaintiff alleged individual costs of approximately $2,000 in repairs and replacement costs that were typical of the approximately 390,000 putative class members; thus, based on the plaintiff's allegations in his complaint, the court was satisfied that the jurisdictional threshold was satisfied.

Decisions Granting Motion to Remand/Finding No CAFA Jurisdiction

***Dudley v. Eli Lilly & Co.*, No. 14-13048, 2014 WL 7360016 (11th Cir. Dec. 29, 2014).** A panel of the U.S. Court of Appeals for the Eleventh Circuit (Tjoflat, Marcus and Wilson, JJ.) affirmed a district court order granting the plaintiff's motion to remand the class action. The lower court found that Lilly, the removing party, had not met its burden of establishing by a preponderance of the evidence that the amount in controversy requirement of CAFA was satisfied. The plaintiff alleged that Lilly did not make certain incentive payments due to him and other similarly situated employees. The lower court found, and the Eleventh Circuit affirmed, that the proffers Lilly made about the amount in controversy were purely speculative because Lilly had failed to identify a specific number of class participants who did not receive their promised compensation and failed to identify the amount each member was entitled to receive as compensation. The Eleventh Circuit was guided by the Supreme Court's recent decision in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014) that, while there is no longer a presumption in favor of remand in deciding CAFA jurisdictional questions, when the amount in controversy is contested, more than a plain statement of grounds for removal is required, and the district court must find by a preponderance of the evidence that the amount in controversy exceeds CAFA's threshold. Judge Marcus held that, while Lilly did not have to "concede liability or be unduly burdened by providing detailed, sales-record-by-sales-record proof of incentive payments," the defendants could have provided the court with more information about the compensation that was allegedly denied the class members "without conceding liability or being unduly burdened."

***Avila v. Con-Way Freight Inc.*, 588 F. App'x 560 (9th Cir. 2014).** A unanimous panel of the U.S. Court of Appeals for the Ninth Circuit (Fletcher and Bybee, JJ., and Singleton, senior district judge sitting by designation) affirmed the district court's remand of a class action removed under CAFA for failure to satisfy the $5 million jurisdictional threshold. The defendants argued that the district court lacked authority to remand because the motion to remand was filed more than 30 days after the notice of removal in violation of 28 U.S.C. § 1447(c), which states that a "motion to remand the case on the basis of any defect *other than lack of subject matter jurisdiction* must be made within 30 days after the filing of the notice of removal." But the Ninth Circuit concluded that a "dispute regarding the amount in controversy is inherently an issue of subject matter jurisdiction," which is not subject to the 30-day deadline.

***Peters v. Equifax Commercial Solutions*, 586 F. App'x 388 (9th Cir. 2014).** A unanimous panel of the U.S. Court of Appeals for the Ninth Circuit (Fletcher and Bybee, JJ., and Singleton, senior district judge sitting by designation) affirmed the district court's decision to grant the plaintiff's motion to remand because the defendant's notice of removal contained little more than conclusory assertions regarding the amount in controversy. Contrary to the defendant's contention that it should have been afforded the opportunity to introduce evidence regarding the amount in controversy before the decision on remand, the Ninth Circuit held that "[a]lthough the district court could have asked for and considered additional jurisdictional evidence, no authority required it to do so before remanding the case to state court." The court also concluded that federal-question jurisdiction was lacking because the complaint pleaded only state-law causes of action. While the complaint mentioned the Fair Credit Reporting Act several times, the state law claims did not necessarily raise a federal issue or depend upon federal law, and "[m]ere references by way of example to federal statutes or regulations in a state-law cause of action are not enough to confer federal-question jurisdiction."

***Judon v. Travelers Property Casualty Co. of America*, 773 F.3d 495 (3d Cir. 2014).** A unanimous panel of the U.S. Court of Appeals for the Third Circuit (Smith, Hardiman and Krause, JJ.) held that the amount-in-controversy requirement of CAFA was not satisfied, affirming in part and vacating in part the decision of the U.S. District Court for the Eastern District of Pennsylvania. The proposed class consisted of individuals injured in motor vehicle accidents who were denied payment of first-party medical benefits by the defendant-insurer Travelers. After Travelers removed the case under CAFA, the district court granted the plaintiff's motion to remand. The district court found CAFA's numerosity and amount-in-controversy requirements to be in dispute and placed the burden of proof on Travelers to establish jurisdiction under CAFA by a preponderance of the evidence. Concluding that Travelers failed to meet its burden, the district court issued an order remanding the case to state court. On appeal, the Third Circuit held that the district court should have placed the burden on the plaintiff — not Travelers — to show to a legal certainty that the numerosity requirement was not satisfied since the plaintiff's complaint unambiguously alleged that there were "hundreds of members" in the class. The district court was correct, however, in finding that Travelers had the burden but failed to prove

the requisite amount in controversy. While Travelers was entitled to rely on an estimate of at least 200 class members based on the language in the complaint, it could not assume that each putative class member would seek the maximum $20,000 in recovery, especially when the named plaintiff was only seeking $2,636. Because Travelers failed to provide a "realistic estimate of the amount of damages per class member," there were insufficient facts to establish jurisdiction.

***Echavarria v. Williams Sonoma, Inc.*, No. 14-7207, 2015 WL 506170 (D.N.J. Feb. 6, 2015).** Judge Anne E. Thompson of the U.S. District Court for the District of New Jersey granted the plaintiffs' motion for remand of their class action, finding that the amount in controversy requirement of CAFA was not satisfied. The plaintiffs brought this action on behalf of all truck drivers employed by a Williams Sonoma facility alleging that they were not independent contractors and thus were owed overtime payments under the New Jersey Wage and Hour Law. The parties debated how to calculate the amount in controversy. The defendant calculated the amount by taking the total amount it paid to Cruz Delivery, the delivery company owned by one of the plaintiffs, and calculating a per-hour rate from that figure. The plaintiffs, however, claimed that the figure is far lower, because the plaintiffs' amount would include moneys paid to Cruz Delivery for fuel, tolls, insurance, etc., rather than just driver wages. The court was persuaded that the plaintiffs' calculation was more likely to prove correct, and that the amount in controversy was well below CAFA's $5 million threshold.

***Addison Automatics, Inc. v. Netherlands Insurance Co.*, No. 14-13710-FDS, 2015 WL 461958 (D. Mass. Feb. 4, 2015).** Judge F. Dennis Saylor IV of the U.S. District Court for the District of Massachusetts remanded to state court an insurance coverage action related to a class action settlement. The class representative in a federal class action had filed an action in state court against the federal class action defendant's insurer, seeking a declaration that the insurer was obligated to defend and indemnify the class action defendant. After the insurer's motion to dismiss on the grounds that the case failed as a matter of law was denied in state court, the insurer removed the action to federal court under CAFA. Judge Saylor held that removal of the action was untimely, because the defendant could have easily ascertained that the case was removable from prior pleadings, including the initial complaint. Judge Saylor explained that the initial complaint provided notice that the class representative was seeking relief both as an individual and as a representative of a class and attached the federal class action complaint, even though it was not filed as a class action, and the insurer could have ascertained that CAFA's $5 million threshold was exceeded once the underlying judgment in the federal class action (*i.e.*, the approval of the class action settlement) was included in briefing before the state court.

***Hood v. Gilster-Mary Lee Corp.*, No. 3:14-cv-05012-MDH, 2015 WL 328409 (W.D. Mo. Jan. 26, 2015).** Judge Douglas Harpool of the U.S. District Court for the Western District of Missouri granted the plaintiffs' motion to remand, holding that the action satisfied the criteria for CAFA's "local controversy" exception. The proposed plaintiff class was comprised of several former or current employees of Gilster-Mary Lee, owner of a microwave popcorn packaging plant in Missouri. The plaintiffs alleged that they suffered or would suffer from lung impairment as a result of being exposed to natural and artificial butter flavoring products, compounds and ingredients while at work. After the defendants removed under CAFA, the plaintiffs moved to remand, invoking the "local controversy" exception and submitting evidence that all of the current employees satisfying the class definition resided in Missouri. In addition, the plaintiffs contended that of the 246 individuals on the list of former employees satisfying the class definition, all but 11 had last known addresses in Missouri. Plaintiffs obtained affidavits from 95 of those former employees confirming that they were still residing in Missouri, whereas only seven former employees submitted affidavits stating that they no longer resided in Missouri. While 126 former employees did not return an affidavit, the court found that the evidence provided met the "burden of establishing it is more likely than not that over two-thirds of the potential class members are Missouri citizens."

***Aiona v. Bayer Healthcare Pharmaceuticals, Inc.*, No. C-14-4745 EMC, 2015 WL 293496 (N.D. Cal. Jan. 20, 2015).** Bayer initially removed the action in December 2013 on fraudulent joinder grounds, which the court remanded. In September 2014, the plaintiffs in another state court case involving alleged injuries caused by Mirena filed a Joint Petition for Coordination seeking to coordinate seven Mirena actions, including *Aiona*, without objection from the plaintiff. Bayer removed again, arguing that the request for coordination triggered CAFA's mass action provision. Noting that the number of plaintiffs in the coordinated Mirena actions exceeded 100 and that the amount in controversy exceeded $5 million, Judge Edward M. Chen of the U.S. District Court for the Northern District of California nonetheless granted the plaintiff's motion to remand. According to the court, the coordination petition was in many ways "identical" to the petition at issue in the *en banc* decision in *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218 (9th Cir. 2014) (described above). However, unlike in *Corber*, the joint petition in

Aiona repeatedly stated that the parties were seeking coordination "for pre-trial purposes only" and "are in no way petitioning this Court for multi-plaintiff trials." As a result, removal under CAFA was improper.

***Estate of Hanna v. Agape Senior, LLC*, No. 3:12-cv-02872-JFA, 2015 WL 247906 (D.S.C. Jan. 20, 2015).** Judge Joseph F. Anderson, Jr. of the U.S. District Court for the District of South Carolina granted the plaintiffs' motion to remand in this class action arising out of purported medical treatment rendered by an unlicensed physician to patients at a senior facility. The court held that the local controversy exception to CAFA applied. The decision turned on whether "significant relief" was sought from the forum defendant (the senior facility) and whether the forum defendant's conduct formed a "significant basis" for the claims made. The court determined that the plaintiffs sought "significant relief" from the forum defendant because the relief sought from the senior facility was significant in comparison to the relief sought from the diverse defendant; the plaintiffs specifically requested particularized relief from the forum defendant that was not demanded from the diverse defendant; and the plaintiffs' causes of action sounded in negligence arising out of the forum defendant's actions. The forum defendant's actions also formed a "significant basis" for the proposed plaintiff class's claims because the claims against the senior facility were substantial; all but one of the claims relied on the alleged conduct of the senior facility; the majority of the claims were brought against the senior facility; and the forum defendants were related to one another and comprised the vast majority of all the defendants in the case.

***McCown v. NGS, Inc.*, No. 3:14-27719, 2015 WL 251489 (S.D.W. Va. Jan. 16, 2015).** Chief Judge Robert C. Chambers of the U.S. District Court for the Southern District of West Virginia granted the plaintiffs' request to remand this class action seeking recovery under West Virginia common law and the West Virginia Consumer Credit and Protection Act. CAFA jurisdiction turned on whether the defendants established that minimal diversity existed. The plaintiffs' initial complaint sought recovery on behalf of a class "consisting of the business invitees who rented motel rooms and were customers of the Defendants in the State of West Virginia who occupied [Defendants'] motels on or after March 31, 2010." The plaintiffs' amended complaint included the same language, as well as an additional allegation that the class "consist[ed] of business invitees who rented motel rooms from the Defendants and were subjected to Defendants' unconscionable and substandard motel room living conditions due to infestation of bed bugs and other filth on or after March 31, 2010." The defendants argued that this addition destroyed the limitations on the geographic scope of the class. The court disagreed. It read the complaint as a whole and determined that the plaintiffs intended to limit the class to residents of West Virginia who were the defendants' customers during the relevant time period. Accordingly, the minimal diversity requirement was not satisfied.

***Baker v. PDC Energy, Inc.*, No. 14-cv-02537-RM-MJW, 2014 WL 7445626 (D. Colo. Dec. 30, 2014).** The plaintiff brought claims for breach of contract, breach of covenants and unjust enrichment on behalf of a class of royalty owners. One of the defendants, PDC Energy, removed under CAFA on the basis that the plaintiff was a citizen of a different state than the other defendant, DCP Midstream. After conceding that DCP Mainstream was also a citizen of Colorado, PDC Energy sought to amend the notice of removal, arguing, *inter alia*, that minimal diversity was satisfied because 400 members of the class received royalty payments at mailing addresses outside of Colorado and were therefore citizens of other states. Judge Raymond P. Moore of the U.S. District Court for the District of Colorado denied defendant PDC Energy's request to amend the notice of removal and granted the plaintiff's motion for remand. According to the court, "[c]itizenship and residency are distinct legal concepts." In addition, the court explained that a "'mailing address' does not necessarily reflect one's residence." Instead, it merely reflects where mail is sent. Because there was insufficient evidence that the mailing addresses corresponded to class members' residences or domiciles, minimal diversity of citizenship was not satisfied. Amendment of the notice of removal would have been futile and the court proceeded to remand the action.

***Carr v. National Association of Forensic Counselors, Inc.*, No. CV 14-8761-JFW (JCx), 2014 WL 7384718 (C.D. Cal. Dec. 29, 2014).** The plaintiff brought a class action for fraud and violation of California consumer protection statutes, alleging that the defendants provided worthless alcohol and drug counselor certifications to individuals in California when the defendants were not authorized to issue such certifications. The defendants filed a timely notice of removal on diversity grounds under 28 U.S.C. § 1332(a), claiming that the $75,000 amount-in-controversy minimum was satisfied because the plaintiff spent $90 per year for 10 years, and "hundreds of other class members have done the same." Eight days later, the defendants filed a "supplement" to the notice of removal asserting that removal was also justified on CAFA grounds because there were 176 minimally diverse class members seeking close to $70,000 each in damages, satisfying the $5 million amount in controversy. Judge John F. Walter of the U.S. District Court for the Central District of California remanded, finding that the first notice of removal only established that the *plaintiff*'s damages are $900, well below the amount in controversy requirement of Section 1332(a). The second

notice of removal (which asserted CAFA jurisdiction) was improper because there was no "substantial change in the nature of the instant case" before the second removal was filed, making it untimely.

***Kaufman v. Lumber Liquidators, Inc.*, No. 14-6434, 2014 WL 7336795 (D.N.J. Dec. 22, 2014).** Judge Anne E. Thompson of the U.S. District Court for the District of New Jersey granted the plaintiffs' motion for remand in a case alleging that hardwood flooring sellers violated New Jersey's Delivery of Household Furnishing Regulations and Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA). In removing the suit under CAFA, the defendants asserted that the amount-in-controversy requirement was "easily satisfied" based on: (1) the amount of statutory civil penalties the plaintiffs sought under the TCCWNA; (2) the number of the defendants' deliveries and average sales prices of the hardwood flooring during the class period, which were relevant to calculating actual damages under the Furnishing Regulations; and (3) potential attorneys' fees. In response, the plaintiffs asserted that they were only seeking statutory penalties under the TCCWNA — which amounted to $100 per violation — and that the inclusion of the term "actual damages" in the complaint was a typographical error. The court agreed, finding that the complaint failed to allege defects in the hardwood flooring or delivery delays that would sustain a claim for actual damages.

***Ardino v. RetroFitness, LLC*, No. 14-cv-01567 (JAP), 2014 WL 7271937 (D.N.J. Dec. 18, 2014).** Judge Joel A. Pisano of the U.S. District Court for the District of New Jersey granted the plaintiffs' motion to remand. The plaintiffs' complaint alleged violations of the Health Club Services Act, the Consumer Fraud Act, the Retail Installment Sales Act, and the Truth-in-Consumer Contract, Warranty and Notice Act by six corporations — five New Jersey businesses and one Arkansas corporation. The Arkansas corporation removed the case under CAFA. The plaintiffs moved to remand, arguing, inter alia, that the "home state" exception applied. The court agreed, explaining that the plaintiffs had established that both two-thirds of the putative class and the "primary defendants" were residents of New Jersey because the Arkansas corporation had argued in an accompanying motion to dismiss that the only possible claims against it stemmed from its third-party relationship with the New Jersey corporations, and thus it could not simultaneously argue that it was the "primary defendant" for purposes of CAFA.

***South Hills Area Council of Governments v. Verizon Pennsylvania LLC*, No. 13-7457, 2014 WL 7058586 (E.D. Pa. Dec. 15, 2014).** Judge Mitchell S. Goldberg of the U.S. District Court for the Eastern District of Pennsylvania granted the defendants' motion to dismiss the plaintiffs' complaint for lack of jurisdiction. The plaintiffs, a group of 11 municipalities, filed a putative class action alleging that Verizon was improperly withholding a portion of its gross revenues. The court first dismissed the plaintiffs' Federal Communications Act claim against Verizon Pennsylvania and all the claims against Verizon Delaware for lack of standing, thereby eliminating the possibility of federal question jurisdiction and diversity jurisdiction under § 1332. Thus, the only remaining possible basis for federal jurisdiction was diversity jurisdiction under CAFA. But CAFA did not provide a basis for jurisdiction for two reasons. First, the requisite diversity was lacking because the plaintiffs, a group of municipalities in the Pittsburgh area, and Verizon Pennsylvania, the sole remaining defendant, were all citizens of Pennsylvania. Second, even if there were a degree of diversity among the parties, the lawsuit would nevertheless be subject to two CAFA exceptions — the "local controversy" and "home state" exceptions – because more than two-thirds of the members of the proposed class were citizens of the state where the action was originally filed, the principal parties were Pennsylvania citizens and the alleged conduct for which relief was sought occurred in Pennsylvania.

***Fowler v. BAC Home Loans Servicing, L.P.*, No. 4:14CV1127 RLW, 2014 WL 6607257 (E.D. Mo. Nov. 19, 2014).** Judge Ronnie L. White of the U.S. District Court for the Eastern District of Missouri granted the plaintiff's motion for remand under the "local controversy" exception. In November 2011, the plaintiff and her counsel filed successive class actions in Missouri state court, both of which involved claims in connection with attorneys' fees paid by the class to reinstate Missouri mortgage loans. The first action did not specifically name Bank of America (BANA) but referred to various unnamed "Doe" defendants. The second action was filed against BANA and other defendants. Both actions were voluntarily dismissed, but the second one was ultimately refiled, and the defendants filed a notice of removal of this "third" action under CAFA. The plaintiff moved to remand under the "local controversy" exception, which the court granted. Most of the court's ruling focused on whether any "other class action ha[d] been filed asserting the same or similar factual allegations against any of the defendants" — an element that renders the "local controversy" exception inapplicable. The court determined that the first action was not an "other class action" filed against BANA, even if BANA was one of the "Doe" defendants. In addition, the court reasoned that because the present action was simply a "refiling" of the second action, the second action did not qualify as an "other class action" within the meaning of CAFA. Because neither the first nor second action constituted "other class actions" filed within the last three years, the court held that CAFA's local controversy exception applied and granted the plaintiff's motion to remand to state court.

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

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