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The Class Action Chronicle

This is the 10th edition of *The Class Action Chronicle,* a quarterly publication that provides an analysis of recent class action trends, along with a summary of class certification and Class Action Fairness Act rulings issued during each quarter. Our publication is designed to keep both practitioners and clients up to date on class action developments in antitrust, mass torts/products liability, consumer fraud and other areas of law.

The winter 2015 edition focuses on rulings issued between August 15, 2015, and November 15, 2015, and begins with an excerpt from a recent white paper published by the U.S. Chamber Institute for Legal Reform regarding multidistrict litigation proceedings.[1] The article is highly relevant to class actions because multidistrict litigation has, in many ways, become the new class action, and numerous cases that previously would have been filed as class actions are being litigated on an aggregate basis in multidistrict proceedings.

MDL Proceedings: Eliminating the Chaff

In theory, multidistrict litigation (MDL) proceedings concentrate multiple lawsuits involving the same subject before one court, and thereby streamline litigation. Unfortunately, MDL practice is not living up to the theory, with MDL proceedings morphing from a procedural device that is intended to create efficiencies in civil litigation (particularly pretrial discovery) into lawsuit magnets.[2] This is so in large part because plaintiffs' counsel have increasingly been able to turn the chief virtue of multidistrict litigation — the efficiencies gained from resolving pretrial matters in the aggregate — into a significant vice. Through aggressive advertising and highly sophisticated client recruitment strategies, plaintiffs' counsel have been able to use the existence of multidistrict proceedings to attract claims of dubious merit. And because multidistrict proceedings by design have tended to prioritize global issues over individual ones, plaintiffs' counsel

[1] *See* John H. Beisner, Jessica D. Miller and Jordan Schwartz, *MDL Proceedings: Eliminating the Chaff,* U.S. Chamber Institute for Legal Reform, October 2015.

[2] More than one-third of the civil cases pending in the nation's federal courts are now consolidated in multidistrict litigations, up from just 15 percent a decade ago. *See* Table C, U.S. District Courts — Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2012 and 2013, 2009 and 2010, 2007 and 2008, 2005-2006, 2003 and 2004, 2001 and 2002, and 1998 and 1999, Judicial Business of the United States Courts, Annual Reports of the Director, Administrative Office of the United States Courts; Cumulative Summary of Multidistrict Litigation: United States Judicial Panel on Multidistrict Litigation, Statistical Analysis of Multidistrict Litigation Fiscal Year 2013, 2011, 2009, 2007, 2006, 2004 and 2001.

have successfully warehoused meritless claims and shielded them from judicial scrutiny in a way they never could if all the cases were being tried individually.

This cynical strategy has produced one windfall after another for plaintiffs' counsel. The filing of bogus claims inflates the size of multidistrict proceedings, which in turn lends baseless credence to allegations that, in reality, might pertain only to a small minority of all the claims filed. Plaintiffs' counsel then tout the mass of claims as evidence that the presiding court could never hope to resolve them all, in an effort to spur the court into browbeating defendants to settle. Too often, these efforts succeed, producing settlements that include no robust mechanisms to ensure that baseless claims are disqualified from compensation. In the name of "efficiency," defendants end up writing a bigger check than they would have if multidistrict proceedings had never been established, paying people to whom they would never be found liable.

This result is not inevitable. Courts overseeing MDL proceedings can curb the incentives to amass bogus claims by adopting common-sense case management procedures and other measures that would streamline multidistrict litigation and weed out frivolous claims in the early stages. Such measures include the expanded use of plaintiff fact sheets and *Lone Pine* orders that would require plaintiffs at the outset of litigation to satisfy a minimum evidentiary threshold before the parties proceed to expensive and burdensome discovery. In addition, MDL judges should require a percentage of randomly selected cases to undergo advanced discovery and dispositive *Daubert* and summary judgment motions. Those cases that do not survive the dispositive motions could give rise to orders to show cause as to why similar cases brought by the same plaintiffs' counsel should not be dismissed. And those cases that withstand the dispositive pretrial motions would proceed to trial as bellwether cases, the outcome of which would have significant consequences for the broader MDL proceeding by educating the parties on the strengths and weaknesses of the claims at issue and informing settlement discussions. These requirements would keep the courthouse door open to mass tort claims that have some footing in fact, while at the same time restoring the efficiency that MDL proceedings are designed to promote and filtering out frivolous claims.

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These measures would ensure that the individual claims at issue in an MDL proceeding are carefully considered before the parties rush to settlement or spend large sums of money trying cases.

Notices of Diagnosis

The most logical starting point for sensible MDL case management is an "up front" requirement of notices of diagnosis — *i.e.*, documentation by a physician that he or she has seen the plaintiff and has determined that the alleged injury appears to be related to the cause alleged in the complaint. In the welding fume MDL proceeding, for example, Judge Kathleen O'Malley implemented a simple mechanism for identifying and excluding weak cases by requiring plaintiffs to submit notices of diagnosis. Judge O'Malley entered a case management order requiring each plaintiff to provide a Notice of Diagnosis certifying that a licensed medical doctor had examined the plaintiff and diagnosed a manganese-induced neurological disorder. This requirement led to the dismissal of about 25 percent of the pending claims.[3] Imposing such a requirement at the start of an MDL proceeding would provide a much better understanding to the court and the parties of the actual merit and size of the litigation.

More often than not, "plaintiffs' attorneys do not provide a physician's diagnosis until discovery, and, if the case settles, a diagnosis may never be provided."[4] Further, "[d]efense efforts to obtain diagnostic information can be time consuming and costly."[5] Requiring plaintiffs to disclose their diagnosis "up front," along with the identity of the diagnosing physician and relevant medical records, would "help ensure adherence to defensible diagnostic practices and allow defendants to more rapidly evaluate [individual] claims."[6] Disclosure of the diagnosing physician's identity at the outset of litigation is also important because it "would make that person subject to deposition and prevent plaintiffs from broadly shielding all of their experts from deposition 'by arguing that [a particular] expert is a consulting expert and would not testify in a particular case.'"[7] Notably, the requirement to submit a notice of diagnosis would not be burdensome for plaintiffs, who presumably have some kind of medical diagnosis before bringing suit. Indeed, obtaining some type of medical diagnosis before commencing litigation is arguably already required by Rule 11, which requires litigants to certify that their claims are not frivolous.[8] Further, plaintiffs

[3] Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 Vand. L. Rev. 107, 163-64 (2010).

[4] Stephen J. Carroll *et al.*, RAND Inst. for Civil Justice, *The Abuse of Medical Diagnostic Practices in Mass Litigation: The Case of Silica* (2009), at xi-xii, http://www.rand.org/pubs/technical_reports/2009/RAND_TR774.pdf

[5] *Id.* at 23.

[6] *Id.* at 28.

[7] Mark A. Behrens & Corey Schaecher, *Rand Institute for Civil Justice Report on the Abuse of Medical Diagnostic Practices in Mass Tort Litigation: Lessons Learned from the 'Phantom' Silica Epidemic that May Deter Litigation Screening Abuse,* 73 Alb. L. Rev. 521, 535 (2010) (quoting Carroll *et al.*, *The Abuse of Medical Diagnostic Practices in Mass Litigation* at 29).

[8] Fed. R. Civ. P. 11(b).

should expect to produce this information by putting their health at issue (as they clearly would have to do in an individual lawsuit outside the MDL context).

Plaintiff Fact Sheets and Medical and Employment Records

In addition to notices of diagnosis, MDL judges should require plaintiff fact sheets and (in the case of personal injury or employment cases) the collection of medical and employment records. Fact sheets are "court-approved standardized forms that seek basic information about plaintiffs' claims — for example, *when* and *why* the plaintiff used the product at issue and what injury did the plaintiff sustain as a result of using the product."[9]

Standardized fact sheets should not be a controversial matter; they spare defendants the cost of adapting hundreds — or perhaps thousands — of interrogatories to individual plaintiffs, while affording plaintiffs' counsel an easy and inexpensive opportunity to satisfy initial discovery obligations.[10] These sheets "can have a deterrent impact that counterbalances the structural incentives toward the inclusion of weaker claims by some [plaintiffs'] counsel."[11]

Plaintiff fact sheets have become standard in multidistrict litigation,[12] but fact sheets are only useful if they are completed accurately, honestly and on time. To that end, MDL courts should enforce time limitations for submitting fact sheets and mandate that they be completed accurately.[13] "[T]he transferee judge [should] clearly specify the sanctions that will be imposed should counsel submit erroneous or incomplete sheets."[14] After all, "[a]bsent the imposition of specific and substantial sanctions from the court, the structure of the MDL does not itself impose a significant check upon the veracity of fact sheets."[15]

In addition to requiring fact sheets, MDL courts should also grant defendants access to plaintiffs' medical and employment histories. Authorizations for collection of medical and employment records can shed light on individual mass tort claims early in the litigation. Defendants can then use this information to verify plaintiffs' fact sheet responses and investigate causation issues and contributory negligence defenses.[16] In the diet drugs MDL, for example, the court not only required the completion of plaintiff fact sheets, but also required plaintiffs to provide a "list of medical providers and authorizations."[17] The list required the disclosure of the plaintiff's current family physician, his or her primary care physicians for the last twenty years; each cardiologist, pulmonary physician and/or heart, lung or chest surgeon who had ever treated the plaintiff; and, *inter alia*, each hospital where he or she received inpatient treatment during the last ten years.[18] Each plaintiff had to sign an authorization allowing his or her doctors "to furnish copies of all medical records, reports, radiographic films, prescription records, echocardiographic recordings, written statements, employment records, wage records, disability records, medical bills, and other documents in [their] possession concerning" the plaintiff.[19] While these types of authorizations are becoming increasingly common in MDL proceedings, MDL judges should be more aggressive in sanctioning plaintiffs for failure to comply with these most basic disclosure requirements, including dismissing cases where plaintiffs drag their feet.[20]

Lone Pine Orders

Transferee judges should also consider the entry of *Lone Pine* orders requiring all plaintiffs to submit an affidavit from an independent physician to support their theory of injury and causation.[21] "The basic purpose of a *Lone Pine* order is to identify and cull potentially meritless claims and streamline

[9] MDL Standards and Best Practices at 11-12, Duke Law Center for Judicial Studies (2014), https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf; Manual for Complex Litigation § 22.83 (similar); *see also* Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 Sedona Conf. J. 1, 8 n.40 (2011) ("The use of 'fact sheets' to streamline discovery by replacing formal interrogatories with supposedly less onerous, more fact-oriented formats is now a common practice in mass tort multidistrict litigation.").

[10] Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 Utah L. Rev. 863, 927-28 (2005).

[11] Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 Emory L.J. 329, 352-53 (2014).

[12] George M. Fleming & Jessica Kasischke, *MDL Practice: Avoiding the Black Hole*, 56 S. Tex. L. Rev. 71, 81 (2014) ("Transferee courts routinely engage in plaintiff and defendant fact sheets, a uniform set of questions asked of all MDL plaintiffs and defendants that generally serve as interrogatories.").

[13] *See* MDL Standards and Best Practices, *supra* note 79, at 13 ("The court should impose concrete time limitations for completing fact sheets.").

[14] Dodge, 64 Emory L.J. at 354.

[15] *Id.*; *see also* MDL Standards and Best Practices at 13 ("Unless such deadlines are rigorously enforced, counsel handling multiple claims may fall far behind in fulfilling that obligation.")

[16] *See* MDL Standards and Best Practices at 12 (authorizations "can help defendants verify the answers provided in the fact sheets and shed light on the potential causes of the plaintiffs' injuries").

[17] 1-4 ACTL Mass Tort Litigation Manual § 4.05; *see also In re Prempro Prods. Liab. Litig.*, No. 4:03-CV-1507-WRW, 2010 U.S. Dist. LEXIS 135152, at *20 (E.D. Ark. Dec. 6, 2010) (the fact sheets require plaintiffs to provide "the identity of each of plaintiff's prescribing physician(s), medical history, employment history, educational history, and the identity of potential fact witnesses").

[18] Pretrial Order No. 22, *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, No. 2:11-md-01203-HB, MDL No. 1203 (E.D. Pa. Mar. 23, 1998).

[19] *Id.*

[20] Hon. Eldon E. Fallon *et al., The Problem of Multidistrict Litigation: Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2352 n.99 (2008) (noting frequency of plaintiff fact sheets and medical authorization, but noting that "parties may occasionally fail to provide this information," which may subject their cases to dismissal).

[21] *Lone Pine* orders are named after a New Jersey case that adopted this procedure. *See Lore v. Lone Pine Corp.*, No. L 33606-85, 1986 N.J. Super. LEXIS 1626 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

litigation in complex cases involving numerous claimants[.]"[22] Such an order "can drastically alter the landscape of the litigation by forcing dismissal of numerous fraudulent or unsupported claims."[23] *Lone Pine* orders are increasingly being employed in MDL proceedings to ensure there is a good-faith basis for plaintiffs' claims before requiring the parties to engage in more complex, cumbersome discovery.[24]

While these orders undoubtedly have the potential to weed out baseless claims, MDL courts should consider using them earlier in litigation to maximize their value.[25] For example, the MDL court in the *Vioxx* litigation entered a *Lone Pine* order after there had been six federal bellwether trials and while the parties were negotiating the global settlement.[26] The *Lone Pine* order applied to nonsettling plaintiffs and succeeded in trimming down the remaining mass of cases after the settlement was complete.[27] Nevertheless, the fact that nearly one-third of claimants enrolled in the master settlement agreement could not satisfy the basic "gate" requirements demonstrates that spurious claims permeated the Vioxx MDL proceeding at the time of settlement.[28] These meritless cases probably could have been culled out prior to settlement by earlier use of *Lone Pine* orders.

Similarly, in the Fosamax MDL proceeding in the Southern District of New York, the court issued a *Lone Pine* order two and a half years after Merck first moved for such an order. The court concluded that experience had shown that the time for the order had come, noting that "more than 50% of the cases set for trial ha[d] been dismissed, and some 31% of cases that ha[d] been selected for discovery ha[d] been dismissed."[29] According to the court, "[p]laintiffs' habit of dismissing cases after both parties have expended time and money on case-specific discovery demonstrates that this MDL is ripe for a *Lone Pine* order."[30] "In short, [the court] had become skeptical about the bona fides of plaintiffs' claims and the candor of the plaintiff's steering committee."[31] Based on counsel's pattern of behavior, the MDL court had "reason to believe that spurious or meritless cases [were] lurking in the some 1,000 cases on the MDL docket."[32] Here, too, earlier implementation of *Lone Pine* requirements might have culled out meritless cases sooner and potentially eliminated the waste resulting from working cases up for trial only to have plaintiffs' counsel dismiss them.

The lesson to be gleaned from prior MDL proceedings is that *Lone Pine* orders should not be viewed as a sort of sanction for bad or wasteful litigation conduct. The issue is not necessarily counsel misconduct or candor, but rather the lack of incentive on the part of plaintiffs' lawyers in mass tort litigation to investigate each one of the cases in their inventories on the front end. MDL courts should recognize this disincentive as inherent in the structure of multidistrict litigation, and embrace *Lone Pine* orders early as one means of mitigating the problems caused by a systemic issue.

Advanced Discovery

Another tool for streamlining multidistrict litigation is requiring a full case work-up for trial with respect to a representative sample of randomly selected cases. A certain percentage — for example, two or three percent — of all cases in the MDL proceeding should be randomly selected for intensive discovery, the results of which would be used for dispositive pretrial *Daubert* and summary judgment motions. MDL judges have the authority to rule on dispositive pretrial motions, and as a Federal Judicial Center paper makes clear, such rulings can serve as a

[22] *Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2007 U.S. Dist. LEXIS 6601, at *2 (S.D. Ohio Jan. 30, 2007); *see also* Hon. Brian. R. Martinotti, *Complex Litigation in New Jersey and Federal Courts: An Overview of the Current State of Affairs and a Glimpse of What Lies Ahead*, 44 Loy. U. Chi. L.J. 561, 572-73 (2013) (these orders "seek to ensure that completely unsupported claims will not consume the judge's or litigants' resources").

[23] Rodney K. Miller, *Article III and Removal Jurisdiction: The Demise of the Complete Diversity Rule and a Proposed Return to Minimal Diversity*, 64 Okla. L. Rev. 269, 317 n.192 (2012).

[24] *In re Fosamax Prods. Liab. Litig.*, No. 06 MD 1789 (JFK), 2012 U.S. Dist. LEXIS 166734, at *7 (S.D.N.Y. Nov. 20, 2012) (granting motion for issuance of *Lone Pine* order; "With increasing frequency, courts overseeing complex pharmaceutical MDLs are using *Lone Pine* orders to streamline the docket."); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2012 U.S. Dist. LEXIS 56309, at *5 (E.D. La. Apr. 23, 2012) ("*Lone Pine* orders [are] appropriate" because "it is not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury.") (internal quotation marks and citation omitted). In the Vioxx litigation, the Fifth Circuit affirmed the dismissal of cases where plaintiffs failed to comply with Judge Fallon's *Lone Pine* order, resolving that "it is within a [district] court's 'discretion to take steps to manage the complex and potentially very burdensome discovery that the cases would require.'" *Dier v. Merck & Co.*, 388 F. App'x 391, 398 (5th Cir. 2010) (*per curiam*) (quoting *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000)).

[25] *See* MDL Standards and Best Practices at 89 ("[C]ourts often implement *Lone Pine* proceedings at or near the end of the MDL[.]").

[26] *Smoke Screens: Decades of Dubious Mass Tort Claims*, Latitude Litigation, Oct. 31, 2014, http://latitudelitigation.com/smoke-screens-decades-of-dubious-mass-tort-claims/.

[27] *Dier*, 388 F. App'x at 393-94.

[28] Indeed, plaintiffs' resistance to the pretrial order — which merely required a "minimal showing … that there is some kind of scientific basis that Vioxx could cause the alleged injury," *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 744 (E.D. La. May 30, 2008) — confirms that at least some counsel had filed cases without conducting an adequate investigation of the basis for the allegations in the suits.

[29] *In re Fosamax*, 2012 U.S. Dist. LEXIS 166734, at *7.

[30] *Id.*

[31] William A. Ruskin, *Lone Pine's Impact on Pharma Products Litigation*, Law360, Jan. 22, 2013.

[32] *In re Fosamax*, 2012 U.S. Dist. LEXIS 166734, at *6-7.

"'yardstick'" for rulings in other cases on remand.[33] Indeed, MDL courts can use show-cause orders to help clear their dockets of frivolous claims even before remand, as a number of courts have done to great effect in multidistrict litigation.

Daubert rulings offer one means of shutting down large numbers of cases — or even an entire litigation – where the science is tentative or lacking.[34] As previously discussed, in the silica MDL, which encompassed over 10,000 plaintiffs, Judge Jack determined that the substantial number of diagnoses in the sprawling litigation "def[ied] medical knowledge and logic,"[35] and found the diagnoses of the diagnosing physicians to be "fatally unreliable."[36] While the court ultimately concluded that it had subject matter jurisdiction over only one of the cases, the court issued extensive findings regarding the admissibility of the challenged physicians' testimony in the broader litigation.[37] "Had the court found that it had subject-matter jurisdiction with respect to the other cases before it, exclusion of the plaintiffs' doctors — as would have been likely, given the court's view of the case — would have sounded the death knell for the lawsuits."[38] Indeed, Judge Jack's scathing findings regarding the dubious nature of the diagnoses in the MDL proceeding clearly "affected the viability of the plaintiffs' actions," as more than half of the lawsuits remanded were voluntarily dismissed by the plaintiffs' firms that had filed them in a matter of months.[39]

Like *Daubert* rulings, summary judgment decisions are another important tool for effective case management in an MDL proceeding. In addition to weeding out unmeritorious cases and entire causes of action, summary judgment decisions can excise certain issues from the broader MDL proceeding. Specifically, the rule governing summary judgment states that "[a] party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought."[40] "The upshot for complex cases is that the transferee court can resolve individual issues within a cause of action that have been coordinated under the MDL statute by granting an appropriate summary judgment motion."[41] For example, in the MDL proceeding stemming from an airplane crash in Taiwan, the MDL court determined that the Warsaw Convention applied to most of the cases asserted against Singapore Airlines.[42] The MDL judge held that all punitive damages claims against Singapore Airlines failed as a matter of law under the Warsaw Convention.[43] "By eliminating this facet of the claim, the federal court effectively whittled down the complex action piece by piece into a more manageable form."[44]

Show-Cause Orders

In the event the defendant prevails on an early *Daubert* or dispositive motion, the MDL judge should consider issuing an order to show cause why other cases presenting similar issues should not be dismissed. The order would afford the plaintiffs an opportunity to come forward with evidence that their cases differ in some material respect from the dismissed case, while simultaneously paving the way to expeditious resolution of their cases. The usefulness of dispositive show-cause orders in MDL proceedings was recently on full display in the Fosamax MDL proceeding. The plaintiffs in that litigation asserted a variety of warning-based claims arising out of allegations that Fosamax causes atypical femur fractures.[45] After a jury verdict in favor of Merck was returned in a bellwether trial, Judge Pisano nonetheless addressed the issue of preemption and ruled as a matter of law that the claims of the bellwether plaintiffs were preempted "because [d]efendant submitted to the FDA all of the information relevant to a label change and tried to change the Precautions section of the label to include low-energy femoral fractures, but the FDA rejected this change."[46] Because "the parties ha[d] been aware of the potential global effects preemption could have on the entire MDL for at least two ... years," Judge Pisano issued an order to show cause why other plaintiffs' cases presenting similar facts with respect to the preemption issue should not be dismissed

[33] Linda S. Mullenix, *Dropping the Spear: The Case for Enhanced Summary Judgment Prior to Class Certification*, 43 Akron L. Rev. 1197, 1241 (2010) ("'Interpretation and application of the Twombly pleading standard, the Court's summary judgment trilogy, and the *Daubert* admissibility standard understandably are not identical across the federal system. MDL treatment for pretrial proceedings ... effectively operates to lend a unitary yardstick for the making of such rulings.'") (quoting Emery G. Lee *et al., The Expanding Role of Multidistrict Consolidation in Federal Civil Litigation* 26 (Draft paper, Federal Judicial Center 2009)).

[34] *See, e.g.*, Jeremy Hays, *The Quasi-Class Action Model for Limiting Attorneys' Fees in Multidistrict Litigation*, 67 N.Y.U. Ann. Surv. Am. L. 589, 624 (2012) ("In some cases, a *Daubert* ruling may be dispositive for all intents and purposes.").

[35] *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 620 (S.D. Tex. 2005).

[36] *Id.* at 675.

[37] *Id.* at 676-77, 680.

[38] Hays, 67 N.Y.U. Ann. Surv. Am. L. at 625.

[39] *Id.* at 625-26.

[40] Fed. R. Civ. P. 56(a).

[41] Scott Paetty, *Complex Litigation in California and Beyond: Classless Not Clueless: A Comparison of Case Management Mechanisms for Non-Class-Based Complex Litigation in California and Federal Courts*, 41 Loy. L.A. L. Rev. 845, 893 (2008).

[42] *Id.* (citing Order Granting Singapore Airline's Motion for Partial Summary Adjudication of Punitive Damages Issue app. A, *In re Air Crash*, MDL 1394 (C.D. Cal. Sept. 3, 2002)).

[43] *Id.* at 893-94

[44] *Id.* at 894.

[45] *In re Fosamax (Alendronate Sodium): Prods. Liab. Litig.*, MDL No. 2243, 2014 WL 1266994, at *1 (D.N.J. Mar. 26, 2014).

[46] *Id.* at *5.

under the reasoning of the court's ruling in the bellwether case.[47] Finding that those plaintiffs failed to come forward with any evidence that the FDA would not have rejected a stronger warning by Merck prior to September 2010, the court dismissed the claims of all plaintiffs with injuries that occurred prior to September 2010.[48] While the court's decision has been appealed o the Third Circuit, it can serve as a useful judicial template for using show-cause orders to dispose of meritless cases.

Attorneys' Fees

"Over the long history of MDLs, judges have awarded lead attorneys billions of dollars in fees and cost reimbursements."[49] The supposed hallmark of multidistrict litigation is the efficiency gained from coordinating overlapping cases before a single judge for pretrial matters.[50] Nonetheless, when it comes time to settle, plaintiffs' counsel often seek contingency payments in the same 33-40% range that they would typically obtain in an individual action outside the MDL context.[51] Such substantial awards make no sense. If litigating a matter in an MDL proceeding is truly more efficient, the cost for doing so on a per-case basis (and therefore the amount of the contingent fee to be paid) should be considerably less than 33%, perhaps ten percent or some other percentage that reflects the supposed efficiencies of mass torts. Adopting this more modest approach to attorneys' fees would maximize the benefits realized by the settling plaintiffs and ensure that plaintiffs' counsel do not receive a windfall.

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MDLs are designed to maximize efficiency and judicial economy by centralizing overlapping cases before a single court for pretrial proceedings. But while MDL proceedings play important roles in attempting to foster fair resolutions of mass tort claims, these proceedings are increasingly being exploited by plaintiffs' counsel who park meritless, poorly investigated lawsuits into these proceedings in the hopes that defendants will enter into a global settlement without assessing the viability of the individual claims at issue. This conduct takes advantage of the structure of MDLs and the general approach to their administration, and as a result, plaintiffs are able to avoid the exchange of information required of plaintiffs at the early stages in non-MDL cases.

To close this loophole, MDL courts should consider employing a broad array of tools to require plaintiffs to make earlier and more substantive contributions in MDL proceedings. Plaintiffs in MDL proceedings should be required to complete fact sheets and provide some sort of *Lone Pine* proof of injury and causation and copies of medical records as the price of admission in the MDL proceeding. In addition, MDL courts should randomly select a representative sample of cases for advanced discovery, dispositive pretrial motion practice and ultimately (if necessary) bellwether trials. These requirements would shift the focus of multidistrict litigation to the merits of the individual claims at issue, ensuring that MDL proceedings are no longer havens for meritless claims and promoting the fair and efficient resolution of the broader litigation.

Class Certification Decisions

In this issue of the Class Action Chronicle, we cover 2 decisions granting motions to strike/dismiss class claims, 5 decisions denying such motions, 35 decisions denying class certification or reversing grants of class certification, 28 decisions granting or upholding class certification, 12 decisions denying motions to remand or reversing remand orders pursuant to the Class Action Fairness Act, and 13 decisions granting motions to remand or finding no jurisdiction under CAFA that were issued during the three-month period covered by this edition.

Decisions Granting Motions to Strike/Dismiss Class Claims

***Paternostro v. Choice Hotel International Services Corp.*, 309 F.R.D. 397 (E.D. La. 2015).**

The plaintiffs sued a hotel franchisee and franchisor over the alleged presence of legionella bacteria in the hot tub. The defendants moved to strike class allegations because the plaintiffs failed to satisfy the requirements of Rule 23(b). Judge Eldon E. Fallon of the U.S. District Court for the Eastern District of Louisiana granted the defendants' motion. Judge Fallon held that certification under Rule 23(b)(1) would be inappropriate because there was no risk of inconsistent adjudications, nor was there a continuing course of conduct that must be stopped (the hot tub was removed in 2013). Also, because the class members were primarily seeking monetary damages, they could not qualify for certification under Rule 23(b)(2). Finally, the court rejected the plaintiffs' attempt to circumvent Rule 23(b) altogether through issue certification under Rule 23(c)(4): "Rule 23(c)(4) is not a

[47] *Id.*

[48] *Id.* at *17.

[49] Silver & Miller, 63 Vand. L. Rev. at 109.

[50] *In re Elec. Books Antitrust Litig.*, No. 11 MD 2293 (DLC), 2014 U.S. Dist. LEXIS 42549, at *67 (S.D.N.Y. Mar. 28, 2014) ("'[T]he essential purpose of section 1407 [is] to promote the just and efficient conduct of complex multidistrict litigation.'") (quoting *Shah v. Pan Am. World Servs., Inc.*, 148 F.3d 84, 92 (2d Cir. 1998)).

[51] Lester Brickman, *Anatomy of an Aggregate Settlement: The Triumph of Temptation Over Ethics*, 79 Geo. Wash. L. Rev. 700, 706 (2011) ("[F]orty percent appears to have become the standard contingency fee in nonclass mass tort litigation.").

stand-alone clause. It does not permit plaintiffs to ignore the requirements of 23(a) or (b)." Because there were no allegations by a class that could be certified under Rule 23, the court struck the class allegations.

***Mladenov v. Wegmans Food Markets, Inc.*, Nos. 15-00373, 15-00382, 15-00618-JEI-AMD, 2015 WL 5023484 (D.N.J. Aug. 26, 2015).**

Senior Judge Joseph E. Irenas of the U.S. District Court for the District of New Jersey struck the plaintiffs' class allegations after ordering the parties to submit briefing as to whether the plaintiffs' proposed classes were ascertainable. The plaintiffs alleged that the defendants misrepresented that their baked goods were made from scratch in stores and brought suit on behalf of all individuals and entities in New Jersey who purchased baked goods from the defendants that were advertised as "made in house" or "freshly baked." The court struck the plaintiffs' class allegations at the pleading stage under Rule 12(f), holding that the class was not ascertainable for two reasons. First, the court found that the plaintiffs would be unable to establish class membership based on the defendants' sales records because those records would do nothing to establish that the purchased products were advertised at the time of purchase as being baked fresh in stores, a defining element of class membership. Second, the plaintiffs would be unable to identify individual cash purchasers in any reliable way, and under Third Circuit precedent, the court found that if the records the plaintiffs proposed relying upon were insufficient to identify those included within the class definition, as was the case here, the class was not ascertainable.

Decisions Denying Motions to Strike/Dismiss Class Claims

***Abella v. Student Aid Center, Inc.*, No. 15-3067, 2015 WL 6599747 (E.D. Pa. Oct. 30, 2015).**

Judge Stewart Dalzell of the U.S. District Court for the Eastern District of Pennsylvania denied the defendant's motion to strike the plaintiff's class definition from the complaint in this putative class action alleging violations of the Telephone Consumer Protection Act (TCPA). The plaintiff asserted his claims on behalf of a class of individuals who had received a text message from the defendant that was made for the purpose of promoting the defendant's products and services and for whom the defendant had no record of express consent at the time the text message was sent. The defendant claimed that the plaintiff's class was an impermissible "fail-safe" class because class membership was dependent on whether the putative class member had a valid claim. The court held that it was not a fail-safe class because the plaintiff's class definition did not reference whether or not the defendant had used an automatic telephone dialing system in sending the putative class member the text messages at issue (a requirement to state a claim under the TCPA). Judge Dalzell held that the class was otherwise ascertainable because the plaintiff intended to rely on the defendant's internal records to determine whether the defendant had received consent to text certain phone numbers, rather than relying on affidavits of putative class members. Thus, the class definition was proper and the defendant's motion to strike was denied.

***Equal Rights Center v. Kohl's Corp.*, No. 14 C 8259, 2015 WL 5920883 (N.D. Ill. Oct. 7, 2015).**

Judge Ronald A. Guzman of the U.S. District Court for the Northern District of Illinois denied the defendants' motion to strike class allegations in a putative class action involving alleged violations of the Americans with Disabilities Act and the New York Human Rights Law based on allegedly inaccessible counters, restrooms, fitting rooms, and inadequate accessible parking at Kohl's Department Stores. In the amended complaint, the plaintiffs defined the proposed class as consisting of "[a]ll people with mobility disabilities who relied on wheeled mobility devices" and "were denied access to the goods, services, facilities, privileges, advantages, or accommodations of any Kohl's Department Store ... on the basis of disability because of the existence of aisles which were too narrow ... ." Kohl's moved to strike the class allegations on the ground that the class itself was not ascertainable. Although the court voiced concerns about the ability to locate and identify class members, it cited recent Seventh Circuit precedent for the proposition that Rule 23 "does not insist on actual notice to all class members in all cases" and "recognizes it might be impossible to identify some class members for purposes of actual notice." Thus, the court declined to find that the class was unascertainable at this early stage and denied the motion to strike the class allegations.

***Blankenship v. Pushpin Holdings, LLC*, No. 14 C 6636, 2015 WL 5895416 (N.D. Ill. Oct. 6, 2015).**

Judge Amy J. St. Eve of the U.S. District Court for the Northern District of Illinois denied the defendants' motion to strike class allegations in a putative class action involving alleged violations of the Illinois Consumer Fraud and Deceptive Practices Act (ICFA). The plaintiffs alleged that their signatures were forged on lease agreements for credit-card swiping machines. They further complained that the defendants took money out of customer bank accounts on an unauthorized basis and then obtained *ex parte* default judgments in violation of mandatory arbitration clauses if the customer took action to stop the unauthorized withdrawals. The plaintiffs sought certification of classes consisting of (1) "all persons who were sued in small claims court ... by the ... Defendants in violation of the mandatory arbitration clauses"; and (2) "all persons who were sued in small claims court ... on Leases

where their signature was forged in violation of the [ICFA]." The defendants moved to strike the class allegations, arguing that the plaintiffs failed to plausibly allege that forged signatures on lease agreements were common to all putative class members and failed to allege any facts that would permit an inference that the putative class members were somehow affected by the same particularized facts. The court rejected these arguments and found that the plaintiffs had "alleged a series of [c]ommon [a]llegations" to support their unfair and deceptive practices claims, which "if proven to be true ... , could meet the commonality requirement[.]" In particular, the plaintiffs had asserted common facts surrounding the alleged forgery and the enforceability of the leases, which the court found sufficient to satisfy the mandates of Rule 23(a). Accordingly, the court denied the motion to strike the class allegations.

***Cole's Wexford Hotel, Inc. v. UPMC*, No. 10-1609, 2015 WL 5123672 (W.D. Pa. Sept. 1, 2015).**

The plaintiff, a purchaser of small group health insurance, filed this putative class action alleging that the defendants, an insurer and health care provider, conspired to monopolize the markets for medical care and health insurance in the region in violation of the Sherman Act. Highmark argued that the class allegations should be stricken because it was "clear on the face of the complaint that individualized inquiry regarding issues of injury in fact and damages would predominate over any common issues in this case." But Chief Judge Joy Flowers Conti of the U.S. District Court for the Western District of Pennsylvania held that striking the class allegations in this antitrust case was not warranted. Judge Conti rejected the argument that class certification is proper only where damages can be proven on a classwide basis, noting that it was based upon a misreading of *Comcast*. The plaintiff's third amended complaint stated that it was seeking damages for class members limited to the difference between the rates charged and the rates that would have been charged but for the alleged conspiracy. The court found it was "not plain enough" from the pleadings that individualized inquiries regarding whether each putative class member could prove its *prima facie* case and damages would overwhelm common questions of law and fact, and that under such circumstances, this was not one of the "rare cases" justifying striking class action allegations.

***Gitman v. Pearson Education, Inc.*, No. 14 Civ. 8626(GBD), 2015 WL 5122564 (S.D.N.Y. Aug. 31, 2015).**

Judge George B. Daniels of the U.S. District Court for the Southern District of New York denied the defendants' motion to strike the class allegations because it was procedurally premature. The plaintiffs alleged that the defendants, a publishing company and its parent company, breached publishing agreements and the implied covenant of good faith and fair dealing by engaging in a sales practice that reduced the royalty payments owed to the plaintiffs. The defendants argued for striking the class allegations because each author in the putative class had a different publishing agreement with the defendants with a unique bargaining history and course of performance. The court, however, rejected the defendants' argument, holding that it could not determine at this early stage based solely on the allegations in the complaint that the plaintiffs would be unable to establish commonality.

Decisions Rejecting/Denying Class Certification

***Sergeants Benevolent Association Health & Welfare Fund v. Sanofi-Aventis U.S. LLP*, No. 14-2318-cv, 2015 WL 7067837 (2d Cir. Nov. 13, 2015).**

The U.S. Court of Appeals for the Second Circuit (Cabranes, Livingston and Droney, JJ.) affirmed a district court's decision to deny class certification in an action alleging that a drug manufacturer engaged in a pattern of mail fraud by concealing the safety risks of an antibiotic drug, Ketek, in violation of the Racketeer Influenced and Corrupt Organizations Act. The proposed class was composed of health benefit providers that paid or incurred costs for Ketek from the time that the drug was approved by the Food and Drug Administration (FDA) until it lost FDA approval. According to the plaintiffs, the drug was "so dangerous that no physician would have prescribed Ketek if [the defendant] had not concealed its true safety risks." Thus, according to the plaintiffs, every Ketek prescription and subsequent injury was "traceable" to the defendant's alleged fraud. However, the district court found that common issues did not predominate as required for class certification under Rule 23(b)(3). According to the district court, the causal chain was "disrupted" by "physicians' individual treating decisions." The Second Circuit affirmed, finding that the district court's decision was not an abuse of discretion because the plaintiffs "could not establish using generalized proof that each putative class member suffered an injury 'by reason of' [the defendant's] alleged fraud."

***Torres v. S.G.E. Management, L.L.C.*, 805 F.3d 145 (5th Cir. 2015).**

After the district court granted class certification to a class of plaintiffs asserting Racketeer Influenced and Corrupt Organizations Act claims against an allegedly illegal pyramid scheme, the U.S. Court of Appeals for the Fifth Circuit (Jolly and Clement, JJ., Wiener, J. (dissenting)) vacated and remanded, finding that predominance was lacking. The court found that individualized reliance issues would overwhelm common issues of fact because a presumption of reliance was improper; as in any fraud, there

are willing participants who knowingly participate in the scheme in an attempt to profit. Thus, a case-by-case inquiry would need to be conducted into what representations each plaintiff received and whether they relied on those representations.

***Smith v. ConocoPhillips Pipe Line Co.*, 801 F.3d 921 (8th Cir. 2015).**

The U.S. Court of Appeals for the Eighth Circuit (Murphy and Shepherd, JJ., and Harpool, district judge sitting by designation) reversed the district court's decision granting class certification in a class action centering around alleged contamination from a leak in a petroleum pipeline that had been discovered in 1963. In 2002, Phillips, the owner of the pipeline, had fenced in the area around the leak site and set up monitoring wells to track any spread of pollutants. In 2011, four plaintiffs sued Phillips and sought certification of two separate classes, each including property owners within a 1.1 mile radius of the contamination site. The first class asserted claims based on nuisance and negligence theories, and sought money damages for the diminution in their property values and injunctive relief requiring Phillips to rid the area of leaked petroleum products and to conduct testing for soil and water contamination on nearby properties. The second proposed class sought compensation for ongoing expenses of medical monitoring due to potential exposure to pollutants from the pipeline leak. The district court certified only the first class, relying on evidence that contaminants had been shown in the monitoring wells, the pollution was continually shifting and contaminants had been discovered at one of the named plaintiff's residences, located .25 miles away from the epicenter of the contamination. On appeal, Phillips argued that there was no classwide proof of contamination. The plaintiffs argued that under applicable state law, proof of such physical invasion by contaminants was not necessary because the presence of contaminants on the class site created a "cloud on the class' land" and diminished its property value. The court rejected plaintiff's argument and found that the putative class's fear of contamination spreading from the leak site to harm their property was not a sufficient injury to support a claim for common law nuisance. Accordingly, the plaintiffs had failed to demonstrate a classwide injury and could not satisfy the commonality requirement of Rule 23.

***Weidenhamer v. Expedia, Inc.*, No. C14-1239RAJ, 2015 WL 7157282 (W.D. Wash. Nov. 13, 2015).**

Judge Richard A. Jones of the U.S. District Court for the Western District of Washington refused to certify two nationwide classes of Expedia customers purportedly misled by false statements regarding baggage fees and discounts on purchases made using the Expedia app. The "baggage fee" class was not ascertainable due to incomplete records regarding the fees class members actually paid and the baggage fee rules posted by Expedia versus the actual airline policies, and "the astronomical number of permutations created by the mix of carriers, flights, and fare classes offered by Expedia over the relevant period." The court held that numerosity, typicality and commonality were satisfied, but that individualized issues predominated, precluding certification under Rule 23(b)(3). "Given the confluence of carriers, routes, fare classes, and other variables, ... the Court would have to review millions of transactions to identify customers that may have been exposed to differing false statements" and determine whether individual customers were actually deceived and the amount of Expedia's liability. Similarly, certifying a Rule 23(b)(2) class for injunctive relief was not possible since an injunction "would have to be retailored anytime a flawed display was found." The second class (about discounts) also was not ascertainable because Expedia's records did not show whether customers purchased flights using the app after seeing the discount code, and consumer affidavits regarding attempts to apply the coupon were insufficient. In addition, the court held that the plaintiff was not typical of the class because he received a refund and did not read the instructions, and his testimony about using the app lacked credibility. Thus, the court declined to consider commonality or predominance.

***Conrad v. Boiron, Inc.*, No. 13 C 7903, 2015 WL 7008136 (N.D. Ill. Nov. 12, 2015), 23(f) pet. pending.**

Judge William T. Hart of the U.S. District Court for the Northern District of Illinois denied the plaintiff's renewed motion for class certification in a putative class action against Boiron, Inc., a pharmaceutical company, involving alleged violations of the Illinois Consumer Fraud and Deceptive Business Practices Act. This action was one of several class actions filed against Boiron alleging that the company sold a homeopathic drug called Oscillo by falsely claiming it would relieve flu-like symptoms, when the active ingredient allegedly had been diluted through the manufacturing process to the point that it no longer could have any effect on users. The court denied class certification, concluding that the adequacy-of-representation requirement was not met because, before filing any motion for class certification, the plaintiff had been offered $25 plus reasonable attorneys' fees and costs to settle his claims, which exceeded the $20 the plaintiff had spent purchasing Oscillo. Because the plaintiff had rejected that offer, the court determined that he "[could not] possibly be an adequate class representative of a damages class."

***Ruzhinskaya v. Healthport Technologies, LLC*, No. 14 Civ. 2921(PAE), 2015 WL 6873399 (S.D.N.Y. Nov. 9, 2015).**

Judge Paul A. Engelmayer of the U.S. District Court for the Southern District of New York denied the plaintiffs' motion to certify a statewide class on behalf of individuals alleging that they were charged excessively for medical records in violation of the New York Public Health Law and the New York General Business Law. According to the court, common issues of fact and law did not predominate over individual issues, as required by Rule 23(b)(3). The court noted that Rule 23(b)(3)'s predominance requirement "is far more demanding than the commonality requirement" and requires "that the issues resolvable through generalized proof are more substantial than the issues subject only to individualized proof." The court found that the defendant's defenses to the allegations differed across medical providers. More specifically, some plaintiffs might be "entitled to relief based on the provider-level costs incurred and others might not be," and some costs might be attributable to the defendant's economic arrangements with the plaintiffs' respective medical providers. Thus, the court held that a certification of a statewide class was inappropriate. Nevertheless, the court noted that it stood ready "to certify a narrower class, defined at the level of [the named plaintiff's] healthcare provider."

***In re Comcast Corp. Set-Top Cable Television Box Antitrust Litigation*, MDL No. 09-md-2034, 2015 WL 6757611 (E.D. Pa. Nov. 5, 2015), 23(f) pet. pending.**

Judge Anita B. Brody of the U.S. District Court for the Eastern District of Pennsylvania denied the plaintiffs' motion for certification of a settlement class and declined to approve the parties' class action settlement in this case alleging that Comcast unlawfully tied the sale of Premium Cable services to the rental of one of Comcast's Set-Top Boxes. The parties' proposed settlement class was defined as persons who subscribed to Premium Cable in certain states (or otherwise opted out of Comcast's arbitration clause) and who paid Comcast a rental fee for a Set-Top Box during the class period. The proposed settlement provided varying relief for different subclasses of plaintiffs, depending on whether they were former or current subscribers and the length of time they rented a box from Comcast. In determining whether the proposed settlement class met the ascertainability prerequisite of Rule 23, Judge Brody found that there was no "reliable and administratively feasible method" to determine whether former subscribers fell within the class definition because Comcast lacked records for most of these individuals. The court found it unlikely that the alternative forms of evidence the parties proposed to prove class membership, such as credit card receipts or insurance claims, could establish both that an individual subscribed to Comcast and that he or she rented a Set-Top Box. Having putative class members submit sworn statements, in addition to such evidence, was also deemed insufficient to satisfy the ascertainability requirement under Third Circuit precedent, as the plaintiffs did not also establish a reliable methodology for screening out unreliable claim forms. Because the proposed class was unascertainable, Judge Brody declined to certify the class for settlement purposes.

***Shepherd v. Vintage Pharmaceuticals, LLC*, No. 1:11-CV-3805-SCJ, 2015 WL 6956767 (N.D. Ga. Nov. 4, 2015).**

Judge Steve C. Jones of the U.S. District Court for the Northern District of Georgia denied the plaintiffs' motion for class certification in a putative nationwide class action against manufacturers of birth control pills, alleging that the birth control pills were improperly packaged. The proposed class was not ascertainable because there was no way to determine which consumers purchased or digested birth control pills that were improperly packaged, and the plaintiffs did not proffer any plan as to how to address this issue beyond contending that the plaintiffs could submit affidavits that they purchased these pills. The plaintiffs also could not satisfy Rule 23's commonality and predominance requirements because their claims implicated highly individualized factual and legal inquiries. Typicality also was not satisfied because, among other reasons, the proposed class representative, who became pregnant, was not typical of other class members who suffered only economic injury.

***Riffle v. Convergent Outsourcing, Inc.*, No. 6:14-cv-1181-Orl-22KRS, 2015 WL 6778001 (M.D. Fla. Nov. 2, 2015).**

Judge Anne C. Conway of the U.S. District Court for the Middle District of Florida denied the plaintiff's motion for class certification in a putative class action alleging that the defendants violated the Fair Debt Collection Practices Act (FDCPA) by sending form collection letters that demanded payments from consumers on time-barred debts without disclosure of that fact. According to the court, class certification was not appropriate because the proposed class was not ascertainable and common issues did not predominate. First, in order to establish a claim under the FDCPA, each plaintiff would need to make a threshold showing that the debts in question arose out of transactions entered into for personal, family or household purposes. However, the plaintiff failed to set forth sufficient information from which the court could determine the primary purposes of each class member's debt. Second, even if the plaintiff were able to establish, on a class-wide basis, that the defendants had a routine practice of sending consumers the form letters in an

attempt to collect on time-barred debts, significant individualized liability issues would still remain because the court would need to make individualized inquiries as to whether each class member's debt was actually time-barred. Accordingly, the class could not be certified.

***Circle Click Media LLC v. Regus Management Group LLC*, No. 3:12-CV-04000-SC, 2015 WL 6638929 (N.D. Cal. Oct. 30, 2015).**

Judge Samuel Conti of the U.S. District Court for the Northern District of California refused to certify classes of California and New York lessees of commercial office space, asserting claims for unjust enrichment and violations of California consumer protection laws arising from the defendants' allegedly charging deceptive fees. The court found that predominance was not satisfied because the fees at issue were disclosed in some of the contracts in a more legible manner than others. In addition, the class also included lessees who did not order telephone services, precluding recovery for unlawful telephone bills. Finally, the class definition was overbroad as to false advertising on the defendants' website because the definition included individuals who never saw the website and the challenged representations were not even on the website for a number of years during the proposed class period. The court also found that neither of the named plaintiffs was typical of the class with respect to claims arising from the "miniscule" font size of the terms and conditions.

***In re Class 8 Transmission Indirect Purchaser Antitrust Litigation*, No. 11-00009-SLR, 2015 WL 6181748 (D. Del. Oct. 21, 2015), appeal pending.**

Judge Sue L. Robinson of the U.S. District Court for the District of Delaware denied certification of a class of indirect purchasers of transmissions for use in customized heavy duty trucks. The purchasers alleged that certain manufacturers and suppliers of the transmissions had engaged in anticompetitive conduct, resulting in overcharges for the customized trucks they purchased from other retailers. While the requirements of numerosity, commonality and typicality were satisfied, the court found that neither the class representatives nor their proposed substitutes were adequate class representatives, as there was intraclass conflict over whether the representatives of certain state subclasses had standing. Furthermore, the plaintiffs failed to establish that they could provide common proof that all class members suffered harm from the alleged antitrust activity necessary to satisfy the predominance requirement. As a putative class of indirect purchasers, the plaintiffs were required to demonstrate the ability to show through common proof that the alleged overcharges the defendants assessed on the sales of transmissions to direct purchasers were passed on to substantially all of the putative class members in the form of higher prices. The court found that the plaintiffs' expert's pricing analysis suffered from various flaws, including that it only included data from two dealers in a single state. Thus, the plaintiffs were incapable of establishing that common issues predominated, and class certification was denied.

***Powell v. Town of Georgetown*, No. 4:14-cv-00004-TWP-WGH, 2015 WL 6158795 (S.D. Ind. Oct. 20, 2015).**

Judge Tanya Walton Pratt of the U.S. District Court for the Southern District of Indiana denied class certification in a putative class action against the town of Georgetown, Indiana, and members of its town council. The plaintiff, a landlord, asserted that the town shut off water to one of his rental properties after one of his tenants vacated the property without paying a water bill. Thereafter, the town refused to turn the water back on until the plaintiff paid the full amount of the tenant's delinquent water bill. The plaintiff argued that such takings violated the due process clause of the state and federal constitutions. In his motion to certify a class, the plaintiff sought to represent a class of all landlords in the town, arguing that all were at risk of similar due process violations. The court found that the plaintiff had not satisfied the numerosity requirement because he had submitted only a vague estimate of the maximum number of landlords in the town without even attempting to specify the number of landlords who might actually risk the type of constitutional harm alleged in his complaint. In addition, the court voiced "serious concerns" about the suitability of the named plaintiff as a class representative and the adequacy of his attorney. With respect to the named plaintiff, the court noted that he had been hospitalized for a serious ongoing illness at least twice since filing his complaint, which already had delayed discovery. Regarding the plaintiff's counsel, the court noted that he failed to mention any class action litigation experience, had not practiced law in Indiana, had violated local rules in filing the motion to certify and already had missed one status conference. For all of these reasons, the court denied class certification.

***In re Avon Anti-Aging Skincare Creams & Products Marketing & Sales Practices Litigation*, No. 13-CV-150 (JPO), 2015 WL 5730022 (S.D.N.Y. Sept. 30, 2015), 23(f) pet. pending.**

Judge J. Paul Oetken of the U.S. District Court for the Southern District of New York denied class certification of several putative classes of purchasers of Avon anti-wrinkle products, alleging that Avon sold the products by making specific false or misleading claims about their scientific anti-aging properties. The court found that the plaintiffs had failed to satisfy the preponderance

and ascertainability requirements for class certification. The plaintiffs argued that the issue of the falsity of Avon's scientific claims about its products' abilities to reverse wrinkles predominated. However, the court rejected this line of reasoning because the falsity issue was not amenable to generalized proof. Avon had produced many different brochures making these claims, and the plaintiffs failed to demonstrate that the brochures were regularly given to customers who purchased the products. The court also found that the proposed classes were not ascertainable. Although the plaintiffs arguably proposed objective criteria to determine who fit within the classes, identifying class members would require a mini-hearing on the merits of each case. The plaintiffs proposed using Avon's own records to verify the class members, but the court found that these purchase records could not show whether putative class members saw the allegedly false statements. Finally, the court denied the plaintiffs' attempts to seek class certification for injunctive and declarative relief under Rule 23(b)(2) because the plaintiffs lacked standing. The court held that the plaintiffs were unlikely to buy the products again because they had argued that if they had been aware of the alleged truth they would not have bought the products initially.

***Delmoral v. Credit Protection Association, LP*, No. 13-CV-242 (RRM)(SMG), 2015 WL 5793311 (E.D.N.Y. Sept. 30, 2015).**

Judge Roslynn R. Mauskopf of the U.S. District Court for the Eastern District of New York denied the plaintiff's motion for class certification. The plaintiff sued Credit Protection Association, LP (CPA), alleging that CPA sent him a letter that violated various provisions of the Fair Debt Collection Practices Act (FDCPA). The plaintiff claimed that the letter was sent during a period when such a collection letter may not be sent under the FDCPA. The plaintiff asserted that the letter in question was mass produced and sought to certify a class of all persons who were sent such a letter. The court found that the plaintiff's proposed class failed to meet the requirements of commonality and typicality under Rule 23(a). As it explained, the crux of the plaintiff's claim concerned the timing of the letter — a fact that varies from one letter to the next. As such, each class member's claim would therefore need an individualized determination of exactly when each letter was received in order to establish an FDCPA violation.

***City Select Auto Sales, Inc. v. BMW Bank of North America Inc.*, No. 13-4595 (NLH/JS), 2015 WL 5769951 (D.N.J. Sept. 29, 2015), 23(f) pet. granted.**

Judge Noel L. Hillman of the U.S. District Court for the District of New Jersey denied the plaintiff's motion for class certification in this action arising from the receipt of unsolicited fax advertisements. Judge Hillman emphasized the recent focus on ascertainability in Third Circuit case law, the main point upon which the defendants' opposition to certification was based. The court explained that although invoices document the total number of faxes sent on various dates, none of the defendants maintained records of the individuals to whom the faxes were sent. Thus, even if the plaintiff could identify the potential universe of fax recipients from the defendants' database of customers, there was no objective way to determine which customers were actually sent the fax. Because the plaintiff failed to demonstrate that the class was ascertainable, a prerequisite to class certification under Rule 23, the court declined to address the remaining Rule 23 requirements.

***Village of Bedford Park v. Expedia, Inc.* (WA), 309 F.R.D. 442 (N.D. Ill. 2015).**

Judge Matthew F. Kennelly of the U.S. District Court for the Northern District of Illinois denied the plaintiffs' second motion for certification under Rule 23(b)(3) in a putative class action involving Expedia's failure to remit to municipalities taxes allegedly owed under hotel tax ordinances. The plaintiffs sought certification of a class consisting of 154 municipalities, all of which had hotel tax ordinances that required hotel owners and operators to pay taxes to the municipality on the retail room rate charged to guests. The court determined that the proposed class did not satisfy the predominance requirement of Rule 23(b)(3) because individualized questions regarding the language and interpretation of each ordinance would predominate over any common questions of law or fact. Similarly, the court determined that the superiority requirement was not satisfied because the plaintiffs had failed to demonstrate that the 154 different ordinances could be arranged into a modest number of subclasses with materially identical legal standards. The court thus determined that class certification was inappropriate. For purposes of creating a full record, the court rejected the defendants' ascertainability and commonality arguments, and noted that if the proposed class had satisfied Rule 23(b)(3)'s requirements, it would have granted class certification with slight modifications to the class definition. Because neither predominance nor superiority were satisfied, however, the court denied the motion for class certification.

***Flynn v. CTB, Inc.*, No. 1:12CV68 SNLJ, 2015 WL 5692299 (E.D. Mo. Sept. 28, 2015).**

Judge Stephen N. Limbaugh, Jr. of the U.S. District Court for the Eastern District of Missouri denied class certification in a putative product liability class action involving breach of implied warranty claims under Indiana law. The plaintiffs were purchas-

ers of a machine manufactured by the defendant and marketed to unload free-flowing grains. The plaintiffs alleged that the defendant had breached the implied warranty of merchantability because the machine suffered from design defects that prevented it from working as advertised, requiring end users to manually move grains in a manner that exposed them to physical harm. The proposed nationwide class of purchasers sought damages under the Uniform Commercial Code and Indiana law. The court noted that under U.S. Supreme Court precedent, an "individualized choice-of-law analysis must be applied to each plaintiff's claim in a class action." Based on the proper choice-of-law analysis, the court determined that Indiana law did not apply to the named plaintiff's claim. In response to that finding, the plaintiffs amended their position and instead sought certification of a class limited to Missouri purchasers. The court, however, found that the only identified Missouri purchaser who fell within the appropriate class period was the named plaintiff, precluding a finding of numerosity.

***Johnson v. GEICO Casualty Co.*, No. 06-408-RGA, 2015 WL 5613155 (D. Del. Sept. 24, 2015).**

Judge Richard G. Andrews of the U.S. District Court for the District of Delaware granted the defendants' motion to decertify the previously certified classes and denied the plaintiffs' motion to substitute new class representatives in this case arising from GEICO's use of allegedly arbitrary computer-based rules to determine whether to pay personal injury protection benefits. The court had previously certified two classes, those who received no payment and those who received partial payment after submitting first-party medical expense claims to GEICO and having their claims submitted through the computer system. Thereafter, the court granted summary judgment on each of the class representative's individual claims. The plaintiffs sought to substitute two medical treatment providers as class representatives; however, the court held that healthcare providers were not included in the certified class of GEICO policyholders. Finally, upon considering the parties' revised trial plan that was submitted after the initial class was certified, the court found that the proposed damages model explicitly provided for individual proof of damages rather than evaluation of damages by an "objective standard" as originally represented by the plaintiffs, which justified reevaluation of whether class certification was appropriate. Finding that individualized determinations regarding entitlement to relief and damages would predominate over any common questions of law and fact among class members, the court held that decertification of the class was appropriate, even assuming a new policyholder class representative could be found.

***Knisely v. Allied Health Benefits, Inc.*, No. 3:14-CV-15, 2015 WL 5634612 (N.D. W. Va. Sept. 24, 2015).**

Judge Gina M. Groh of the U.S. District Court for the Northern District of West Virginia denied certification of a nationwide class of consumers who allegedly purchased "junk health insurance." The plaintiff filed a purported motion for leave to file a second amended complaint, but the motion erroneously attempted to assert and certify a class action. The court therefore decided the class certification issue. It first found that the proposed class of "thousands of individuals across many states" satisfied the numerosity requirement if accepted as true. However, the court denied certification under Rule 23(b)(3), because: (1) common issues did not predominate, because individual reliance inquiries would have been necessary to establish the plaintiff's essential claim of fraud; (2) oral misrepresentations "fail to establish a solid basis for a class action"; and (3) "inevitable individualized damage calculations" indicated the potential unmanageability of a class action. The court further found that any commonalities "based on provisions of form contracts, general practices, common schemes and uniform charges" related to the defendants, not the class members.

***Sherman v. Yahoo! Inc.*, No. 13cv0041-GPC-WVG, 2015 WL 5604400 (S.D. Cal. Sept. 23, 2015).**

Judge Gonzalo P. Curiel of the U.S. District Court for the Southern District of California denied certification of a class of consumers who received an unsolicited text message via Yahoo's Mobile SMS Messenger Service, allegedly in violation of the Telephone Consumer Protection Act. The plaintiff proposed ascertaining the class by using Yahoo's records to identify when the messages were sent, limiting the mobile numbers to particular carriers, and then obtaining contact information for the mobile number account holders. Yahoo argued that this process was unworkable because users did not need to provide identifying information to establish an account, and many carriers object to disclosing information under California privacy law. The plaintiff's alternative proposals, including emailing proposed class members for self-identification, were similarly unfeasible because prospective class members were unlikely to retain or remember receiving one message two years before. Thus, the plaintiff did not demonstrate an administratively feasible method of identifying putative class members. Further, the adequacy and typicality requirements were not met because Yahoo solicited users' consent to receive messages in a number of different ways, and thus, the manner in which plaintiff provided consent would only coincide with a select group of members of the putative

class and not the class as a whole. Similarly, because issues of consent required individualized inquires, individualized factual issues predominated. Finally, the court found that a class action was not a superior method for resolving the dispute because plaintiff's class definition — which included only consumers who had received a text message in one month in 2013 — was too narrow. Even if Yahoo prevailed in the action, it would still be subject to suit for every other month in which it sent a text message, opening up the possibility of inconsistent verdicts contrary to the purposes of Rule 23.

***St. Gregory Cathedral School v. LG Electronics, Inc.*, No. 6:12-cv-739, 2015 WL 5604763 (E.D. Tex. Sept. 23, 2015).**

In this action arising from the sale of allegedly defective heating, ventilation and air conditioning units, Judge Michael H. Schneider of the U.S. District Court for the Eastern District of Texas denied class certification because individualized questions predominated over questions of law and fact common to the class. Specifically, both the causation and the damages analyses required individual investigation. As to causation, the claims required investigation into which individuals were actually misled and which individuals actually relied on LG's alleged misrepresentations. As to damages, there would be individual questions regarding how much each class member paid and how long the unit functioned, among other issues. Thus, the plaintiffs failed to prove, as required by Rule 23(b)(3), that questions of law and fact common to the class predominated over individual questions.

***Leyse v. Lifetime Entertainment Services*, No. 13 Civ. 5794(AKH), 2015 WL 5837897 (S.D.N.Y. Sept. 22, 2015).**

Judge Alvin K. Hellerstein of the U.S. District Court for the Southern District of New York denied class certification of a proposed class action against Lifetime Entertainment Services, LLC (Lifetime) for alleged violations of the Telephone Consumer Protection Act. The plaintiff alleged that Lifetime or a third party acting on its behalf had placed prerecorded calls to his residential phone without his consent in August 2009. The plaintiff claimed that thousands of others had received the same call and sought to certify a class of those call recipients. The court found that the proposed class failed the ascertainability requirement of Rule 23(b). Neither party had produced a copy of the list of called numbers. Moreover, the fact that the calls were made over a two-day period more than six years earlier made it unlikely that such a list would be discovered. Because the court had no method to determine if any particular individual was a member of the class, the class was unascertainable.

***Pagliaroni v. Mastic Home Exteriors, Inc.*, No. 12-10164-DJC, 2015 WL 5568624 (D. Mass. Sept. 21, 2015), 23(f) pet. pending.**

Judge Denise J. Casper of the U.S. District Court for the District of Massachusetts denied certification of a class of building owners to which the defendant's decking product had been applied. The court determined that the proposed class was ascertainable, because the objective criterion — ownership of a building to which the decking product had been applied — could be verified by looking for the necessary laser-etching. In doing so, the court distinguished the case before it from cases like *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), that dealt with "ascertaining a class of purchasers of consumable products." But the court decided that Rule 23(a)'s commonality, typicality and adequacy requirements were not satisfied. As to commonality, the court explained that the plaintiffs had failed to offer questions with common answers that would drive the resolution of the action: the express warranty claims were premised on individualized representations, the implied warranty claims included some decks that were fit for their purpose, and the unjust enrichment and state consumer protection claims involved class-member variations as to the precise injuries and causation. The court also found that the named plaintiffs were not typical of the absent class members because their decks failed "whereas most class members have not reported any problems." The court also recognized that the plaintiffs, direct purchasers of the decking product, had different claims from individuals who purchased buildings that already included the decking product at issue.

***Wagner v. White Castle System, Inc.*, 309 F.R.D. 425 (S.D. Ohio 2015).**

Judge Algenon L. Marbley of the U.S. District Court for the Southern District of Ohio denied certification of a class of mobility-impaired individuals in an Americans with Disabilities Act (ADA) action alleging that 54 of the defendant's restaurants were not wheelchair accessible. In their complaint, the plaintiffs had listed purported ADA violations found at five locations and alleged that they visited other White Castle restaurants and observed similar violations. The plaintiffs sought only injunctive relief, namely, that the defendant be enjoined to remedy the purported violations. The court found that the plaintiffs had not satisfied commonality because they had presented no evidence of a common design for the 54 locations that would support a common ADA violation; in fact, the plaintiffs had alleged that the five locations investigated suffered from different ADA violations. Moreover, the court noted that the legal requirements for each location under the ADA would vary based on the date

the location was constructed, and there was no evidence in the record identifying those dates. Because discovery in the action had not yet commenced, the court noted that the plaintiffs might be able to present evidence supporting a more narrowly drawn class at some later date.

***Reed v. Big Water Resort, LLC*, No. 2:14-cv-1583-DCN, 2015 WL 5554332 (D.S.C. Sept. 21, 2015).**

The plaintiffs sought to certify a class of all persons who entered membership agreements with the defendant campground containing an exclusive use provision, alleging that the defendant breached the membership contracts by changing from a private to public campground. Judge David C. Norton of the U.S. District Court for the District of South Carolina, adopting in part and denying in part the magistrate judge's recommendation to deny class certification, denied certification pending limited class discovery. The court first found the proposed class ascertainable because, although defining the class would entail individual inquiries into each member's contractual terms, these inquiries were not impossible and numbered in the hundreds rather than thousands. The court next found that the Rule 23(a) factors were satisfied, holding that the exclusive use provision was common to all class members and that although certain named plaintiffs sought inconsistent relief from the proposed class members, no "fundamental" conflict existed given the common objective of seeking a remedy for the defendant's alleged misconduct. Analyzing Rule 23(b)(3), however, the court concluded that individualized inquiries were necessary with respect to the defendant's statute of limitations defense because many of the proposed class members discovered non-members using the campground at different times. The court therefore held that limited discovery regarding the statute of limitations was necessary to decide class certification and accordingly denied certification without prejudice pending that discovery.

***Walney v. SWEPI LP*, No. 13-102, 2015 WL 5333541 (W.D. Pa. Sept. 14, 2015), 23(f) pet. denied.**

Chief Judge Joy Flowers Conti of the U.S. District Court for the Western District of Pennsylvania granted in part and denied in part class certification in this dispute over whether the plaintiffs were entitled to bonus monies under the terms of oil and gas leases. The court considered each individual legal claim at issue to determine whether the requirements of commonality and predominance were satisfied. Without resolving the merits of whether an enforceable contract existed, the court held that resolution of the plaintiffs' claim for breach of express contract would require interpretation of certain key provisions in the form documents that were applicable to all transactions. The court held that the commonality and predominance requirements were not satisfied with respect to the plaintiffs' unjust enrichment claims, as individualized factors (such as how long a particular lease remained of record, the information communicated during lease negotiations, the reasons the lease was surrendered without payment and whether there were opportunities to re-lease the rights in question) all determined whether a defendant was unjustly enriched in a particular circumstance. Similarly, the court found that the predominance and commonality requirements were not satisfied with respect to the plaintiffs' claims for fraud and promissory estoppel. Finding the remaining requirements for class certification satisfied, the court certified the plaintiffs' claims for breach of express and implied contract and denied certification as to the remaining claims.

***Galitski v. Samsung Telecommunications America, LLC*, No. 3:12-CV-4782-D, 2015 WL 5319802 (N.D. Tex. Sept. 11, 2015).**

In this consumer class action arising from alleged malfunctions in Samsung cell phones, Judge Sidney A. Fitzwater of the U.S. District Court for the Northern District of Texas denied class certification because the plaintiffs failed to prove that questions of law and fact common to the class predominated over individual questions. First, as to the express and implied warranty claims, the court rejected the plaintiffs' argument that predominance was satisfied because Samsung provided the same written warranty stating that the phones would be "free from defects in material and workmanship" to all class members and that the phones suffered from a common hardware defect. According to the court, common questions did not predominate over the numerous individual questions, such as what caused each individual's device to malfunction; whether the device failed during the warranty period; and whether the malfunction was sufficient to render the device unfit for its ordinary purpose. The court further held that, under California law, a latent defect discovered after the expiration of the warranty period could not form the basis of a breach of express warranty claim, even if the warrantor knew of the defect at the time of the sale. In addition, the court pointed out that determining whether each class member fulfilled the warranty precondition — which required the consumer to return an allegedly defective phone to an authorized phone service facility within the warranty period for repair — and whether Samsung fulfilled its obligation to repair the phone would require individualized inquiries. As to the plaintiffs' implied-warranty claim, the court found that the evidence showed that most members of the proposed class likely never experienced any functionality problems with their phones and that implied-warranty claims were barred absent manifestation of the alleged defect. The court further held that, even for members of the class who experienced problems with the phone, individualized inquiries would be required to determine whether those problems rendered the phones unfit for ordinary

use. Finally, as to the plaintiffs' statutory consumer law claims, the court held that each individual must prove actual injury and that damages could not be resolved on a classwide basis because there was evidence that putative class members received at least some benefit from their phones.

***Varnes v. Home Depot USA, Inc.*, No. 3:12-cv-622-J-39JBT, 2015 WL 5190648 (M.D. Fla. Sept. 4, 2015), 23(f) pet. pending.**

Judge Brian J. Davis of the U.S. District Court for the Middle District of Florida denied class certification in a lawsuit brought against Home Depot for deceptive advertising under the Florida Deceptive and Unfair Trade Practices Act. The crux of the complaint was that in counties with "closed" inspections, the defendants did not follow the Florida Building Code and manufacturer instructions when installing windows and sliding glass doors. The court found that the plaintiffs' proposed class, defined as all purchasers who lived in counties and municipalities with closed inspections and whose windows or sliding glass doors were installed by the defendants during the class period, was not clearly ascertainable. The court noted that the proposed class was overbroad because the alleged problem with installation occurred only in masonry openings (as opposed to, for example, wood-frame window openings). Additionally, even all parties in the proposed class with masonry openings would not necessarily be damaged because they may have had preexisting architectural features that would have prevented the defendants from having to do the work that the plaintiffs allege they should have completed. Finally, the plaintiffs would have to rely on an expert to inspect each and every class member's windows and doors, requiring too much individualized inquiry for a class action.

***Torres v. Nissan North America Inc.*, No. 15-03251 RGK (FFMx), 2015 WL 5170539 (C.D. Cal. Sept. 1, 2015), 23(f) pet. pending.**

Judge R. Gary Klausner of the U.S. District Court for the Central District of California refused to certify a class of consumers alleging violations of the California consumer protection laws, warranty claims and unjust enrichment. The plaintiffs alleged that the 2013 and 2014 models of the Nissan Pathfinder contained a defective transmission that caused unsafe conditions and premature wear, and sought damages and equitable relief. The plaintiffs claimed that common questions of law or fact predominated, including whether the vehicles contained transmission defects, whether any defects caused an unreasonable safety risk, and whether Nissan was aware or concealed the defect. The court held that the plaintiffs had failed to provide evidence that all class members are "substantially certain to experience a malfunction from the alleged defect," and thus individual questions predominated for the warranty claims. For the consumer protection and unjust enrichment claims, the court determined that the "proliferation of news about the defective transmission" led to "uniquely individualized questions" about which consumers relied on Nissan's representations, and/or purchased their vehicles "fully aware" of the potential defect. Therefore, certification under Rule 23(b)(3) was improper. Certification was also not appropriate under Rule 23(b)(2) since the plaintiffs did not seek primarily injunctive relief; the disgorgement and restitution sought was not incidental because it raised significant factual issues based on "each consumer's particular use and experience with the vehicle."

***Gillis v. Respond Power, LLC*, No. 14-3856, 2015 WL 5139366 (E.D. Pa. Aug. 31, 2015), 23(f) pet. granted.**

The plaintiffs, Pennsylvania customers of residential electrical services who entered into variable rate contracts with the defendant, brought this putative class action alleging that the defendant breached its contracts by failing to adhere to the alleged rate cap. Judge Norma L. Shapiro of the U.S. District Court for the Eastern District of Pennsylvania denied class certification, finding the typicality, adequacy and commonality requirements of Rule 23(a) were not satisfied. Judge Shapiro held that the class representatives had different understandings of their contracts and different interactions with the defendant's sales persons from other class members, factual circumstances that made them atypical of other class members. Additionally, the court held that whether the defendant's disclosure statement promised a rate cap that the defendant breached was not a common question because class members had different understandings of their contractual rights and extrinsic evidence may be required to resolve the meaning of the contract.

***Troche v. Bimbo Foods Bakeries Distribution, Inc.*, No. 3:11-cv-234-RJC-DSC, 2015 WL 5098380 (W.D.N.C. Aug. 31, 2015), 23(f) pet. denied.**

Judge Robert J. Conrad, Jr. of the U.S. District Court for the Western District of North Carolina denied class certification where the plaintiff, an "independent operator" (IO) who contracted with the defendant to distribute and resell baked goods at a markup, alleged that the defendant interfered with his and other IOs' relationships with their end customers. Although the plaintiff asserted that the defendant had a "uniform policy" of granting its managers absolute discretion to interfere with the IOs' businesses, the court found that this led to a "wide variation in IO experiences," defeating commonality. The court also held that typicality and adequacy were lacking because the plaintiff's

claims were subject to unique defenses. Specifically, the plaintiff's deposition testimony contradicted some of the allegations in the class complaint, including whether the defendant owed a fiduciary duty to him or how any such duty was breached.

***Blair v. CBE Group, Inc.*, 309 F.R.D. 621 (S.D. Cal. 2015).**

Judge Michael M. Anello of the U.S. District Court for the Southern District of California denied certification of a nationwide class of individuals who allegedly received unsolicited phone calls from the defendant, a debt collection/recovery service, in violation of the Telephone Consumer Protection Act (TCPA). The plaintiffs moved to certify three proposed classes pursuant to Rule 23(b)(3), arguing that three questions were capable of classwide resolution and turned on generalized proof applicable to the whole class: (1) whether the defendant made automated or prerecorded calls to class members; (2) whether the defendant obtained consent to make the calls; and (3) whether the class members were harmed as a result. Judge Anello noted that, in TCPA cases, the predominance inquiry under Rule 23(b)(3) often turns on whether an individual's prior express consent can be determined by generalized proof applicable to the entire class or instead requires an individualized inquiry. Here, the defendant provided evidence regarding consent by all three plaintiffs, and the nature of the evidence demonstrated the need for individualized inquiries on the issue, since, *inter alia*, "the underlying debts of the three Plaintiffs arose in varying contexts and in connection with different underlying creditors." Thus, the court held that the plaintiffs had failed to demonstrate predominance under Rule 23(b)(3).

***Grubb v. Nucor Steel Marion, Inc.*, No. 3:14 CV 158, 2015 WL 5023030 (N.D. Ohio Aug. 24, 2015).**

Judge Jack Zouhary of the U.S. District Court for the Northern District of Ohio denied certification of a class of residents near a steel factory who alleged tort claims based on the factory's emissions. Although the plaintiffs argued that air and soil testing and expert testimony would provide the common proof necessary to satisfy the predominance requirement, the record included only other court opinions, a map of the proposed class area and general information on the health effects of the alleged emissions. The court held that, without including the supposed common proof in the record, the plaintiffs could not satisfy their burden of showing actual compliance with Rule 23(b)(3)'s predominance requirement. The court also denied the plaintiffs' request to certify a Rule 23(b)(2) injunctive relief class, noting that, by seeking to certify only liability questions and not damages under Rule 23(b)(3), the plaintiffs had all but admitted that their requested monetary relief was not merely incidental to their injunctive relief and would raise individualized issues for each class member.

***McVicar v. Goodman Global, Inc.*, No. SA CV 13-1223-DOC (RNBx), 2015 WL 4945730 (C.D. Cal. Aug. 20, 2015), 23(f) pet. denied.**

Judge David O. Carter of the U.S. District Court for the Central District of California refused to certify a class claiming violations of California consumer protection statutes and warranty claims in the defendant's marketing representations regarding air-conditioning systems containing purportedly defective coils. The proposed Rule 23(b)(3) class was sufficiently numerous and ascertainable based on warranty databases reflecting claims submitted, but while sufficient common questions existed, such as whether the air conditioners had "a propensity to leak refrigerant and prematurely fail," whether the defendant knew about it and whether the defendant's omission of the purported propensity was material, predominance was not satisfied because individualized issues "overwhelm[ed]" the common questions about the defects. The plaintiffs could not show that members of the class were exposed to or relied on the same misrepresentations or omissions, for "myriad reasons" (*e.g.*, the marketing was almost exclusively directed at contractors, not consumers). Further, the defendants introduced evidence showing that the materiality of the omission would vary from consumer to consumer, precluding certification of the consumer protection claims, while fact-intensive questions about when and why the air conditioner failed precluded certification of the warranty claims. Finally, the proposed damages model would compensate only out-of-pocket repair costs of class members whose units actually failed, and did "not touch on the economic impact of any alleged misrepresentations leading to purchases of air conditioners containing the defective product where the product does not fail." Certification of a Rule 23(b)(2) class was also improper because the plaintiffs' "true request [was] for future monetary payouts in the event of future product failures."

***Nguyen v. Medora Holdings, LLC*, No. 5:14-cv-00618-PSG, 2015 WL 4932836 (N.D. Cal. Aug. 18, 2015).**

The plaintiffs sought to certify a class of purchasers of "Popcorners" chips, which were allegedly advertised as "all natural" even though they contained genetically modified ingredients. The plaintiffs alleged violations of the California, New York and Florida consumer protection statutes and asserted various warranty and negligent misrepresentation claims. Magistrate Judge Paul S. Grewal of the U.S. District Court for the Northern District of California denied the motion. Since the plaintiffs

offered no evidence to support their alleged injury-in-fact, they lacked standing under Article III to pursue any relief at all; the plaintiffs failed to show they paid a price premium for the mislabeled products or dispute the defendant's evidence that sales actually increased once the "all natural" label was removed from the packaging, and admitted that they have not avoided foods that they know contain GMOs. Further, because the defendant had already removed the "all natural" language and the plaintiffs showed no likelihood of future injury, the court found that the plaintiffs lacked Article III standing to seek injunctive relief under Rule 23(b)(2).

Decisions Permitting/Granting Class Certification

***Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979 (9th Cir. 2015).**

The U.S. Court of Appeals for the Ninth Circuit (Paez and Tashima, JJ., and Quist, senior district judge sitting by designation) reversed and remanded the district court's order denying certification of a class seeking restitution under California's Unfair Competition and Fair Advertising Laws based on Google allegedly having misled the class members as to the types and quality of websites on which their advertisements could appear. In denying certification, the district court found that, assuming the plaintiffs could prevail on liability issues, individual questions would arise in ascertaining which plaintiffs were entitled to restitution and the amount of restitution due to each class member. In so holding, the court distinguished Y*okoyama v. Midland National Life Insurance Co.*, 594 F.3d 1087 (9th Cir. 2010), which held that damages calculations alone cannot defeat class certification, by noting that *Yokoyama* applied only to cases where there was a "workable method for calculating monetary recovery" and that here, there was no such "workable method." The Ninth Circuit reversed, holding that *Yokoyama* was controlling and that individualized damages calculations did not defeat predominance. The panel further held that the plaintiffs' proposed model of calculating restitution, which employed a ratio from Google's data to adjust the price based on the quality of the Web page where the advertisement appeared, was not arbitrary because it "directly addresses Google's alleged unfair practice by setting advertisers' bids to the levels a rational advertiser would have bid if it had access to all of Google's data about how ads perform on different websites."

***Reyes v. Netdeposit, LLC*, 802 F.3d 469 (3d Cir. 2015).**

The plaintiffs in this putative class action alleged that the defendants conspired in a fraudulent scheme to place unsolicited telemarking calls to consumers whereby they would obtain the consumers' bank account information and make unauthorized withdrawals from their accounts. The district court concluded that class treatment was inappropriate because, in carrying out their scheme, the defendants collaborated with different mass-marketing firms and different consumers were affected in different ways. Thus, the plaintiffs could not establish that there was "absolute proof of fraud" as to each consumer. A unanimous panel of the U.S. Court of Appeals for the Third Circuit (McKee, C.J., Smith and Shwartz, JJ.) vacated and remanded the decision, holding that the lower court erred in determining that individualized issues of law and fact predominated. According to the Third Circuit, the district court's imposition of a burden of "absolute proof" of fraud as to each consumer at the class certification stage was in error. Under the specific Racketeer Influenced and Corrupt Organizations Act (RICO) theory the plaintiffs were pursuing, the plaintiffs were only required to show that it was "more likely than not that each of the telemarketers" operated a "complete sham." As the court explained, where a RICO "plaintiff alleges that a defendant's disputed conduct is a complete sham, the relevant inquiry is whether there was an ongoing scheme to defraud or deceive." If so, a "common harm will be presumed." Accordingly, it follows that such claims raise "common issues and that those common issues will predominate over individual issues."

***Cox v. Community Loans of America Inc.*, No. 14-12977, 2015 WL 5063167 (11th Cir. Aug. 28, 2015) (*per curiam*).**

A panel of the U.S. Court of Appeals for the Eleventh Circuit (Jordan and Fay, JJ., and Walker, district judge sitting by designation) upheld the certification of a class comprised of active duty service members and their dependents who allege that the defendant's vehicle title loans violated the Military Lending Act (MLA). The defendant argued that the district court abused its discretion in certifying the class under Rule 23(b)(3), because the plaintiffs failed to satisfy the requirements for class certification, in part because there is no implied private right of action under the MLA. The Eleventh Circuit generally noted that there was "no abuse of discretion in the district court's analysis for the Rule 23 prerequisites" and that it was writing only to address the defendant's claim that no private right of action exists under the MLA. According to the Eleventh Circuit, this question is appropriately addressed at the class certification stage because it is "inextricably intertwined" with whether common issues for class adjudication exist. Because the Eleventh Circuit concluded that plaintiffs *did* have a private right of action under the statute, it affirmed the class certification decision.

***Edwards v. First American Corp.*, 798 F.3d 1172 (9th Cir. 2015).**

A unanimous panel of the U.S. Court of Appeals for the Ninth Circuit (Gould and Tallman, JJ., and Murphy, U.S. Court of Appeals for the Tenth Circuit senior judge sitting by designation) affirmed in part and vacated in part an order denying certification of a proposed class of home buyers who alleged that the defendants gave kickbacks to 38 title companies in order to obtain referrals for future title insurance business in violation of the Real Estate Settlement Procedures Act. The Ninth Circuit held that the district court improperly denied certification with respect to claims based on the insurer's financial investment in 26 of the title companies at issue because the claims arose from the same "nationwide scheme" and therefore involved common questions of fact regarding the title agencies' obligations under the standard contract with all home buyers. According to the Ninth Circuit, any individualized issues raised by the involvement of third parties (like lenders and realtors) in individual home purchase transactions did not overwhelm these common issues. The Ninth Circuit did, however, affirm denial of certification with respect to claims based on the insurer's relationships with the 12 remaining title agencies. Because these title agencies were "newly formed" at the time the insurer invested in them, the Ninth Circuit agreed that claims based on those investments turned on a "different set of facts" than claims stemming from the insurer's relationship with pre-existing title agencies.

***Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015).**

In a 2-1 decision, a panel of the U.S. Court of Appeals for the Sixth Circuit (Moore, J. and Cohn, district judge sitting by designation, Cook, J. (dissenting)) affirmed certification of a class of purchasers of a particular brand of probiotics suing over alleged false advertising. In affirming class certification, the panel explained that the plaintiffs satisfied Rule 23's commonality and typicality requirements because they alleged that the probiotics did not work for anybody in the class. With respect to Rule 23(b)'s predominance requirement, the panel held that the probiotic was advertised through a common theme (even if certain advertising language may have changed) and that its effectiveness would have been material to a purchaser. Consequently, the panel decided that each purchaser would have been exposed to the uniform theme, regardless of an individual's particular reason for purchasing the probiotics at issue (*e.g.*, a doctor's or friend's recommendation). The panel also held that the plaintiffs could prove whether the probiotics worked *for anyone* through common evidence and expert opinions — and rejected the argument that the plaintiffs were required to establish that the probiotics worked for *everyone* at the class certification stage. In addition, because the plaintiffs were seeking the return of the probiotics' full purchase price, the panel decided that the plaintiffs had provided a sufficient classwide damages model pursuant to *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Finally, the panel concluded that the proposed class definition — anyone who purchased probiotics in certain states — was sufficiently ascertainable, because membership could be determined through reasonable, if not perfect, accuracy.

***Mitchell v. LVNV Funding, LLC*, No. 2:12-CV-523-TLS, 2015 WL 7016343 (N.D. Ind. Nov. 10, 2015).**

Judge Theresa L. Springmann of the U.S. District Court for the Northern District of Indiana granted the plaintiff's motion for class certification in a putative class action involving alleged violations of the Fair Debt Collection Practices Act (FDCPA). According to the plaintiff's complaint, the defendants sent her a debt collection letter that failed to disclose the date of the transactions that gave rise to the claimed debt, failed to inform her that the debt was barred by Indiana's six-year statute of limitations, and inaccurately informed her that the creditor could sue her to recover the debt if she failed to pay. The court found that the case presented common questions of fact and law for purposes of Rule 23, including whether the defendants, in fact, sent the letters described in the plaintiff's complaint and whether the letters would mislead an unsophisticated consumer into believing that the debt was legally enforceable. In addition, the court noted that the FDCPA provides for statutory damages without a showing of actual injury, and recovery could thus be calculated on a classwide basis. Finally, the court determined that common issues of liability would predominate over individual issues of causation because each alleged violation of the FDCPA concerned the same omission.

***In re Wal-Mart ATM Fee Notice Litigation*, MDL No. 2:11-md-02234-JPM-dkv, 2015 WL 6690412 (W.D. Tenn. Nov. 3, 2015).**

In an action over the alleged failure to include a required fee notice on ATMs, Judge Jon P. McCalla of the U.S. District Court for the Western District of Tennessee certified a class of individuals who had been assessed a fee when using certain of the defendants' ATMs in alleged violation of the Electronic Funds Transfer Act (EFTA). First, the court held that the class definition was sufficiently definite to make the class ascertainable because it included only individuals who were assessed a fee and was limited in terms of time and the specific ATM location. Second, the court held that adequacy and typicality were satisfied because all class representatives had used one of the specified ATMs and had been charged a fee during the class period. Third, the court held that the common questions

of whether the defendants had complied with the EFTA notice requirements and whether there were any applicable statutory defenses would predominate over individual issues. Notably, the court determined that individualized proof was not necessary to prove that the notice was lacking at the time of each transaction; instead, according to the court, the plaintiffs could present common proof that the notice was absent for a specific period of time, and the finder of fact could therefore infer that the notice was absent for a particular transaction during that time.

***Suchanek v. Sturm Foods, Inc.*, No. 11-CV-565-NJR-PMF, 2015 WL 6689359 (S.D. Ill. Nov. 3, 2015).**

On remand from the U.S. Court of Appeals for the Seventh Circuit, Judge Nancy J. Rosenstengel of the U.S. District Court for the Southern District of Illinois granted in part and denied in part the plaintiffs' renewed motion for class certification in a consumer class action against the makers of Grove Square Coffee (GSC), which is packaged, marketed, distributed and sold as premium ground coffee, but is in reality more than 95% instant coffee. The plaintiffs alleged that the marketing of GSC violated the consumer protection statutes and unjust enrichment laws of eight different states. In their renewed motion for class certification on remand, the plaintiffs sought certification of subclasses, by state, consisting of all persons who had purchased GSC products in one of the states whose laws were implicated in the complaint. The court denied certification with respect to the plaintiffs' unjust enrichment claims because the parties did not sufficiently address class treatment of that claim. However, the court granted certification of the plaintiffs' consumer-fraud claims. In so doing, the court first rejected the defendants' arguments that typicality was not satisfied unless the class members all had the same perceptions and knowledge about GSC and the same preferences and reasons for purchasing GSC, noting that in this case, the class members all were exposed to the exact same marketing of GSC and all claimed to have been duped into believing they were purchasing ground coffee. In addition, the court rejected the defendants' assertion that a class could not be certified with respect to residents of states whose consumer protection laws did not permit class litigation. The court relied on the Supreme Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), to conclude that Rule 23 constitutes a procedural, rather than substantive rule, and therefore should be applied in federal cases notwithstanding conflicting state laws. Finally, the court was satisfied with the opinion offered by the plaintiffs' expert that damages could be calculated on a classwide basis either by calculating the value of a full refund or offsetting the full refund price by the actual value of GSC.

***Fosnight v. LVNV Funding, LLC*, No. 1:15-cv-00557-LJM-DKL, 2015 WL 6394334 (S.D. Ind. Oct. 22, 2015).**

Judge Larry J. McKinney of the U.S. District Court for the Southern District of Indiana granted class certification in an action involving alleged violations of the Fair Debt Collection Practices Act (FDCPA). In her complaint, the plaintiff alleged that the defendants sent her a letter that stated, "Creditor: LVNV Funding, LLC," but also stated, "Original Creditor: CitiFinancial Auto Corporation." The plaintiff contended that without an explanation of the difference between "Original Creditor" and "Creditor," or an identification of which entity was the "client," an unsophisticated consumer would be confused as to whom the debt was owed, which constitutes a violation of the FDCPA. In ruling on the motion for class certification, the court noted that there was no dispute that the defendants had sent the letter at issue to more than 1,000 individuals, and that under Seventh Circuit law, the recipients need not have actually read the letter to assert a claim under the FDCPA. Thus, the numerosity, commonality and typicality requirements were satisfied. In addition, the adequacy of representation requirement was also satisfied because the defendants had not pointed to any evidence that the plaintiff had antagonistic or conflicting claims with other members of the putative class. Finally, the predominance and superiority requirements were satisfied because the key issue in the case — whether or not the letter violates the FDCPA — was identical as to each putative plaintiff, and the only individualized issues in the case, namely receipt of the letter and the nature of the debt, could be determined from the defendants' files.

***In re Blood Reagents Antitrust Litigation*, MDL No. 09-2081, 2015 WL 6123211 (E.D. Pa. Oct. 19, 2015), 23(f) pet. pending.**

On remand from a U.S. Court of Appeals for the Third Circuit decision reversing a prior class-certification order, Judge Jan E. DuBois of the U.S. District Court for the Eastern District of Pennsylvania again granted class certification in this antitrust suit against certain sellers of blood reagents. The Third Circuit had reversed the prior certification order because it rested on the district court's conclusion that it need not resolve attacks on expert testimony at the class-certification stage (discussed in the Summer 2015 edition of *the Chronicle* at 8). The Third Circuit concluded that, in light of the Supreme Court's ruling in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), a district court must conduct *a Daubert* inquiry and resolve challenges to the reliability of expert testimony that is offered to show that the requirements of Rule 23 are met. On remand, the district court's analysis focused on the defendants' challenge to the reliability of Dr. John C. Beyer's methodologies for calculating classwide

damages, which were offered in support of certification to show that antitrust impact and damages could be decided on a classwide basis. After engaging in a full *Daubert* analysis, Judge DuBois determined that Dr. Beyer's opinions were reliable and fit the facts of the case, and were admissible to establish predominance. The court held that Dr. Beyer reliably estimated the alleged overcharge caused by the defendants' alleged price-fixing conspiracy and that his opinions demonstrated that plaintiffs could prove antitrust impact through common proof at trial.

***Magee v. Portfolio Recovery Associates, LLC*, No. 12-cv-1624, 2015 WL 5921536 (N.D. Ill. Oct. 8, 2015).**

In an action involving alleged violations of the Fair Debt Collection Practices Act (FDCPA), Judge John W. Darrah of the U.S. District Court for the Northern District of Illinois granted the plaintiffs' motion to modify the definitions of previously certified classes and denied the defendant's motion for decertification. In their complaint, the plaintiffs alleged that the defendant had violated the FDCPA by sending letters demanding payment of time-barred debt without disclosing that the debt was time-barred and threatening credit reporting after a time that a debt could no longer be reported. Following entry of an order granting class certification, the plaintiffs sought to amend the class definitions to include only those who actually paid in response to the letters, those who had not received a subsequent letter from the defendant informing them that the debt was time-barred or no longer could be reported on their credit report, and those who had filed a lawsuit related to these practices. The court found these amendments appropriate, noting that modifying the class definition to a more limited group would be consistent with the plaintiffs' obligation to protect the best interests of the class by making the class size more manageable and allowing counsel to help those class members who may have suffered harm to receive a meaningful and proportionate recovery. In addition, the court rejected the defendant's contention that narrowing the class to members who made a payment after receipt of an allegedly deceptive letter would require an individualized determination as to the cause of any such payment. According to the court, Seventh Circuit precedent previously has held that a "need for individual damages determinations at [a] later stage of the litigation does not itself justify the denial of class certification."

***Good v. American Water Works Co.*, No. 2:14-01374, 2015 WL 5898465 (S.D. W. Va. Oct. 8, 2015).**

In a case stemming from a chemical spill causing interruption of the Charleston-area water supply, Judge John T. Copenhaver, Jr. of the U.S. District Court for the Southern District of West Virginia granted the plaintiffs' motion to certify an issues class under Rule 23(c)(4) as to the defendants' liability, but denied both the proposed issue class as to the availability of exemplary damages and the proposed damages class. The district court considered class certification contemporaneously with the defendants' motions to exclude certain experts, after concluding that the Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), requires consideration of relevant *Daubert* issues at the class certification stage. After finding the plaintiffs' damages experts' methodologies unreliable and excluding their opinions, the court denied certification of the proposed damages class. The court also found that Rule 23(c)(4) certification as to the issue of exemplary damages would violate due process by preventing the jury from assessing the reasonability of the damages multiplier. The court, however, found that Rule 23(c)(4) issue class certification was appropriate with respect to the defendants' liability because the evidence and arguments with respect to liability would be "closely aligned, if not identical." The district court rejected the defendants' argument that issue certification did not make sense because it left myriad individualized issues to be determined later, including causation, damages and punitive damages. According to the district court, it was "not required" under Rule 23 "to sacrifice class adjudication of a driving issue in the case simply because many individualized inquiries will remain thereafter."

***Krueger v. Wyeth, Inc.*, No. 03cv2496 JAH (MDD), 2015 WL 5839197 (S.D. Cal. Oct. 7, 2015).**

Judge John A. Houston of the U.S. District Court for the Southern District of California modified a class definition and refused to decertify a class of purchasers of hormone replacement therapy (HRT) drugs, alleging false advertising and deceptive marketing with respect to the HRT drugs' breast cancer risks. The court found that the class was ascertainable because the plaintiff provided a set of common characteristics sufficient to identify class membership — whether consumers purchased the drugs for personal consumption — and because the defendants' "widespread advertising campaign" eliminated individualized issues of reliance. Judge Houston rejected the defendants' contention that allowing class members to self-identify through affidavits was a violation of the defendants' due process rights, finding that the "defendants have no due process interest in the question of class membership" because liability is determined in the aggregate. The court modified the class definition to remove reference to the class members' exposure to the allegedly false representations, because it concluded that the plaintiffs' allegation of a massive marketing campaign, consisting of product labels, representations to health care professionals, and television, radio and magazine advertisements, sufficed to establish that all drug purchasers were exposed.

***Sanchez-Knutson v. Ford Motor Co.*, No. 14-61344-CIV-DIMITROULEAS, 2015 WL 6395040 (S.D. Fla. Oct. 6, 2015), 23(f) pet. denied.**

Judge William P. Dimitrouleas of the U.S. District Court for the Southern District of Florida certified a class of individuals who purchased or leased a 2011-2015 Ford Explorer in Florida during the class period from authorized Ford dealers. The plaintiffs alleged that the vehicles were defective in that they allowed exhaust and other gases to enter the passenger compartment. As an initial matter, the court rejected Ford's argument that the proposed class was not ascertainable because it included car owners who may not have experienced any problem with their vehicles or who may not have exhausted all remedies available to them under the vehicle warranty. According to the court, the named plaintiff provided evidence that all Explorers in the product line "share[d] the same defect" and therefore all product owners were properly included in the class. The court held that the plaintiff satisfied Rule 23(b)(3)'s predominance requirement for similar reasons. Because the plaintiff "submitted sufficient evidence for class certification purposes that the exhaust contamination in her Explorer is the result of a systemic problem caused by a combination of design and manufacturing defects," the court concluded that a common question of defect predominated. The court also accepted the plaintiff's "conjoint analysis" damages model, whereby the plaintiff's expert would perform an analytic survey to measure customer preferences in order to determine the true value of the vehicles at issue. Finally, the court rejected the plaintiff's attempt to certify a Rule 23(b)(2) class seeking injunctive relief. According to the court, the injunctive relief the plaintiff purported to request was the equivalent of a "judicial recall claim" that the plaintiff has previously decided not to pursue as a matter of law, and therefore (b)(2) certification was inapplicable.

***Castro v. Sanofi Pasteur Inc.*, No. 11-7178, 2015 WL 5770381 (D.N.J. Sept. 30, 2015).**

Judge Madeline Cox Arleo of the U.S. District Court for the District of New Jersey denied the defendant's motion to exclude the plaintiffs' class experts and granted the plaintiffs' motion for class certification in this antitrust action. The plaintiffs brought suit on behalf of all purchasers of Menactra, a pediatric vaccine, alleging that Sanofi's decision to bundle Menactra with its other pediatric vaccines resulted in substantially increased prices. Before analyzing whether the requirements of Rule 23 had been met, the court first considered whether the defendant's challenge to the plaintiffs' economics expert bore upon "those aspects of the expert testimony offered to satisfy Rule 23," and whether those parts of the expert's opinion were admissible under Rule 702 and *Daubert*. The court found the plaintiffs' expert testimony was both relevant and reliable, and that the requirements of Rule 23 were satisfied. The defendant also disputed the adequacy of the named plaintiffs, arguing that some class members may have been overcharged more than others. The court held that "[m]ere hypothetical conflicts do not defeat class certification," and that as long as the named plaintiffs sought to show overcharges to the class, class interests aligned. Lastly, the court examined each significant issue in the case and concluded that they would all turn on the defendant's conduct, rather than the conduct of individual class members. According to the court, "Common issues predominate when the focus is on the defendants' conduct and not on the conduct of the individual class members."

***Tripp v. Berman & Rabin, P.A.*, No. 14-CV-02646-DDC-GEB, 2015 WL 5704075 (D. Kan. Sept. 29, 2015).**

Judge Daniel D. Crabtree of the U.S. District Court for the District of Kansas certified two classes of Kansas consumers alleging violations of the Fair Debt Collection Practices Act (FDCPA) by debt collectors whose form letters failed to inform recipients of the exact amount and character of the debt owed. The defendants did not dispute that the classes satisfied the Rule 23 requirements of numerosity, commonality, typicality and adequacy. However, the defendants contended that because the statutory damages cap that applied to FDCPA class actions limited recovery to "class members' actual damages and their pro rata share of the lesser of $500,000 or 1 per centum of the net worth of the debt collector," the large number of potential class members meant each class member would collect less than $2.63, so that a class action was not superior to individual actions. The court rejected this argument, noting that most claimants would not be aware of their rights under the FDCPA absent the class action lawsuit and that a potential class member could opt out of the class and pursue an individual FDCPA suit against the defendants after the court granted certification.

***Bee, Denning, Inc. v. Capital Alliance Group*, No. 13-cv-2654-BAS-WVG, 2015 WL 5675798 (S.D. Cal. Sept. 24, 2015).**

Judge Cynthia Bashant of the U.S. District Court for the Southern District of California certified two nationwide classes of plaintiffs alleging violations of the Telephone Consumer Protection Act (TCPA) based on the sending of unsolicited "junk faxes" and automated calls with prerecorded messages to cell phones. The court held that the proposed classes were ascertainable because the plaintiffs proffered objective criteria to identify the class members, such as using reverse look-up technology to identify persons who called the toll-free numbers on the fax adver-

tisements or received automated calls from a toll-free number traceable to the defendants. The classes met the Rule 23(a) commonality requirement because the core issue underlying each of the proposed classes was whether the defendants engaged in prohibited conduct under the TCPA. Rule 23(b)(3) predominance was also satisfied for similar reasons, given that the plaintiffs alleged a common scheme with respect to each class and the defendants had not raised any individualized defenses under the TCPA that would make class treatment inappropriate.

***Stampley v. Altom Transport, Inc.*, No. 14 CV 3747, 2015 WL 5675095 (N.D. Ill. Sept. 24, 2015).**

Judge Manish S. Shah of the U.S. District Court for the Northern District of Illinois granted the plaintiff's motion for class certification in a putative class action involving alleged breaches of contract and violations of the federal Motor Carrier Act. The named plaintiff alleged claims on behalf of all truck owners who leased their trucks and driving services to the defendant, a motor-carrier company, in exchange for a set percentage of the defendant's gross profit as a result of the use of the vehicles. The plaintiff alleged that the defendant improperly failed to include certain revenues it obtained in its calculation of the "gross profit" and therefore short-changed the proposed class members. The court found that the case would present common questions as to whether the revenues at issue constituted "gross profit' under the term of the contracts. The court also found that the predominance and typicality requirements were met because the class members' agreements with the defendant were materially identical and the class members' claims arose from the defendant's uniform interpretation of the agreements. The court noted, however, that the evidence in the record only established that the defendant failed to include the contested revenues in its payments to drivers during a specific four-year period — not all drivers over time. Accordingly, the court limited the class to that time period.

***In re Processed Egg Products Antitrust Litigation*, No. 08-md-2002, 2015 WL 6964281 & 2015 WL 7067790 (E.D. Pa. Nov. 10, 2015), 23(f) pet. pending/C.A.V. pending ruling on indirect purchasers' renewed motion for class certification.**

In a consolidated proceeding asserting antitrust violations, Judge Gene E.K. Pratter of the U.S. District Court for the Eastern District of Pennsylvania certified a class of direct purchasers of whole eggs and denied certification of a class of indirect purchasers. As to the direct-purchaser claims, the court determined that Rule 23(a)'s numerosity, commonality, typicality and adequacy requirements were satisfied, rejecting the defendants' arguments that the class representatives were atypical because they had "divergent pricing and purchasing arrangements" and processes. The court also determined that the direct-purchaser plaintiffs proved an antitrust injury that predominated over individualized issues, including through a statistical regression model showing that whole egg prices were higher during the alleged conspiracy than they should have been. But the plaintiffs did not demonstrate predominance as to "egg products" (*i.e.*, the whole or part of eggs removed from their shells and then processed into dried, frozen or liquid forms) because their expert's statistical analysis "lack[ed] the rigor needed." As to the indirect purchasers, the court determined that the proposed class was not ascertainable and the plaintiffs failed to satisfy Rule 23(b)(3)'s predominance and manageability requirements. According to the court, the plaintiffs did not provide a "reliable and administratively feasible" method to ascertain class membership, and individualized issues would predominate because the plaintiffs proposed 21 state antitrust classes, seven consumer state consumer protection classes and 17 unjust enrichment classes to be tried in a single proceeding. The court allowed the indirect purchasers leave to renew their motion for class certification as to their injunctive-relief claims, and has not yet ruled on the renewed motion.

***Makaeff v. Trump University, LLC*, 309 F.R.D. 631 (S.D. Cal. 2015).**

Judge Gonzalo P. Curiel of the U.S. District Court for the Southern District of California granted in part and denied in part a motion to decertify California, New York and Florida subclasses of consumers alleging that the defendants made material misrepresentations inducing them to pay for real estate investing seminars. The plaintiffs claimed entitlement to a complete refund for themselves and all class members. The defendants' decertification motion argued that a full refund was not a proper measure of recovery under the applicable laws, and that any recovery would have to account for the value each class member received from the seminars, a determination that would require individualized inquiries that precluded class treatment. The court disagreed, concluding that the plaintiffs could recover a full refund under all the state laws at issue if they could prove that the product was worthless and that a full refund was the proper "baseline" level of damages. At the same time, the court concluded that the defendants had a due process right to argue in every case that the full refund amount should be "offset" by the extent of value received by the class member. Thus, it granted the motion to decertify in part, concluding that liability should be tried on a classwide basis but the issue of damages would be litigated on an individualized basis with respect to any class members as to which the defendants desired to raise damages defenses specific to the class member.

***In re Target Corp. Customer Data Security Breach Litigation*, 309 F.R.D. 482 (D. Minn. 2015), 23(f) pet. pending.**

Judge Paul A. Magnuson of the U.S. District Court for the District of Minnesota granted the plaintiffs' motion for class certification in a multidistrict litigation proceeding arising out of a breach of Target Corporation's computer network, which led to the theft of financial information involving more than 40 million consumers. The case was separated into two "tracks," one for consumers and one for financial institutions. The plaintiffs in the financial-institution track issued payment cards to consumers who in turn used those cards at Target stores during the period of the 2013 data breach. The class action complaint by these plaintiffs asserted two types of claims against Target: one based on negligence theories, and one for violation of Minnesota's Plastic Security Card Act (PSCA). The financial institutions sought to certify a nationwide class consisting of all entities that issued payment cards that were compromised in the data breach. In its opposition to certification, Target argued that: (1) the plaintiffs' claims were subject to the laws of different states and (2) damages would have to be calculated on a bank-by-bank basis. The court rejected Target's argument that individual legal issues predominated, holding that Minnesota law could be applied to all class members' claims. According to the court, because "Target is headquartered in Minnesota; its computer servers are located in Minnesota; [and] the decisions regarding what steps to take or not take to thwart malware were made in large part in Minnesota," Minnesota had such significant contacts to the action that application of its law to all class members would not be unfair. The court further found that the plaintiffs' negligence and PSCA claims were susceptible to common proof because the plaintiffs could reasonably establish that all banks took actions to protect their card members and therefore suffered injury as a result of the breach. Finally, the court determined that although the amount of each class member's damages ultimately may require some individualized proof, this was not sufficient to defeat certification at this stage. Should classwide damages ultimately prove unworkable, the court stated that a damages class could be decertified and damages questions stayed for determination after the liability phase concludes.

***In re Steel Antitrust Litigation*, No. 08 C 5214, 2015 WL 5304629 (N.D. Ill. Sept. 9, 2015), 23(f) pet. denied.**

Judge James B. Zagel of the U.S. District Court for the Northern District of Illinois granted in part and denied in part the motion for class certification in an action involving an alleged multiyear antitrust conspiracy to reduce the production of steel products in the United States. The plaintiffs alleged that the defendants' top executives, who collectively operated 14 steel mills and received sales of $100 billion during the relevant period, conspired to restrict the output of their steelmaking furnaces to raise the price of finished steel goods purchased by the class. In ruling on the plaintiffs' motion for class certification, the court focused primarily on whether common evidence and a single, reliable methodology could prove the elements of the plaintiffs' antitrust claim — (1) a violation of antitrust law; (2) individual injury or impact caused by the violation; and (3) measureable damages — on a classwide basis. The court specifically grappled with the question of whether there was common evidence of impact felt by the putative class members as a result of the alleged antitrust violations. The court found credible the model offered by the plaintiffs' expert, noting that the plaintiffs had only one distinct theory of liability — that the price of steel products increased directly as a result of the defendants' conspiracy to restrict supply — and that the expert had "translat[ed][ ] the legal theory of the harmful event into an analysis of the economic impact *of that event*." Although "[t]he realities of the steel industry reveal that it is unlikely that class members were either impacted at the same levels or suffered the same damages," the court declined to deny certification "simply because a class includes persons who have not been injured by the defendant's conduct." Accordingly, the court certified the plaintiffs' proposed class for purposes of determining liability. With respect to damages, however, the court concluded that there likely would be differences among the members as to the amount incurred. The court therefore determined that this issue could be severed from the liability inquiry and tried on an individual basis, should it become necessary to do so.

***Krakauer v. Dish Network L.L.C.*, No. 1:14-CV-333, 2015 WL 5254293 (M.D.N.C. Sept. 9, 2015), 23(f) pet. pending.**

Judge Catherine C. Eagles of the U.S. District Court for the Middle District of North Carolina granted the plaintiff's motion for class certification on behalf of persons whose telephone numbers were on the National Do Not Call List or Dish Network's own Do-Not-Call List, but who nonetheless received telemarketing calls from Satellite Systems Network (SSN) on behalf of Dish Network during the defined class period. The court found that the proposed class met the requirements of Rule 23(a), as well as the predominance and superiority requirements of Rule 23(b)(3), based on the plaintiff's proposed common issues: whether SSN called a number on a Do-Not-Call List and whether Dish Network was liable for SSN's actions. The court rejected the defendant's assertions that individualized issues — such as whether Dish had an established business relationship with a class member at the time of the call or whether an individual consented to be called — would make the suit too difficult to try as a class action.

***Meyer v. American Family Mutual Insurance Co.*, No. 3:14-CV-05305-RBL, 2015 WL 5156594 (W.D. Wash. Sept. 2, 2015).**

Judge Ronald B. Leighton of the U.S. District Court for the Western District of Washington certified a class of Washington consumers with auto-insurance policies issued by AmFam, asserting that AmFam failed to disclose the availability of compensation for diminished vehicle value to its insureds and, if pressed to pay this benefit, did not do so fairly or adequately. The common questions capable of classwide resolution included whether AmFam violated Washington state law by failing to disclose the availability of a diminished value benefit; whether the procedure for responding to a diminished value claim was appropriate; and whether any compensation given for diminished value was adequate. The court rejected the defendant's argument that typicality was defeated because the named plaintiff knew to request payment for diminished value despite any alleged failure to disclose. The court also held that the common issues it outlined predominated over any individual damage disputes.

***Galoski v. Applica Consumer Products*, 309 F.R.D. 419 (N.D. Ohio 2015).**

Judge Donald C. Nugent of the U.S. District Court for the Northern District of Ohio certified a multistate class of purchasers of electronic pest repellers in a breach-of-warranty class action. Noting that the U.S. Court of Appeals for the Sixth Circuit does not require that defendants be able to specifically identify each class member to satisfy ascertainability, the court concluded that the proposed class was ascertainable: It was objectively defined; there were several avenues for providing notice; and, because the defendant kept records of the total number of sales during the class period, it knew what the maximum liability would be. The court also concluded that commonality and typicality were satisfied because the plaintiff was strictly alleging that the product did not, under any circumstances, repel any pests — not that it produced insufficient results. That question equally affected all purchasers. The court then rejected the defendant's argument that the plaintiff was not an adequate representative since she failed to provide pre-suit notice. Discovery was necessary to determine whether the defendant knew the product was incapable of performing as a pest repeller because, under those circumstances, Ohio law allowed the filing of suit to satisfy the notice requirement. Finally, in order to satisfy the predominance requirement, the court limited the proposed class to purchasers in the five states where warranty claims did not require privity and where there was no prelitigation notice requirement (or, for Ohio, where the requirement could be satisfied by the defendant's prior knowledge of the alleged breach). Moreover, the court concluded that differences in the states' statutes of limitations would not defeat predominance because the class definition could appropriately limit the time period for each state.

***Manuel v. Wells Fargo Bank, National Association*, No. 3:14CV238, 2015 WL 4994549 (E.D. Va. Aug. 19, 2015).**

Senior Judge Robert E. Payne of the U.S. District Court for the Eastern District of Virginia certified two classes proposed by the plaintiff in a suit brought against Wells Fargo Bank, N.A. The plaintiff alleged that Wells Fargo violated the Fair Credit Reporting Act (FCRA) while performing background checks on potential employees, both by not making a clear disclosure to the potential employee regarding the authorization of the report and by not providing the potential employee with a copy of the report and a summary of his or her rights prior to taking adverse action based on its contents. The plaintiff proposed two different classes for certification: an Impermissible Use Class (consisting of persons who applied for employment with Wells Fargo within the past two years and as part of the application process were the subject of a consumer report obtained by the defendant) and an Adverse Action Class (consisting of all persons who applied for an employment positon with Wells Fargo within the last two years against whom the defendant took an adverse action based on the report without providing the person with a copy of the report and informing him or her of his or her rights). The court certified both classes under Rule 23(b)(3), finding that common issues of law and fact predominated, because each class member's case was based on the same FCRA disclosure form and the fact that he or she was rejected for employment at Wells Fargo. Thus, resolution of whether Wells Fargo's form complied with the FCRA would have a direct impact on each class member's ability to establish liability.

***Reyes v. Julia Place Condominiums*, No. 12-2043, 2015 WL 5012930 (E.D. La. Aug. 20, 2015).**

Judge Helen G. Berrigan of the U.S. District Court for the Eastern District of Louisiana granted in part and denied in part the plaintiffs' motion for class certification in a case brought by condominium owners against their associations for allegedly charging usurious fees on late condominium payments. The court first narrowed the class to only those who had actually paid the fees because only they could satisfy the commonality requirement since they all suffered the same injury by being forced to make payments on late fees above the amount legally

allowed. By contrast, the claims of those members who refused to make the payments and only suffered "harassment" and "threats" were not susceptible to classwide proof. Next, the court held that the named class representatives' claims were typical of the class, even though one of them no longer owned a unit in the building, because both were charged allegedly usurious fees; they actually paid those fees; and now they sought to recover those payments. However, the former owner could not be deemed an adequate representative in terms of the class's request for injunctive relief because his interests would not be tempered by an ongoing financial stake in the property. Thus, the court divided the class into two subclasses — one seeking monetary relief and another seeking injunctive relief — and allowed the former owner to represent only the former. Finally, as to predominance, the court held that the common question of whether the late fees violated usury laws predominated over any other issues. Although resolution of the class's claims would require individualized determinations of whether and how much was charged to each class member, the court held that these determinations were "straightforward, involving the review of ledgers over a finite period of time."

***NEI Contracting & Engineering, Inc. v. Hanson Aggregates, Inc.*, No. 12-cv-01685-BAS (JLB), 2015 WL 4923510 (S.D. Cal. Aug. 18, 2015), 23(f) pet. denied.**

Judge Cynthia Bashant of the U.S. District Court for the Southern District of California granted a motion to reconsider her denial of class certification (discussed in the Summer 2015 edition of the *Chronicle* at 10) in a case brought by customers of the defendant construction material providers, alleging that the providers recorded telephone orders in violation of California Penal Code § 637.2. Originally, Judge Bashant found that individual issues of consent would predominate based on evidence submitted by the defendants that at least two putative class members continued placing orders even after the defendants had added a verbal warning advising customers that their call may be recorded, thereby evidencing consent. However, the plaintiffs later learned that those recordings occurred *after* the close of the class period. Reconsideration was thus appropriate in light of the newly discovered evidence, especially because the defendants "did not make any effort to clarify the issue or correct this mistake." Revisiting the predominance inquiry, the court concluded that "[w]ithout evidence of actual consent during the Class Period, the evidence before the Court on the issue of consent during the Class Period is merely speculative." The court also found numerosity, commonality, typicality and adequacy satisfied and that the class was ascertainable based on the defendants' "call list" reflecting all recorded calls during the class period.

Other Class Action Decisions

***Webster v. Bayview Loan Servicing, LLC*, No. 15-1396, 2015 WL 6388907 (7th Cir. Oct. 21, 2015).**

A unanimous panel of the U.S. Court of Appeals for the Seventh Circuit (Flaum, Manion and Sykes, JJ.) reversed and remanded the district court's decision dismissing a putative class action under the Telephone Consumer Protection Act, holding that the defendant's offer of full compensation did not moot the plaintiff's lawsuit. The district court originally had dismissed the plaintiff's case in its entirety because the defendant provided a full offer of judgment before a class had been certified. On appeal, the plaintiff initially argued that dismissal of her complaint was inappropriate because, at the time the case was dismissed, she had on file a motion for leave to file an amended complaint to allege a class action suit and a motion for class certification. By the time the case reached oral argument, however, the Seventh Circuit had issued a decision in *Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015), wherein it held that a defendant's tender of full relief does not moot the litigation. Based on the holding in *Chapman*, the court reversed the district court's dismissal of the plaintiff's complaint, without needing to consider whether the filing of a motion for class certification prior to the offer of judgment had any effect on the defendant's ability to obtain dismissal.

***Practice Management Support Services, Inc. v. Cirque Du Soleil, Inc.*, No. 14 C 2032, 2015 WL 7008137 (N.D. Ill. Nov. 12, 2015).**

In this case, Judge Thomas M. Durkin of the U.S. District Court for the Northern District of Illinois considered whether a class action filed outside the relevant statute of limitations was time-barred when nearly identical actions involving the same class of consumers had previously been filed and dismissed in other jurisdictions. The defendants moved for summary judgment, arguing that the applicable statute of limitations had run with respect to the claims raised in the plaintiff's complaint. The court rejected that argument and held that under the "clear rule[s]" established in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011), class members' claims are tolled during the pendency of a class action until the court in that action decides that the suit is not appropriate for class treatment or the named plaintiff in that action voluntarily withdraws its case. Although this action had been filed outside the applicable statute of limitations, the court held that the putative class members' claims had been tolled during the pendency of two other class actions that asserted the same allegations against the same defendants on behalf of the same putative class. The court further rejected the defendants' argument that tolling should not apply because different entities had been named in the two

previous class actions; because the defendants named in this action were part of the same corporate family as those named in the prior actions, the court concluded that *American Pipe* and *Sawyer* rules still applied.

***Connector Castings, Inc. v. Joseph T. Ryerson & Son, Inc.*, No. 4:15-CV-851 SNLJ, 2015 WL 6431704 (E.D. Mo. Oct. 21, 2015).**

Judge Stephen N. Limbaugh, Jr. of the U.S. District Court for the Eastern District of Missouri granted the plaintiff's motion to strike the defendant's offer of judgment, and denied the defendant's motion to strike the class allegations, in a putative class action involving alleged violations of the Telephone Consumer Protection Act. The defendant removed the case to federal court and subsequently moved to dismiss or, in the alternative, to strike the plaintiff's class allegations, because, among other reasons, it had made an offer of "more than complete relief" to the plaintiff. The plaintiff then moved to strike the defendant's offer of judgment, arguing, *inter alia*, that the defendant should not be permitted to use an offer of judgment to "pick off" class actions by offering a nominal judgment relative to the amount of judgment that would be recoverable by the class. The court ultimately agreed with the majority view on this issue and held that the defendant could not use the offer of judgment to thwart the putative class action. In addition, the court declined to strike the class allegations at this early stage, noting that there had been no discovery yet, and it therefore was not yet equipped with information it needed to determine whether the case would be appropriate for certification.

***Peters v. Credit Protection Association LP*, No. 2:13-CV-0767, 2015 WL 5216709 (S.D. Ohio Sept. 8, 2015).**

Judge Algenon L. Marbley of the U.S. District Court for the Southern District of Ohio denied a defendant's motion to dismiss a putative Telephone Consumer Protection Act (TCPA) class action based on an unaccepted Rule 68 offer of judgment and granted the named plaintiff's motion to strike the offer. First, the court found that the defendant's offer of judgment did not offer complete relief because it lacked the requested declaratory relief. The court concluded that the defendant's arguments — that declaratory relief was not available under the TCPA and that the named plaintiff lacked standing to pursue such relief — were merits-based arguments that presented a federal controversy and the offer therefore did not moot the named plaintiff's individual claims. Second, the court held that the class claims would not have been mooted even if the offer of judgment had offered complete relief to the named plaintiff. Relying on U.S. Court of Appeals for the Sixth Circuit authority, the court explained that an offer of judgment on the named plaintiff's individual claims made before class certification will not moot the class claims, as long as the plaintiff had not been dilatory in moving for certification.

***Wasvary v. WB Holdings, LLC*, No. 15-10750, 2015 WL 5161370 (E.D. Mich. Sept. 2, 2015).**

Judge Sean F. Cox of the U.S. District Court for the Eastern District of Michigan granted the defendants' motion to dismiss a putative Telephone Consumer Protection Act class action based on an unaccepted Rule 68 offer of judgment and granted their motion to strike or deny the plaintiff's motion for class certification. First, the court granted the defendants' motion to strike because the plaintiff's motion for class certification was nothing more than a premature placeholder that the plaintiff had filed, unaccompanied by any supporting memorandum, on the same day as the complaint, in order to prevent the defendants from "picking off" the named plaintiff in the putative class action. Second, although noting that several circuits had recently ruled that class claims were not mooted by an unaccepted offer of judgment, the court concluded that it was bound by *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567 (6th Cir. 2009), to enter judgment in favor of the plaintiff in accordance with the unaccepted offer of judgment, as long as the offer satisfied all relief demanded in the complaint. Finding that the defendants' offer of judgment included all relief requested, the court entered judgment in favor of the plaintiff and dismissed the action as moot.

***Yaakov v. Varitronics, LLC*, No. 14-5008 ADM/FLN, 2015 WL 5092501 (D. Minn. Aug. 28, 2015).**

Judge Ann D. Montgomery of the U.S. District Court for the District of Minnesota denied the defendant's motion to dismiss a putative class action based on an unaccepted offer of judgment to the named class representative. Because no motion for class certification had been filed, the defendant argued that the offer of judgment mooted the case in its entirety. The court reviewed the current state of the law on this issue and acknowledged that the U.S. Court of Appeals for the Eighth Circuit has not yet directly ruled on this question. The court, however, took the lead of other district courts in the circuit and determined that the defendant's offer of judgment in this case could not be used to terminate the action at this early stage. Accordingly, the court denied the defendant's motion to dismiss but stayed the action until the U.S. Supreme Court issues a decision in *Campbell-Ewald Co. v. Gomez*, 135 S. Ct. 2311 (2015), which likely will clarify this issue.

Class Action Fairness Act (CAFA) Decisions

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

***Boulanger v. Devlar Energy Marketing, LLC*, No. 3:15-CV-3032-B, 2015 WL 7076475 (N.D. Tex. Nov. 13, 2015).**

In this personal injury case, 111 plaintiffs filed a putative class action against 59 defendants, alleging damages caused by the explosion of derailed oil tanker cars. Although the plaintiffs subsequently withdrew their class claims, the defendants proceeded to remove the case to federal court under both the "class action" and "mass action" prongs of CAFA. Judge Jane J. Boyle of the U.S. District Court for the Northern District of Texas denied the plaintiffs' motion to remand. Because the U.S. Court of Appeals for the Fifth Circuit evaluates CAFA jurisdiction as of the time of removal, the plaintiffs' withdrawal of the class claims was effective to defeat CAFA's "class action" jurisdiction. However, the federal court still had jurisdiction under CAFA's "mass action" provision. This was so, the court explained, because the plaintiffs had filed a single complaint and requested separate damages considerations, which evidenced an implicit request for a joint trial. The plaintiffs' contentions in their motion to remand that they had not intended to try the claims jointly was irrelevant: Fifth Circuit courts look to the complaint at the time of removal to determine jurisdiction.

***Schaefer v. Seattle Service Bureau, Inc.*, No. 2:15-cv-444-FtM-38CM, 2015 WL 6746614 (M.D. Fla. Nov. 5, 2015).**

Judge Sheri Polster Chappell of the U.S. District Court for the Middle District of Florida denied the plaintiff's motion for remand in this putative class action on behalf of Florida citizens involved in accidents with other Florida citizens who were insured by State Farm. The gravamen of the lawsuit was that State Farm paid the insured's damages, resulting in collection letters being sent to class members where no judgment was ever entered against them. The court held that the amount-in-controversy requirement was satisfied because State Farm had set forth an amount in excess of $12 million, which was supported by an affidavit. The declaration stated that 2,585 subrogation files that met the plaintiff's class parameters were referred by State Farm during the applicable class period, resulting in collections exceeding $12 million. This sufficed to satisfy the amount in controversy. The court also noted that "a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; the notice need not contain evidentiary submissions."

***Ruano v. Sears Roebuck & Co.*, No. CV 15-6060 PSG (FFMx), 2015 WL 6758130 (C.D. Cal. Nov. 5, 2015).**

Judge Philip S. Gutierrez of the U.S. District Court for the Central District of California denied the plaintiff's motion to remand a class action asserting that the defendant violated California consumer protection laws by charging fees for nonperformed services in the installation of HVAC systems. The plaintiff argued that removal, more than six months after the complaint was filed, was untimely. The court disagreed. While the complaint was bought on behalf of HVAC system purchasers in California, minimal diversity under CAFA was not established until after the plaintiff admitted in discovery that he was not a citizen of New York or Illinois, like the defendant. The court rejected the plaintiff's contention that the defendant "should have known" that a class of purchasers in California would include at least one California citizen because "[t]he thirty-day clock does not start ticking [where] Defendant could guess or speculate that a class of California residents would include California citizens." CAFA's amount in controversy requirement was satisfied because the defendant showed that a refund of the price paid for HVAC systems sold and installed in California during the class period exceeded $10 million. The court held that the plaintiff's argument that the recovery sought was limited to certain fees read the complaint "too narrowly," and while the defendant did not provide sales records, the defendant's declarant had sufficient knowledge to attest to the number and price of HVAC units sold and installed.

***Long v. State Farm Insurance*, No. 2:13-cv-786, 2015 WL 6391221 (S.D. Ohio Oct. 22, 2015).**

Judge Michael H. Watson of the U.S. District Court for the Southern District of Ohio denied the defendant's motion to remand a case after the class allegations were dismissed upon stipulation of the parties. The defendant had originally removed the case — then a putative class action — based on CAFA jurisdiction. The court explained that post-removal events do not alter whether a district court had jurisdiction at time of removal. Therefore, the dismissal of the class allegations did not require the court to remand the now-individual case back to state court, even though in its current form the case could not be removed to federal court.

***Calderon v. Total Wealth Management, Inc.*, No. 15CV1632 BEN (NLS), 2015 WL 5916846 (S.D. Cal. Oct. 8, 2015).**

Judge Roger T. Benitez of the U.S. District Court for the Southern District of California refused to remand a putative class

action asserting 14 state-law claims arising from allegations that the defendants' investment advisory business routed the plaintiffs' funds to investment companies in return for kickbacks of the money routed. The court rejected the plaintiffs' invocation of CAFA's "local controversy" and "home-state controversy" exceptions as the plaintiffs did not provide evidence about the citizenship of the class. Instead, they only provided a declaration from the plaintiffs' counsel regarding "inquiries" about the case he received from potential plaintiffs. Judge Benitez explained that "concluding more than two-thirds of a class of hundreds are California citizens based on the assertion that inquiries have been received and some unknown number of people calling are California residents is not a reasonable inference." However, the court permitted the plaintiffs to conduct limited jurisdictional discovery and file a renewed motion to remand within 90 days.

***In re Whole Foods Market, Inc., Greek Yogurt Marketing & Sales Practices Litigation*, No. 1:14-CV-1135-SS, 2015 WL 5737692 (W.D. Tex. Sept. 30, 2015).**

Judge Sam Sparks of the U.S. District Court for the Western District of Texas denied the plaintiffs' motion to remand a consumer class action case. The plaintiff consumers sued Whole Foods, alleging that its yogurt containers were deceptively labeled as containing only two grams of sugar when, in fact, they contained over eleven grams. The plaintiffs' petition set out that "No individual Plaintiff's or Class Member's claim is equal to or greater than seventy[-]five thousand [dollars] ($75,000), inclusive of costs and attorneys' fees." The court first held that Whole Foods could satisfy its initial "preponderance of the evidence" burden required for removal by looking solely at the face of the complaint: It did not have to provide extrinsic evidence of the amount in controversy. Next, the court accepted the defendant's argument that because the plaintiffs had pled damages of less than $75,000, the amount in controversy was $74,999 times the thousands of class members, significantly exceeding the $5 million threshold required to satisfy CAFA. Finally, the court rejected the plaintiffs' attempt to argue that the language of the complaint was clearly intended to avoid being brought into federal court. While this tactic may be effective for traditional diversity cases, the court noted, under CAFA jurisprudence, district courts "ignore a named plaintiff's attempt to duck federal jurisdiction by alleging an amount in controversy below $5,000,000."

***Anderson v. SeaWorld Parks & Entertainment, Inc.*, No. 15-cv-02172-SC, 2015 WL 5612499 (N.D. Cal. Sept. 24, 2015), 1453 pet. pending.**

Judge Samuel Conti of the U.S. District Court for the Northern District of California denied the plaintiffs' motion for remand of their action against defendant SeaWorld Parks and Entertainment, Inc., which sought injunctive relief requiring SeaWorld to stop making allegedly false and misleading statements regarding the health of orcas in their parks. In seeking remand, the plaintiffs argued that the amount in controversy was below the $5 million CAFA jurisdictional minimum because their complaint did not implicate or otherwise request monetary damages for the plaintiffs. The court found, however, that the defendant "would place an enormous (negative) value on the injunctive relief if awarded," through, *inter alia*, lost ticket sales, reputational damage, and SeaWorld's inability to secure third-party vendors to market ticket sales or retain sponsors. Because the cost of an injunction to SeaWorld would be far greater than the "simple cost of changing words on a webpage," the amount in controversy was sufficiently high for CAFA jurisdiction. The court also rejected remand on a separate ground. After noting several nearly identical pending cases brought by the plaintiffs seeking monetary relief in federal court, the court reasoned that, if it were to grant remand, federal jurisdiction in the sister suits would effectively be stripped because of the likely preclusive impact of the injunction-only case proceeding in state court. The court held that to permit "break-away, injunctive-only cases ... filed primarily as a tactic to litigate already-pending federal court cases in a state court" would contradict Congress's intent in enacting CAFA to offer a federal forum to class actions and lead to "absurd results from federal courts abdicating their role in class actions."

***Bradford v. Bank of America Corp.*, No. CV 15-5201-GHK (JCx), 2015 WL 5311089 (C.D. Cal. Sept. 10, 2015).**

More than 200 California homeowners filed an action alleging eight state-law claims against various Bank of America defendants and ReconTrust Company, N.A. in Los Angeles County Superior Court. The defendants removed the case as a "mass action" under CAFA, and the plaintiffs moved to remand. While the motion for remand was pending, Chief Judge George H. King of the U.S. District Court for the Central District of California dismissed all but one plaintiff's claims as improperly joined. The remaining plaintiff argued in his motion for remand that he and the defendants were California citizens and the case was no longer a mass action. Judge King held that the action was properly removed as a mass action at the time of removal. As the court explained, the "minimal diversity" requirement of CAFA was satisfied because Bank of America was a citizen of North Carolina, and the later dismissal of all but one of the plaintiffs did not deprive the court of jurisdiction because "[p]ost-filing developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of filing." Finally, the court rejected the plaintiff's reliance on CAFA's "local controversy" exception because the plaintiff did not meet his evidentiary burden to show

that he was seeking "significant relief" from ReconTrust, the local defendant, or that its "conduct forms a significant basis for the claims of this case."

***McMullen v. Synchrony Bank*, No. 14-1983 (JDB), 2015 U.S. Dist. LEXIS 118964 (D.D.C. Sept. 8, 2015).**

Judge John D. Bates of the U.S. District Court for the District of Columbia denied a renewed motion to remand a purported class action filed against two individuals, three of their companies and two banks for their alleged participation in a fraudulent scheme involving lines of health care-related credit. The plaintiff initially moved to remand, arguing, *inter alia*, that the local-controversy exception barred jurisdiction. However, because it was unclear whether more than two-thirds of the putative class were citizens of the District of Columbia, Judge Bates ordered limited jurisdictional discovery to resolve this question. The discovery order instructed the two banks to submit declarations indicating, *inter alia*, the total number of accounts opened through the other defendants and their affiliated companies and the names and addresses associated with them. The rest of the defendants were ordered to produce a copy of the driver's license for each customer who had received health care financing from the banks. None of those defendants were able to produce driver's licenses, but they provided other information, including patient records. The plaintiff subsequently renewed her motion to remand, which Judge Bates denied. According to the court, "the most comprehensive evidence" came from the two banks, which included declarations providing the last known address for 892 putative class members, only 60 percent of whom were linked to a District of Columbia residence. While the other defendants' evidence included addresses for 93 individuals, 80 percent of whom were located in the District of Columbia, the court found that the declarations from the two banks likely "provide[d] a more accurate assessment of the class's composition." Because the plaintiff had the burden to prove the satisfaction of the elements of the local-controversy exception, the court denied her renewed motion to remand and declined to order additional jurisdictional discovery.

***Claridge v. North American Power & Gas, LLC*, No. 15-cv-1261 (PKC), 2015 WL 5155934 (S.D.N.Y. Sept. 2, 2015).**

In this case, Judge P. Kevin Castel of the U.S. District Court for the Southern District of New York *sua sponte* determined that the complaint adequately alleged minimal diversity and that it had subject matter jurisdiction under CAFA. The plaintiffs brought a putative class action, alleging that the defendant engaged in deceptive billing practices that unlawfully overcharged customers for electricity services. In determining whether the court had subject matter jurisdiction under CAFA, Judge Castel held that the defendant was an unincorporated association and therefore was a citizen of the state under whose laws it was organized and the state where it had its principal place of business. Under this definition, the plaintiffs were both citizens of a different state from the defendant and sought more than $5 million in damages on behalf of the class. As a result, the complaint adequately alleged minimal diversity and the court's subject matter jurisdiction under CAFA.

***Barfield v. Sho-Me Power Electric Cooperative*, No. 2:11-cv-04321-NKL, 2015 WL 5022836 (W.D. Mo. Aug. 21, 2015), appeal pending.**

Judge Nanette K. Laughrey of the U.S. District Court for the Western District of Missouri denied the defendants' motion for judgment as a matter of law based on their argument that CAFA jurisdiction was lacking. The plaintiffs commenced a putative class action on behalf of several thousand Missouri landowners for claims arising out of the defendants' use of electric transmission line easements for commercial telecommunications purposes. The case proceeded to trial, after which the defendants filed a motion for judgment as a matter of law under Rule 50(b), arguing, in part, that CAFA's local controversy exception required dismissal. The defendants reasoned that, according to a survey they had conducted using excluded class members, more than two-thirds of the class members were Missouri citizens. Although the defendants previously had raised this argument in a pretrial motion for judgment as a matter of law, the court denied it as untimely and allowed the case to proceed to trial. The defendants now argued that the court was obligated to raise a challenge to its own CAFA jurisdiction *sua sponte*, and that failure to do so was error. The court rejected this argument, concluding that while a trial court may raise CAFA's exceptions as a bar to jurisdiction *sua sponte*, it was not required to do so. Rather, as controlling case law made clear, the burden of proving that jurisdiction is lacking falls squarely on the party seeking to invoke a CAFA exception.

***Watson v. American National Property & Casualty Co.*, No. 15cv0888, 2015 WL 5007967 (W.D. Pa. Aug. 20, 2015).**

Judge Arthur J. Schwab of the U.S. District Court for the Western District of Pennsylvania denied the plaintiff's motion for remand, finding that the jurisdictional requirements of CAFA were satisfied. The plaintiff had alleged that the proposed class contained fewer than 100 persons and that the amount in controversy did not exceed $5 million. As such, the court reasoned that

the defendant had to establish the amount in controversy "to a legal certainty." The defendant filed an exhibit list containing the names of 119 individuals that met the class definition — Pennsylvania citizens insured under certain policies that were injured in motor vehicle accidents by uninsured motorists after a certain date — and claimed that the total amount of liability coverage at issue was over $33 million, based on information from the defendants' databases. Finding the affidavits and testimony of the defendants' witnesses supporting the information in the defendants' exhibit to be reliable, the court held that the defendants established the amount in controversy to a legal certainty and that federal jurisdiction under CAFA was appropriate.

Decisions Granting Motions to Remand/Finding No CAFA Jurisdiction

***Bridewell-Sledge v. Blue Cross of California*, 798 F.3d 923 (9th Cir. 2015).**

A unanimous panel of the U.S. Court of Appeals for the Ninth Circuit (Nelson, Silverman and Wardlaw, JJ.) affirmed in part and reversed in part the district court's partial remand of two employee discrimination class action lawsuits filed minutes apart against the same defendants and consolidated by the state court "for all purposes." Despite the consolidation, the defendants filed two separate notices of removal under CAFA. The district court remanded the first-filed action under CAFA's local controversy exception but declined to remand the second-filed action because the fourth prong of CAFA's local controversy exception requires that "no similar class action has been filed against any of the defendants in the preceding three years." The Ninth Circuit rejected this reasoning, holding that it was improper for the district court to treat the two consolidated actions as separate. The Ninth Circuit reasoned that under California law, when two actions are consolidated "for all purposes," the two actions are merged into a single proceeding and should be treated as if only one complaint had originally been filed. After analyzing the legislative history of CAFA's local controversy exception, the panel concluded that the consolidated class action involving primarily California parties was a local controversy and "allowing a California state court to continue to adjudicate that consolidated class action would be entirely in accordance with the purpose of CAFA's local controversy exception." Thus, the panel affirmed the district court's order remanding the first action, reversed the order denying remand of the second, and remanded with directions to treat the cases as a single consolidated case and remand the action in its entirety to state court.

***Whisenant v. Sheridan Production Co.*, No. 15-6154, 2015 WL 5828205 (10th Cir. Oct. 7, 2015).**

A unanimous panel of the U.S. Court of Appeals for the Tenth Circuit (Kelly, Porfilio and Baldock, JJ.) reversed a district court's refusal to remand a class action alleging the defendant failed to pay or underpaid royalties for natural gas wells it operated. In denying remand, the lower court found that the alleged unpaid royalties were only $3.7 million, but it added $1.5 million in interest as actual damages to increase the total potential liability over the requisite $5 million amount in controversy under CAFA. The Tenth Circuit noted that CAFA requires that the amount in controversy be calculated "exclusive of interest and costs," and that, even though "the obligation arises from an Oklahoma statute and may, under that statute, be termed damages," the interest in question could not be included in the amount-in-controversy assessment because it would only be due if the defendant delayed payment on a successful claim for royalties. However, in reversing and remanding the case to the district court, the Tenth Circuit instructed the lower court to consider whether attorneys' fees should be added to satisfy the amount-in-controversy requirement — an argument that the district court did not reach after finding that the amount in controversy had been satisfied by virtue of the $1.5 million in interest as damages.

***Hunter v. Medstar Georgetown University Hospital*, No. 15-1495 (RMC), 2015 WL 7074568 (D.D.C. Nov. 12, 2015).**

Judge Rosemary M. Collyer of the U.S. District Court for the District of Columbia remanded a putative class action alleging violations of the D.C. Consumer Protection Procedures Act. The plaintiffs alleged that they were overcharged for their medical records by the hospital defendants. The defendants removed the action to federal court, and the plaintiffs moved to remand. The court remanded the case under the discretionary "interests of justice" exception to CAFA, which applies whenever more than one-third but less than two-thirds of the class members are citizens of the forum state. The court analyzed the statutorily enumerated factors and found that the case belonged in state court. First, the court noted, federal law did not control the outcome of the case; rather, the asserted claims were governed exclusively by D.C. law. Second, the court found that there was an insufficient "national or interstate interest" to sustain removal because the case had no national importance, was against only D.C. defendants, and could only result in a pronouncement of

D.C. law. Finally, D.C. had a "distinct nexus" with the action because the defendants conducted their business in D.C., were willing to subject themselves to the jurisdiction of D.C. courts, and the alleged harm occurred exclusively in D.C. Thus, the court held, the factors under the "interests of justice" exception to CAFA suggested remanding the action.

***Gyorke-Takatri v. Nestle USA, Inc.*, No. 15-cv-03702-YGR, 2015 WL 6828258 (N.D. Cal. Nov. 6, 2015), 1453 pet. pending.**

Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California remanded a putative class action alleging the defendant's Gerber Graduate Puffs product are misleadingly labeled as to their health benefits. The court concluded that the defendant had failed to establish that the amount in controversy exceeded CAFA's $5 million minimum because the evidence of total retail Puffs sales that the defendant submitted was compiled by a third party without "a declaration from a person with knowledge about that data, how it was collected, or how it was maintained" and was thus inadmissible hearsay. Further, even if the evidence was admissible, Gerber did not show that its "assumption that plaintiffs' restitution claim would require disgorgement equal to the entire purchase price for all Puffs sold in California over the class period is reasonable." Finally, while Gerber's opposition "mention[ed]" that the plaintiffs also sought punitive damages, compensatory damages, and attorney fees, "mere statement of these potential costs does not satisfy a defendant's preponderance burden."

***Johnson v. Sun West Mortgage Co.*, No. CV 15-7329-JFW (ASx), 2015 WL 6697261 (C.D. Cal. Nov. 3, 2015).**

The plaintiff filed a putative class action asserting that the defendants charged excessively priced forced placed insurance premiums, which included unauthorized and wrongful charges and kickbacks. The defendants removed the case, and plaintiff moved to remand on the ground that the defendants failed to satisfy CAFA's $5 million amount-in-controversy requirement. The defendants contended that since the complaint asserted that the premiums were "inflated by a magnitude of ten," the amount in controversy was between $4.5 million and $5.4 million, nine-tenths of the $5 million and $6 million of net written premiums for the force-placed insurance policies at issue. Judge John F. Walter of the U.S. District Court for the Central District of California remanded the action to state court, holding that the defendants' assumptions "do not provide the summary-judgment-type evidence necessary" to establish the amount in controversy. The defendants assumed that the entire amount of the premium was unlawful, even though the plaintiff only sought recovery of the unlawful portion of the forced-placed policy premiums. In other words, the defendants' estimate was overinclusive. Further, because the defendants did not show how many customers were affected or how much they were charged despite having the records of the transactions, "the court would have to speculate as to the size of the class and the average amount of recovery for each class member[]."

***Ferrar v. Johnson & Johnson Consumer Cos.*, No. 4:15 CV 1219 CDP, 2015 WL 5996357 (E.D. Mo. Oct. 14, 2015), 1453 pet. denied.**

Judge Catherine D. Perry of the U.S. District Court for the Eastern District of Missouri granted the plaintiffs' motion to remand several product liability class actions against Johnson & Johnson (J&J) premised on claims that plaintiffs had developed ovarian cancer from using J&J baby powder and shower products. The court held that the actions did not constitute a mass action subject to removal under CAFA. The initial set of plaintiffs filed their complaint in Missouri state court, seeking damages for alleged failure to warn, negligence, breach of warranty, wrongful death, civil conspiracy and concert of action. Over the next few months, two additional lawsuits were filed by the same law firm in the same state court, raising similar if not identical claims against J&J. The cases eventually were transferred to a single state court for pretrial management and trial. Plaintiffs' counsel subsequently sent defense counsel proposed scheduling plans for all three cases, each with a separate caption but setting forth the same deadlines. Relying on these proposed schedules, J&J removed all three cases to federal court, arguing that they together constituted a "mass action" under CAFA. As the court noted, the critical question under CAFA's mass action provision is whether the plaintiffs, either implicitly or explicitly, had proposed a joint trial for all three actions. After reviewing the record, the court concluded that the plaintiffs had not requested assignment to the same judge for trial, but rather did so for pretrial proceedings only. Moreover, the court explained that even if the state court had "decid[ed] on its own initiative to conduct a joint trial[,] ... [t]hat would not be a proposal" *by the plaintiffs* for a joint trial. Since CAFA's mass action provision requires a suggestion by the plaintiffs that multiple actions should be tried together, the district court determined that CAFA jurisdiction was lacking.

***Strayhorn v. Volkswagen Group of America, Inc.*, No. 2:15-cv-584-FtM-99CM, 2015 U.S. Dist. LEXIS 132698 (M.D. Fla. Sept. 30, 2015).**

Judge Sheri Polster Chappell of the U.S. District Court for the Middle District of Florida *sua sponte* dismissed a putative class action for lack of subject matter jurisdiction. The plaintiffs filed a putative class action in federal court against Volkswagen, invoking CAFA. The court dismissed the action on the ground

that the plaintiffs had not sufficiently pled their states of citizenship. While the plaintiffs alleged that they were residents of Florida and that Volkswagen is incorporated in Virginia with its principal place of business in Virginia, the court stressed that "[p]leading residency is not the equivalent of pleading domicile." Because the plaintiffs did not properly allege their citizenship, minimal diversity had not been adequately pled, prompting the court to dismiss the case.

***In re Anthem, Inc.*, No. 15-CV-2873-LHK, 2015 WL 5265686 (N.D. Cal. Sept. 9, 2015), 1453 pet. denied.**

The plaintiffs, Missouri residents, initiated a putative class action against the defendants arising out of a data breach of personal customer information at Anthem, Inc. The defendants removed the action to federal court under CAFA, arguing that "Missouri residents" necessarily included citizens of other states residing in Missouri. After removal, the plaintiffs filed an amended complaint stating that the class was limited to "Missouri citizens." Judge Lucy H. Koh of the U.S. District Court for the Northern District of California granted the motion to remand, relying on the amended complaint. According to the court, U.S. Court of Appeals for the Ninth Circuit law permitted the plaintiffs "to amend a complaint after removal to clarify issues pertaining to federal jurisdiction under CAFA." Judge Koh also held that there was no federal question jurisdiction under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) because "Plaintiffs' single reference to HIPAA in a sixty-three-paragraph complaint does not convert Plaintiffs' state law claim ... into a federal cause of action" and, further, there is no private right of action under HIPAA.

***McGraw v. Geico General Insurance Co.*, No. C15-5336 BHS, 2015 WL 5228027 (W.D. Wash. Sept. 8, 2015).**

The plaintiff sought to represent a class of Geico insureds in Washington claiming they had not been compensated for their vehicles' diminished value. Geico removed the case from Washington state court under CAFA, asserting nearly $14 million was in controversy. Judge Benjamin H. Settle of the U.S. District Court for the Western District of Washington granted the plaintiff's motion to remand. The court held that Geico's calculation of the class at more than 3,200 class members did not track the factors outlined in the plaintiff's more limited class definition. Further, Geico's estimate of damages of at least $8,000 per class member was "mere speculation" and unreasonable based on Geico's own evidence. Finally, the court rejected Geico's attempt to include attorney fees in the amount in controversy because the plaintiff did not allege any statutory violations permitting recovery of attorney fees.

***Robertson v. Chevron USA, Inc.*, No. 15-874, 2015 WL 5178499 (E.D. La. Sept. 2, 2015), 1453 pet. granted.**

More than 157 plaintiffs filed a single lawsuit alleging personal injury and property damage claims arising from alleged exposure to contamination from an oil field pipe. The defendants removed the case to federal court under CAFA, invoking the law's "mass action" provision, and the plaintiffs moved to remand. Judge Susie Morgan of the U.S. District Court for the Eastern District of Louisiana granted the plaintiffs' motion to remand, finding that the defendants had not established that the amount in controversy had been satisfied. As the court explained, unlike CAFA's class action provision, CAFA's mass action provision requires the defendants to establish not only that the claims, in the aggregate, exceed $5 million, but also that each individual plaintiff has asserted claims worth more than $75,000. The court was unable to determine the amount in controversy of each individual plaintiff because the plaintiffs alleged damages as a group. Specifically, the plaintiffs alleged "*their* physical injuries and diseases; *their* past, present, and future medical expenses," and the like. Thus, it was not apparent from the face of the petition that any individual plaintiff's damages were likely to exceed $75,000. As a result, the court concluded that the defendants failed to prove by a preponderance of the evidence that any individual plaintiff's claim would be likely to exceed $75,000. Finally, the court rejected the plaintiffs' request for attorney's fees because the defendants' removal was not objectively unreasonable.

***Alibris v. ADT LLC*, No. 9:14-CV-81616-ROSENBERG/BRANNON, 2015 U.S. Dist. LEXIS 114575 (S.D. Fla. Aug. 28, 2015).**

Judge Robin L. Rosenberg of the U.S. District Court for the Southern District of Florida ruled that the court did not have jurisdiction under CAFA after it dismissed the federal claim in a putative class action arising out of the defendant's decision not to hire the plaintiff for a position in California based on information contained in a background investigation report prepared by a third-party consumer reporting agency. The plaintiff commenced a nationwide class action, asserting claims under, *inter alia*, the Fair Credit Reporting Act (FCRA) and various California state laws. After finding that the FCRA claim was time-barred, the court concluded that the plaintiff could not proceed with that claim on behalf of a putative class. The court then determined that jurisdiction under CAFA was lacking as to the California claims. While the case originally involved a putative nationwide class in excess of 30,000 members, the class had been winnowed to approximately 1,300 individuals in California, strongly suggesting that the amount in controversy fell below $5 million. The court therefore remanded the California claims to state court.

***Scenic Health Alliance, Inc. v. State Farm Mutual Automobile Insurance Co.*, No. 14-62900-LENARD/GOODMAN, 2015 U.S. Dist. LEXIS 111722 (S.D. Fla. Aug. 24, 2015).**

Judge Joan A. Lenard of the U.S. District Court for the Southern District of Florida granted a motion to remand a putative class action arising out of State Farm's systematic denial of claims under its Personal Injury Protection and/or Medical Payments insurance coverage when one of its insureds does not receive initial medical services within 14 days of an automobile accident. This practice is permitted under Florida law. The plaintiff sought multiple forms of relief, including a declaration that the Florida law is unconstitutional; a declaration that State Farm cannot deny payments under the Florida statute; an injunction barring State Farm from denying future claims; and supplemental relief requiring State Farm to recalculate all submitted claims that had been denied pursuant to the Florida statute. State Farm removed the action to federal court under CAFA, and the plaintiff moved to remand on the ground that the $5 million amount-in-controversy had not been satisfied. In support of removal, State Farm submitted a declaration stating that the value of bills denied under the Florida statute exceeded $4.76 million. However, the court determined that the amount specified in the declaration was overstated and speculative because the declaration did not state whether the figure accounted for certain fee schedule reductions that limit State Farm's liability. In particular, Florida law only requires insurers to pay 80% of medical costs incurred as a result of a motor vehicle accident. The court also rejected State Farm's valuation of the requested injunctive relief because it failed to provide any evidence in support. Finding that State Farm failed to satisfy its burden with respect to CAFA's amount in controversy, the court granted the plaintiff's motion to remand.

***Rhodes v. Kroger Co.*, No. 4:15CV000312 JLH, 2015 WL 5006070 (E.D. Ark. Aug. 24, 2015), appeal dismissed.**

Judge J. Leon Holmes of the U.S. District Court for the Eastern District of Arkansas granted the plaintiffs' motion to remand a putative class action brought against Kroger Co. and two of its Arkansas district managers for failing to provide discounts to customers who did not have a Kroger Plus Card. The action initially was filed in Arkansas state court and was limited to customers of Arkansas Kroger stores. The defendants removed the action to federal court under CAFA, and the plaintiffs subsequently moved to remand to state court under CAFA's "local controversy" exception. After concluding that more than two-thirds of the class members likely were Arkansas citizens, the court went on to consider whether the action included an Arkansas defendant "from whom significant relief [was] sought" and "whose alleged conduct form[ed] a significant basis for the claims asserted by the proposed plaintiff class." Here, because Kroger was not a "citizen" of Arkansas, the key question became whether the two individual defendants' "alleged conduct form[ed] a significant basis" for the plaintiffs' claims. To support their argument that they did not, the individual defendants submitted affidavits stating that decisions about discounted prices associated with the Kroger Plus Card program were made by Kroger's corporate office, and that they had no decision-making power or discretion with respect to these issues. Although these affidavits directly contradicted the allegations in the complaint, the court noted that CAFA, as written, looks to the local defendants' "alleged conduct," and therefore does not permit the court to look beyond the allegations in the complaint. The court thus "reluctantly" concluded that the local controversy exception applied and remanded the case.

The Class Action Chronicle

Contributors

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

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