Skadden

The Class Action Chronicle

This edition focuses on rulings issued between November 15, 2015, and February 15, 2016, and begins with an article that discusses four particularly noteworthy decisions for class action practitioners and defendants.

Notable Developments in Class Action Rulings

In this issue, we discuss the U.S. Supreme Court's latest class action ruling, which struck a blow to defendants in wage-and-hour litigation, and highlight three rulings from other federal courts around the country that rejected class treatment on grounds that may aid defendants in consumer lawsuits.

In March 2016, the Supreme Court affirmed class certification in *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146, 2016 U.S. LEXIS 2134 (Mar. 22, 2016) by a vote of 6-2. In *Tyson Foods*, an employee at a Tyson's pork processing plant brought a class action and collective action on behalf of herself and other plant employees seeking compensation for time spent donning and doffing protective gear to perform their jobs. The gravamen of the employees' suit, which was brought under the Fair Labor Standards Act and Iowa wage law, was that they did not receive statutorily required overtime pay for time spent donning and doffing protective equipment. Tyson objected to class certification, among other reasons, because the variations in protective gear each employee wore, the time it took for them to don and doff the gear, and the hours worked gave rise to individualized issues precluding class treatment. The district court rejected the argument and the case proceeded to a class trial before a jury.

At trial, each employee had to prove that the time spent donning and doffing combined with the time spent working totaled more than 40 hours a week and that the employer did not pay for all of the work time. To do so, the class members relied on an expert witness to perform a time and motion study on a sample of class members that purported to calculate the average time employees spent donning and doffing in two departments

Upcoming Webinar

On Wednesday, June 8, 2016, Skadden will hold a webinar to discuss the latest developments in class action law. The webinar will begin at 12:30 p.m. EST. To participate, please contact Laura Runco at laura.runco@skadden.com.

within the processing plant. The expert averaged the time taken in observations to produce an estimate of 18 minutes a day for one department and 21.25 minutes for the other department. The expert then used company records to determine how much money the employees had actually been paid in work time, added the average don-and-doff time applicable to that employee's department, subtracted the time for which they had been compensated for donning and doffing (if any), then analyzed how much unpaid overtime the resulting figure generated. Notably, Tyson did not challenge the expert's methodology under *Daubert*, and it did not proffer a rebuttal expert. Instead, Tyson argued to the jury that any classwide recovery would be pure speculation given the differing amounts of time it took employees to don and doff different protective equipment. The company also argued that the expert's study inflated the average donning and doffing time. The jury awarded the class $2.9 million in unpaid wages, and the judgment was affirmed by the U.S. Court of Appeals for the Eighth Circuit.

On appeal, the Supreme Court affirmed, rejecting Tyson's call for a "broad rule against the use" of "representative" or "statistical" evidence in class actions. The Court agreed that the "central dispute" in the case was whether the averages calculated by the plaintiff's expert could be extrapolated across the class. According to the Court, if any individual in the class had brought an individual claim to recover unpaid donning and doffing time, that person could have relied on the expert's study to raise a reasonable inference of the amount of time he or she spent donning and doffing. The Court further reasoned that use of the representative evidence did not deprive Tyson of its right to present individualized defenses because it had the opportunity of showing that the evidence was "unrepresentative or inaccurate." In so doing, the Court distinguished its prior seminal ruling in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), in which it rejected the use of statistical evidence in a sprawling nationwide employment class action. *Dukes* was a different case, the Supreme Court explained, because no individual could rely on the statistical evidence in an individual proceeding because the "experiences of the employees in *Wal-Mart* bore little relationship to one another."

Nevertheless, the Court was careful to limit the potential reach of these holdings. With respect to the admissibility of statistical evidence, for example, the Court made clear that its propriety in *Tyson* stemmed from the fact that the same sort of evidence would be admissible to prove an individual's claim outside the class action context. And the Court was also careful to explain that reliance on statistical evidence "was permissible in the circumstances of this case" because there was an "evidentiary gap created by the employer's failure to keep adequate records" as required by law. The upshot of these caveats is that representative evidence that would not be admissible to prove liability in an individual suit cannot be used to supplant the type of evidence ordinarily required to prove an individual claim to facilitate class treatment.

Notably, the Supreme Court punted on the question whether uninjured class members may recover. While the Court recognized that this question is of "great importance," it found it premature to address it because the damages award had not yet been disbursed. The Court noted that Tyson could raise a challenge to any proposed method of allocation at the appropriate time.

The *Tyson* ruling is certainly a setback for the defense bar and reflects an approach to class certification that is at odds with other recent Supreme Court decisions, including *Dukes* and *Comcast*. Still, while the decision will likely spur greater efforts by plaintiffs to proffer statistical evidence in class proceedings, defendants can still challenge the accuracy or representativeness of the evidence. Defendants can also mount challenges to the reliability of the evidence under *Daubert*, which Tyson failed to do — a critical fact that the Supreme Court expressly noted. And defendants should vigorously resist the use of statistical evidence that would not be permitted to prove liability in an individual suit when it is offered in an attempt to facilitate class treatment of individualized claims. In addition, the Supreme Court recognized the importance of one day resolving the question whether uninjured class members may recover in a class proceeding, leaving defendants with a glimmer of hope on this fundamental and recurring issue.

In contrast to *Tyson*, a recent decision by the U.S. Court of Appeals for the Eleventh Circuit in a front-load washer case is welcome news for defendants. In *Brown v. Electrolux Home Products*, 2016 WL 1085517 (11th Cir. Mar. 11, 2016), the Eleventh Circuit vacated a district court's order certifying California and Texas consumer fraud and warranty classes of purchasers of washing machines that are allegedly prone to accumulating mold. The Eleventh Circuit began its decision by finding that the district court applied the wrong standard for class certification by resolving all doubts regarding class certification in favor of certifying the classes and accepting the class allegations as true. As the Court of Appeals explained, the "party *seeking* class certification has the burden of proof," meaning that "if doubts remain about whether the standard is satisfied, the party with the burden of proof loses." (Internal quotation marks and citation omitted.) And the burden is one "of *proof*, not ... pleading," meaning that in a case of disputed facts that are relevant to class certification, the court "has a duty to actually decide it and not accept it as true or construe it in anyone's favor."

The Court of Appeals next determined that the district court abused its discretion in finding predominance satisfied under Rule 23(b)(3). With respect to consumer fraud, the court

concluded that certification was not proper under the California or Texas consumer protection statutes because causation and reliance are individualized. As the court noted, "We have no inkling whether the class members saw any advertisements from Frigidaire, much less uniform advertisements, before they purchased their washing machines." In other words, the Eleventh Circuit concluded that any lawsuit based on advertisements like those in the case — at least where there is no evidence of classwide exposure — cannot be certified. With respect to breach of warranty, the decision leaves open the possibility of certification on remand, but only if the district court concludes that the presuit notice and opportunity to cure requirements of California's and Texas' consumer protection statutes do not apply. As the court explained, if California and Texas law do not excuse these requirements, then each class member would need to prove that he or she gave Electrolux presuit notice and an opportunity to cure, which could require individual proof. Similarly, the district court must also resolve whether California and Texas law require the defect at issue to manifest, which also could require individual proof.

The *Electrolux* decision is a significant victory for product manufacturers and other defendants that are increasingly in the crosshairs of putative consumer fraud and breach-of-warranty class actions. At least with respect to consumer fraud claims under Texas and California law, the decision is likely to be a serious obstacle to any plaintiff seeking to certify those claims in the Eleventh Circuit given the individualized nature of causation and reliance. While the decision leaves open the possibility of certifying warranty claims under those states' laws on remand, the district court could only do so after resolving fundamental threshold questions about notice of breach and manifestation of defect. Because the decision underscores that the burden is on the plaintiff to demonstrate the propriety of class certification — and that the district court must undertake a sufficiently rigorous analysis of the Rule 23 prerequisites before certifying a class — it can serve as a powerful weapon in defeating class certification going forward.

The second piece of good news for defendants is the ruling in *Carlson v. Gillette Co.*, No. 14-14201-FDS, 2015 WL 6453147 (D. Mass. Oct. 23, 2015). The plaintiffs in *Carlson* brought a putative class action, alleging that the defendants falsely marketed certain batteries as being "guaranteed for 10 years in storage" when, in fact, they had a propensity to leak. The plaintiffs asserted a claim under the Massachusetts Consumer Protection Act based on allegations that the defendants made affirmative misrepresentations and failed to disclose the alleged propensity to fail. The court granted the defendants' motion to dismiss, finding that the 10-year guarantee on the product's package was "simply not a promise that the batteries have no potential whatsoever to leak or otherwise fail within that time." Instead, it was merely a promise to repair or replace a failed battery, which was not a deceptive act or practice under Massachusetts law. The court also determined that the plaintiffs failed to plausibly state a consumer fraud claim rooted in a fraudulent-concealment theory because the plaintiffs did not include any allegations supporting the materiality of the omitted information. According to the court, while the complaint included general allegations that the batteries leak under certain conditions, the plaintiffs did not specify the magnitude of the leakage problem, including the likelihood of leakage.

The import of *Carlson* is clear: A guarantee or warranty to replace a product if it fails within a certain time period does not constitute a promise or representation that the product will in fact last or perform for that entire period. Thus, plaintiffs cannot contort such a guarantee or warranty into the sort of misrepresentation required to support a consumer fraud claim. Rather, plaintiffs must pinpoint a particular affirmative misstatement or specify why the purportedly omitted information would materially affect consumers' decision to purchase the product in question. This decision thus provides important support in resisting consumer fraud claims alleging design defects in consumer product cases that are based on warranties to repair or replace products within a certain time period.

The third decision that should prove helpful to defendants is *Harris v. Nortek Global HVAC LLC*, No. 14-CIV-21884-BLOOM/Valle, 2016 U.S. Dist. LEXIS 18795 (S.D. Fla. Jan. 28, 2016). In *Harris*, the plaintiffs moved to certify a class of Florida purchasers of residential HVAC systems manufactured by the defendant. The plaintiffs alleged that the HVAC systems contained defective copper evaporator coils, which are susceptible to corrosion, resulting in leaks and premature failure. The plaintiffs asserted claims for violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) and unjust enrichment and sought class certification under, *inter alia*, Rule 23(b)(3), which governs claims for monetary damages. Judge Beth Bloom of the U.S. District Court for the Southern District of Florida denied the plaintiffs' motion for class certification on a variety of grounds, including the implied requirement of ascertainability and the explicit requirement of predominance under Rule 23(b)(3).

With respect to ascertainability, the court determined that the proposed class definition was both overbroad and not identifiable by objective means. Specifically, the court took issue with the fact that the proposed class — all Florida customers who had purchased one of the defendant's HVAC units that include copper evaporator coils — encompassed class members whose units had not failed. The court was "reluctant" to certify such a class, which would "provid[e] a structure that potentially overcompensates

class members." In addition, the court agreed with the defendant that the plaintiffs had failed to offer an administratively feasible mechanism for identifying members of the class because, *inter alia*, many HVAC contractors would not have sales records dating to the beginning of the class period.

The request for class certification under Rule 23(b)(3) was also doomed to fail, the court explained, because causation — a fundamental element under the FDUTPA — would be highly individualized. In particular, the coils used in the HVAC units at issue varied in material ways that may impact the risk of corrosion, the central theory of defect underlying the plaintiffs' claims. The court found that the same problems plagued the request for an unjust-enrichment damages class. Finally, the court rejected the plaintiffs' proposal to certify a liability-only class regarding the issues of (1) whether the HVAC units are defective, and (2) the defendant's prior knowledge of the defect. According to the court, endorsing such an issues-only class would amount to an "end run around the (b)(3) predominance requirement."

Harris provides compelling support for a multifaceted challenge to a putative consumer fraud class action. A prime starting point is ascertainability, especially given its suitability to early challenges to putative class actions on a motion to strike. Indeed, one ground for rejecting the ascertainability of the proposed class in *Harris* — *i.e.*, that the proposed class was overbroad — could easily be raised in such a motion because it would be based solely on the proposed class definition and would not depend on any evidence that would have to await discovery. Similarly, the holding in *Harris* that material differences in models of a particular product can render causation a highly individualized factual inquiry might also be worth exploring at the outset of a putative class action.

Class Certification Decisions

In this issue, we cover four decisions granting motions to strike/dismiss class claims, five decisions denying such motions, 17 decisions denying class certification or reversing grants of class certification, 19 decisions granting or upholding class certification, 14 decisions denying motions to remand or reversing remand orders pursuant to the Class Action Fairness Act (CAFA), and eight 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 Class Claims/ Deny Certification

***Hockenbury v. Hanover Insurance Co.*, No. CIV-15-1003-D, 2016 WL 552967 (W.D. Okla. Feb. 10, 2016).**

Judge Timothy D. DeGiusti of the U.S. District Court for the Western District of Oklahoma granted the defendant's motion to strike class claims asserted on behalf of insureds who submitted claims for property damage, alleging the defendant did not fairly investigate, and intentionally underpaid, such claims. The court observed that a defendant may bring a pre-emptive motion to deny certification before discovery, and that courts may strike class allegations where a complaint fails to plead the minimum facts necessary to satisfy Rule 23. While U.S. Court of Appeals for the Tenth Circuit courts are split as to which party bears the burden of proof on a pre-emptive motion to deny certification, Judge DeGiusti found that he did not need to resolve the issue because the defendant prevailed under either view: The class was overbroad as defined because it included all insureds who submitted claims during the class period, even if they benefited from filing a claim or were not otherwise injured. Since the plaintiffs' definition presupposed that every claim submitted after February 2009 involved the bad faith of the defendant, individual investigations would be necessary, a "task ... so daunting as to make the class definition insufficient." However, the court granted leave to amend the class allegations, finding it was premature to address the defendant's other arguments regarding the propriety of class treatment before an ascertainable class was properly defined.

***Rietdorf v. City of Fort Wayne*, No. 1:15-CV-113 JVB, 2016 WL 245253 (N.D. Ind. Jan. 21, 2016).**

Judge Joseph S. Van Bokkelen of the U.S. District Court for the Northern District of Indiana granted the City of Fort Wayne, Indiana's motion to deny class certification in a putative class action brought against the city for allegedly maintaining and encouraging unconstitutional police practices and failing to train its police officers regarding the seizure and detention of citizens against their will and without a warrant or probable cause. The plaintiffs included in their complaint a request for class certification under Rules 23(b)(2) and (b)(3). Before any class discovery took place, the city brought a motion to deny class certification, which Judge Van Bokkelen determined required the court to accept all allegations in the complaint as true and construe all reasonable inferences in the plaintiffs' favor. Notwithstanding this forgiving standard of review, the court determined that class certification was not appropriate under either subsection of Rule 23. First, the court found that the named plaintiffs lacked standing to pursue injunctive relief under Rule 23(b)(2) because there was no reason to believe, from the allegations in their complaint,

that there was any likelihood they would again be detained and transported to the Fort Wayne police department against their will without probable cause or a warrant. The court further determined that the proposed class did not satisfy the U.S. Court of Appeals for the Seventh Circuit's ascertainability requirement because (1) it was a fail-safe class and (2) the question of whether an individual was detained against his or her will was a subjective inquiry that could not be determined on a classwide basis. Accordingly, the court denied class certification.

***Martinez v. Equifax Inc.*, No. 15-2100 (SRC), 2016 WL 226639 (D.N.J. Jan. 19, 2016).**

Judge Stanley R. Chesler of the U.S. District Court for the District of New Jersey granted the defendants' motion to strike class action allegations from the plaintiffs' complaint, finding it clear from the face of the complaint that the requirement of ascertainability for maintaining a class action could not be met. The plaintiffs' proposed class definition included (1) all persons who disputed a credit report by the defendants (2) where the defendants failed to apply the proper and appropriate Fair Credit Reporting Act procedures. While the first part of the class definition was capable of being ascertained by reference to objective criteria, the court found the second half of the definition "unworkably vague" and incapable of being identified by objective criteria, a requirement for establishing ascertainability.

***Sherrod v. Enigma Software Group USA, LLC*, No. 2:13-cv-36, 2016 WL 25979 (S.D. Ohio Jan. 4, 2016).**

Judge James L. Graham of the U.S. District Court for the Southern District of Ohio granted a motion to strike class allegations in a putative breach of contract class action alleging that a software licensing company did not follow the cancellation policy in its subscription agreement. (The court had previously dismissed related fraud and misrepresentation claims.) The plaintiff sought to certify a class of subscribers who canceled their subscriptions but were nevertheless charged for a renewal. The court concluded that this was a fail-safe class because class membership turned on whether a customer's subscription was wrongfully renewed, meaning that the fact-finder would need to determine liability in order to determine class membership. The court denied the plaintiff leave to amend her class definition because she had not offered — and the court could not conceive of — any class definition that solved the fail-safe problem without creating other class-definition problems, such as including customers who had not suffered an injury. Further, the court held that the plaintiff could not satisfy the commonality and typicality requirements of Rule 23(a) because each class member's claims turned on individualized facts: namely, whether the class member timely canceled his or her subscription and whether the defendant honored that cancellation.

Decisions Denying Motions to Strike/Dismiss Class Claims

***Burns v. Toyota Motor Sales, U.S.A., Inc.*, No. 2:14-CV-02208, 2016 WL 128544 (W.D. Ark. Jan. 12, 2016).**

Chief Judge P.K. Holmes, III of the U.S. District Court for the Western District of Arkansas denied the defendant's "motion to deny class certification" in a putative class action involving unjust enrichment and deceptive trade practice claims against the defendant arising from its marketing of certain of its trucks. The defendant argued that class certification should be denied, even though class discovery had not yet been conducted, because (1) the classes were not ascertainable, (2) some members of the proposed class would lack standing, (3) the plaintiff could not maintain national classes for certain of his causes of action, (4) factual questions common to class members would not predominate over individualized factual questions, (5) mini-trials would be required to make liability and damages determinations as to each class member, and (6) class treatment was not the superior means to resolve issues presented in the case. While noting that these arguments were "well-taken," the court was not satisfied that a final determination could be made based upon the pleadings alone and therefore found it premature to make a final ruling on class certification. Rather, the court found it appropriate to allow the plaintiff to proceed with discovery to further develop the factual issues, which could lead him to alter his class definition. Accordingly, the court denied the defendant's motion without prejudice to its raising the same arguments once the plaintiff filed a motion to certify one or more classes.

***Marcoux v. Szwed*, No. 2:15-cv-93-NT, 2015 WL 7705790 (D. Me. Nov. 27, 2015), *report and recommendation adopted by* 2016 WL 74407 (D. Me. Jan. 6, 2016).**

Judge Nancy Torresen of the U.S. District Court for the District of Maine adopted the recommendation of Magistrate Judge John H. Rich III to deny a defendant's "motion to dismiss and objection to class certification" in a putative Fair Debt Collection Practices Act (FDCPA) class action. The court concluded that the objection to class certification was premature, as it was not obvious from the pleadings that the case could not move forward on a classwide basis, the plaintiff had not yet moved for class certification and the defendant had not even moved to strike class allegations.

***St. Louis Heart Center, Inc. v. Nomax, Inc.*, No. 4:15CV517 RLW, 2015 WL 9451046 (E.D. Mo. Dec. 23, 2015).**

Judge Ronnie L. White of the U.S. District Court for the Eastern District of Missouri denied the defendant's motion to strike the class allegations in a putative class action involving allegations under the Telephone Consumer Protection Act (TCPA). In his

complaint, the plaintiff alleged that the defendant violated the TCPA by transmitting certain faxes to the plaintiff and others without obtaining their prior express permission or invitation and without displaying the proper opt-out notice required by 47 C.F.R. § 64.1200(a)(4). The plaintiff sought to represent a class consisting of "[a]ll persons or entities [that] sent facsimiles by or on behalf of Defendant ... where the facsimile [was] substantially similar in form, content, or purpose" to the ones received by the plaintiff. In its motion to strike the class allegations, the defendant argued that the plaintiff's class definition would include all persons who were sent the faxes in question "regardless of invitation or permission," and that this class definition was "impermissibly over-inclusive" because "only those persons who received unsolicited advertisements without the required opt-out notice would have standing — making Plaintiff[']s class definition unascertainable under Rule 23." In addition, the defendant argued that the class definition's reference to faxes "substantially similar in form, content, or purpose" to those received by the plaintiff was overly vague and imprecise. The court refused to strike the class allegations based on their alleged overbreadth, noting that because the plaintiff had properly "pleaded a violation of the [TCPA,] he didn't need to plead the affirmative defense of consent." Rather, as the court stated, "the burden is on the defendant to plead affirmative defenses." Moreover, although the court agreed that the proposed class definition was overly vague and imprecise and a class could not be certified based on the current definition, it declined to dismiss the class allegations at this early stage, because discovery had not yet commenced and the plaintiff still had ample time to refine the class definition based on the discovery produced.

***Cholly v. Uptain Group, Inc.*, No. 15 C 5030, 2015 WL 9315557 (N.D. Ill. Dec. 22, 2015).**

Judge Robert W. Gettleman of the U.S. District Court for the Northern District of Illinois granted in part and denied in part the defendants' motion to strike the plaintiff's class allegations in a putative class action brought under the TCPA. The plaintiff's complaint alleged that at some unspecified time, she incurred a debt to Alere, a medical services provider. The plaintiff later filed a Voluntary Petition for Chapter 7 Bankruptcy, listing Alere as one of her creditors. Despite being put on notice that an automatic stay had been put in place for all collection actions against the plaintiff, Alere allegedly hired Uptain to collect the debt. The plaintiff alleged that on several occasions, Uptain called her, for nonemergency reasons, with a prerecorded or artificial voice attempting to collect the debt on Alere's behalf. Uptain's calls, according to the complaint, violated the TCPA because the plaintiff did not consent to the phone calls, or, in the alternative, because the automatic stay revoked any consent she previously had given. The plaintiff filed her complaint on behalf of herself and a putative class consisting of individuals who had received similar automated calls from the defendants and (1) had not consented to such calls, or (2) had entered Chapter 7 with an automatic stay in place. The court first dismissed the plaintiff's automatic stay revocation claim, holding that a plaintiff's consent to be contacted is not implicitly revoked merely because a bankruptcy court has put an automatic stay in place. The court therefore granted the defendants' motion to strike the class allegations pertaining to the plaintiff's proposed TCPA Bankruptcy Stay Sub-Class. With respect to the plaintiff's claim that she never gave consent to be contacted in the first place, however, the court determined that her allegations were sufficient to survive a motion to dismiss and would require discovery in order to determine whether the class allegations were sufficient to warrant class certification under Rule 23. Accordingly, the court denied the defendants' motion to strike class allegations pertaining to the plaintiff's proposed nonconsent class.

***Rysewyk v. Sears Holdings Corp.*, No. 15 CV 4519, 2015 WL 9259886 (N.D. Ill. Dec. 18, 2015).**

Judge Manish S. Shah of the U.S. District Court for the Northern District of Illinois denied the defendants' motion to strike the plaintiffs' class allegations in a putative nationwide products liability class action arising from alleged defects in lawnmowers sold and manufactured by the defendant and its affiliates. In their motion to strike, the defendants first argued that class treatment was inappropriate because the claims would be governed by the laws of 50 different states. The court rejected this argument because it found that the defendants had failed to explain in detail how the laws in different states differed in material ways. Because the defendants bore the burden of persuasion with respect to their motion to strike, the court determined that it could not strike the class allegations on this basis. In addition, although the court credited the defendants' argument that the complaint improperly set forth a fail-safe class, it found that this, alone, was not grounds for striking the class allegations. Instead, the court viewed the proposed fail-safe class primarily as a placeholder intended to give notice of the type of class the plaintiffs eventually would seek to certify, rather than a final class definition.

Decisions Rejecting/Denying Class Certification

***Gannon v. Network Telephone Services, Inc.*, No. 13-56813, 2016 WL 145811 (9th Cir. Jan. 12, 2016).**

A unanimous panel of the U.S. Court of Appeals for the Ninth Circuit (Pregerson, Callahan and Hurwitz, JJ.) affirmed the district court's denial of class certification of a class seeking damages under the TCPA arising from allegedly unauthorized

text messages. While the central issue in the case was whether the text messages were unauthorized, the court observed that the proposed class included, *inter alia*, text recipients who called the defendant's information number but hung up before hearing the message that informed the caller that the defendant would send future text messages, or who heard the message but did not follow its instructions on how to opt out of receiving the texts. Because "the district court would be required to determine whether under each of these different factual scenarios — and undoubtedly others — the caller agreed to receive text messages," the lower court did not abuse its discretion by finding Rule 23(b)(3) was not satisfied. The court also found that the lower court did not abuse its discretion in finding the class was not readily ascertainable, due to the extreme difficulty in determining which individuals had not consented to receive the messages.

***Soseeah v. Sentry Insurance*, 808 F.3d 800 (10th Cir. 2015).**

A unanimous panel of the U.S. Court of Appeals for the Tenth Circuit (Briscoe, McKay and McHugh, JJ.) reversed and remanded certification of a class of insureds alleging bad faith and breach of contract claims, and violations of New Mexico's Unfair Practices Act (UPA) for the defendant insurers' alleged failure to notify them of recent New Mexico Supreme Court cases concerning the technical requirements for valid offers and rejections of uninsured and underinsured motorist coverage. The plaintiffs sought class certification for all insureds with policies issued by the defendants in which such coverage was purportedly rejected. The court focused on Rule 23(a)'s commonality requirement and agreed with the defendants' argument that purported lack of notice of the change in the law was "not a common injury or, indeed, any injury at all" because it was undisputed that few, if any, of the class members had a viable claim for uninsured motorist benefits. Thus, the UPA and New Mexico contract and tort law did not impose any duty on the defendants to notify policyholders of the impact of the New Mexico Supreme Court rulings. However, because the district court's certification ruling did not expressly address the Rule 23 factors as they applied to each of the plaintiffs' proposed subclasses, the Tenth Circuit remanded and instructed the district court to address those issues.

***Banarji v. Wilshire Consumer Capital, LLC*, No. 14-cv-2967-BEN (KSC), 2016 WL 595323 (S.D. Cal. Feb. 12, 2016), *appeal pending*.**

Judge Roger T. Benitez of the U.S. District Court for the Southern District of California granted the defendant's motion to deny certification of a class brought by an individual whose father provided her phone number as his own on his loan application, after which the defendant repeatedly called her about the debt, purportedly in violation of the TCPA. Judge Benitez denied the defendant's motion to strike the plaintiff as a class representative as untimely under Federal Rule of Civil Procedure 12(f), because the defendant had already answered the complaint. However, the court found that sufficient discovery had been conducted to consider the defendant's motion to deny class certification on typicality grounds because the plaintiff and her father had been deposed. The court held that while the plaintiff's annoyance with the unwanted robocalls might be shared by the proposed class, the plaintiff's situation was unique because her father had provided her number to the defendant and, in doing so, may have provided express consent as a matter of law as a nonsubscriber customary user of the number. Thus, typicality was not satisfied because "the majority of the proposed class may suffer as Plaintiff will be engrossed with disputing [the defendant]'s arguments regarding Plaintiff's individual case."

***Elite Logistics Corp. v. MOL America, Inc.*, No. CV 11-02952 DDP (PLAx), 2016 WL 409650 (C.D. Cal. Feb. 2, 2016).**

Judge Dean D. Pregerson of the U.S. District Court for the Central District of California refused to certify a class of independent truckers asserting claims for breach of contract and violations of California Business and Professions Code § 2298 because they were charged late fees for unreturned shipping containers on weekends and holidays when the ports were closed. Typicality, adequacy and predominance problems precluded certification due to the availability of a "pass-on" defense, which eliminates liability where a plaintiff passes on an overcharge to a subsequent purchaser and thus suffers no injury. The defendant introduced evidence that, when charged late fees, the plaintiff invoiced and received substantially more than the fees it paid from the cargo owners themselves. The court concluded that, while the plaintiff was harmed when it was charged illegal fees, the plaintiff's argument that it was forced to charge its customers more as a result was "vitiated" by the profit the plaintiff received. The court rejected the plaintiff's argument that because cargo owners lacked standing since only truckers were charged the fees, the pass-on defense would preclude recovery for illegal late fees: "[o]nly those parties who were made whole, or who, like the plaintiff, actually profited from the imposition of fees, will face such an obstacle." Finally, the court noted that the plaintiff's interactions with its customers and the defendant made its claims, and the defendant's defenses to them, such as unclean hands, atypical.

***Dykes v. Portfolio Recovery Associates, LLC*, No. 1:15cv110 (JCC/MSN), 2016 WL 346959 (E.D. Va. Jan. 28, 2016).**

Judge James C. Cacheris of the U.S. District Court for the Eastern District of Virginia denied the plaintiff's motion for class certification and appointment of class counsel. The plaintiff claimed that the defendant violated the FDCPA by sending her

debt collection notices in Spanish rather than English, when the plaintiff never indicated she preferred to receive correspondence in Spanish and does not speak or understand Spanish. The plaintiff sought certification of a class of Virginia consumers who were sent debt collection letters in Spanish by the defendant in a form materially identical or substantially similar to the letters sent to the plaintiff. The court found that the class described by the plaintiff was both incorrectly defined and lacked commonality. The class was incorrectly defined because it was not limited to individuals who received a Spanish-language letter without first indicating that they primarily spoke Spanish or wanted to receive correspondence in Spanish. Similarly, the proposed class lacked commonality because only those class members who received the Spanish-language letters without first indicating that they primarily spoke Spanish or wished to receive communications in Spanish would potentially have a claim for violation of the FDCPA. Because the validity of the FDCPA claim turned not on receipt of the letter but on the "individual circumstances of each class member," the court denied the plaintiff's motion to certify her class on the basis of commonality as well. The court additionally found that even if the class had been properly defined, it would be fatally deficient with respect to ascertainability and numerosity. Ascertainability was not met because the plaintiff did not demonstrate a reliable or administratively feasible mechanism for determining which of the 3,330 Spanish-language letter recipients received a letter without a prior indication that they primarily spoke Spanish or wished to receive their correspondence in Spanish. Numerosity was not met because the court could not ascertain how many of those 3,330 letter recipients would be part of the class.

***Food Lion, LLC v. Dean Foods Co.*, No. 2:07-CV-188, 2016 WL 310432 (E.D. Tenn. Jan. 25, 2016).**

Judge J. Ronnie Greer of the U.S. District Court for the Eastern District of Tennessee declined to certify a class in a putative antitrust class action brought by retail sellers of milk against milk processing companies. The court found that predominance was not satisfied because the plaintiffs did not demonstrate that the amount of damages incurred by each class member could be proven by common evidence. Specifically, the court rejected the damages model presented by the plaintiffs' expert, which estimated average overcharges by zip code, because the model assumed that class members within 200 miles of specific processing plants incur the same overcharges. The court further noted that some retailers, including one of the named plaintiffs, at times were charged prices set by individually negotiated formulas based on cost figures and set profit margins, and whether purchases based on such agreements were affected by the price fixing conspiracy was an individualized issue that defeated predominance. The court held that typicality was not met for the same reasons that predominance was not satisfied. Although it declined to rule on the issue of adequacy, the court noted that it had concerns about the named plaintiffs' adequacy as class representatives because of the idiosyncratic nature of their claims: One purchased minimal amounts of milk from the defendants and had since sold his business, and one was a high-volume purchaser who had negotiated favorable price terms with the defendants, which raised the possibility that that purchaser had not been harmed by the alleged price-fixing scheme.

***Cox v. Sherman Capital LLC*, No. 1:12-cv-01654-TWP-MJD, 2016 WL 274877 (S.D. Ind. Jan. 22, 2016).**

Judge Tanya Walton Pratt of the U.S. District Court for the Southern District of Indiana denied a motion for class certification in a putative class action brought against the defendant and four of its subsidiaries for violations of the FDCPA, the Racketeer Influenced and Corrupt Organizations Act, fraud and constructive fraud, restitution and unjust enrichment. Each of the named plaintiffs had in common an unpaid consumer debt that was "written off" by the originating creditor after a period of 180 days of nonpayment. Thereafter, each plaintiff was the subject of collection activities by the defendants and their agents, and each plaintiff's purported "indebtedness" was repeatedly reported to the major credit reporting agencies by the defendants and their agents. The plaintiffs, however, contended that, for a variety of legal reasons, the defendants did not actually own their debts and therefore could not legally engage in collection activities. In ruling on the plaintiffs' motion for class certification, the court first noted that the proposed subclasses could not be certified because they all were fail-safe classes that included the language of the relevant claims in their definitions. Although this, alone, was sufficient reason to deny certification, the court further found that the named plaintiffs likely could not satisfy the typicality and adequacy requirements of Rule 23 due to their difficulties in determining and/or proving that their own debts had been securitized, a fact that was essential to their claims.

***Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, No. 3:13 CV 2085, 2016 WL 75535 (N.D. Ohio Jan. 7, 2016), *23(f) pet. pending*.**

Judge Jack Zouhary of the U.S. District Court for the Northern District of Ohio declined to certify a class of recipients of a fax advertisement in a putative TCPA class action. The court held that the plaintiff could not demonstrate ascertainability, manageability or commonality because, although the identity of intended fax recipients could be determined from the defendant's records, only those recipients who were successfully sent the fax were proper claimants under the TCPA, and those recipients could not be identified because the defendant only retained such records for up

to 18 months at a time. (The claims at issue related to a fax sent about three years before the lawsuit was filed.) The court rejected the suggestion that affidavits could be used to identify class members, concluding that any recollection that a class member had received a particular unsolicited fax some years ago would be suspect. The court further noted that the available records did not show the intended fax recipient and that a particular fax number could be associated with multiple physicians or entities, further complicating ascertainability. (In fact, the defendant argued that the named plaintiff itself was not the intended recipient of the fax it received; rather, the intended recipient was a physician who worked at that facility.) Finally, the court determined that individualized inquiries into whether each class member consented to receive the fax precluded class certification, as the plaintiff had not provided any viable theory of generalized proof to identify those recipients to whom the defendant would be liable.

***Esquivel v. Bank of America, N.A.*, No. 2:12-cv-02502-GEB-KJN, 2016 WL 80937 (E.D. Cal. Jan. 7, 2016).**

Judge Garland E. Burrell, Jr. of the U.S. District Court for the Eastern District of California refused to certify a class of California residential mortgage holders pursuing California state law claims under the Consumer Credit Reporting Agencies Act, the Rosenthal Fair Debt Collection Practices Act and the Unfair Competition Law (UCL), arising from purported delays in implementation of their loan modification agreements. The defendants argued that individualized issues predominated in light of differences in both the amount of time it took to implement the mortgage holder's modifications and the loan modification agreements themselves, including material terms that appeared in some, but not all, of the agreements and numerous additional conditions determining whether a valid modification agreement existed. Judge Burrell concluded that the plaintiffs could not satisfy Rule 23(b)(3)'s predominance requirement because the court would have to conduct separate evidentiary hearings to determine whether each loan modification contract's conditions were satisfied. Further, the plaintiffs did not demonstrate that damages could be measured on a classwide basis. As a result, the court did not analyze the threshold requirements of Rule 23(a) or superiority under Rule 23(b)(3).

***Gagnon v. Merit Energy Co.*, No. 14-cv-832-WJM-KLM, 2015 WL 9489609 (D. Colo. Dec. 30, 2015).**

The plaintiffs sought to certify a class of royalty owners with interests in gas-producing wells in Colorado and Oklahoma, alleging that the class was entitled under leases and contracts to be paid the gross value of the gas but was paid only the net value — *i.e.*, the gross value less the costs incurred in conditioning the gas after extraction from a well. Judge William J. Martínez of the U.S. District Court for the District of Colorado held that Rule 23(a)'s commonality requirement was not satisfied, precluding certification. Specifically, the court reviewed the various royalty clauses in the potential class members' leases and concluded that they did not uniformly entitle class members to royalties based on gross value. Some expressly provided for such royalties, but others did not; and as to those that did not, the applicable state laws produced varying results depending on a range of issues, precluding commonality. As part of its analysis, the court also rejected the plaintiffs' effort to define the problem of variation out of the class definition by excluding certain types of leases and wells from its scope because the court concluded that these exclusions did not resolve the individualized issues. Finally, Judge Martínez refused to "salvage" the class by exercising his discretion to modify the class definition to include only individuals who more clearly shared common questions of law or fact due to "the multitude of modifications that would be required."

***Lee v. Pep Boys-Manny Moe & Jack of California*, No. 12-cv-05064-JSC, 2015 WL 9480475 (N.D. Cal. Dec. 23, 2015).**

Magistrate Judge Jacqueline Scott Corley of the U.S. District Court for the Northern District of California denied the plaintiff's motion to certify a nationwide class of individuals who received settlement demand letters, allegedly in violation of the FDCPA and UCL. The suit arose from the attempted collection of monies on behalf of Pep Boys incurred as a result of the plaintiff's alleged misuse of his employee discount and for changing the oil on his car while at work. The court denied certification of the FDCPA claims on ascertainability grounds, explaining that there was no straightforward way to determine which putative class members received letters pertaining to a consensual consumer transaction — a threshold requirement for application of the FDCPA. Discovery on the plaintiff's own claim highlighted this problem, as it remained disputed whether the conduct at issue in his letter was a consensual transaction. For similar reasons, the court also concluded that the plaintiff's claims were not typical of the class because the factual dispute about the consensual nature of his own transaction made him subject to unique defenses. The court also concluded that the plaintiff would not be an adequate representative because he was "strikingly unfamiliar" with the facts of his own case. The court then explained that the plaintiff failed to satisfy either Rule 23(b)(2) or Rule 23(b)(3). As to Rule 23(b)(2), the plaintiff did not show a likelihood of receiving another letter from the defendant and sought relief exclusively for past conduct, making injunctive and declaratory relief inappropriate. And the court concluded that predominance was not satisfied under Rule 23(b)(3) based on the ascertainability and typicality problems it previously identified. For essentially the same reasons, the court denied class treatment of the plaintiff's UCL claims as well, but as an additional ground it noted that the plaintiff had not paid the

defendant anything and thus could not seek restitution under the UCL, underscoring his failure to establish typicality.

***In re Mortgage Electronic Registration Systems (Mers) Litigation*, No. MDL 09-2119-PHX-JAT, 2015 WL 9268189 (D. Ariz. Dec. 21, 2015), *23(f) pet. denied*.**

Judge James A. Teilborg Sr. of the U.S. District Court for the District of Arizona denied certification of two purported classes pursuing a statutory damages claim on behalf of Arizona property owners from the defendants' alleged violation of Arizona's Groundless Lien Statute (A.R.S. § 33-420) while conducting foreclosure proceedings. The plaintiffs moved for certification after the U.S. Court of Appeals for the Ninth Circuit had affirmed the dismissal of all the claims except for the plaintiffs' claims of robosigning and forgery under A.R.S. § 33-420. Judge Teilborg determined that the proposed classes were not ascertainable because there was no reasonable way to locate the purported fraudulent documents relevant to the plaintiffs' allegations. In any event, the court concluded, any documents obtained from public records or the defendants would require examination of each individual document to determine which documents were forged or robosigned, a task that would entail individual analysis of hundreds of thousands of documents.

***Torres v. Rhoades*, No. 15-cv-288-bbc, 2015 WL 9304584 (W.D. Wis. Dec. 21, 2015).**

Judge Barbara B. Crabb of the U.S. District Court for the Western District of Wisconsin denied without prejudice the plaintiffs' motion for class certification in an action challenging the constitutionality of a Wisconsin statute that requires the nonbirth parent of a same-sex couple to legally adopt his or her child before his or her name is placed on the child's birth certificate. Judge Crabb held that while the claims undoubtedly were appropriate for class certification, the named plaintiffs were not adequate class representatives because of the differences between their circumstances and the circumstances of other proposed class members. In their complaint, the plaintiffs sought to represent a class consisting of "[a]ll same-sex couples who legally married in Wisconsin or in another jurisdiction, at least one member of whom gave birth to a child or children in Wisconsin ... and who request birth certificates for such children listing both spouses as parents, regardless of whether they have already received birth certificates listing only one spouse as a parent ... ; and all children born to such couples on or after" the date on which Wisconsin's same-sex marriage ban was ruled unconstitutional. The court found that although the plaintiffs could meet all the requirements of Rule 23, subclasses were needed because "the different ways in which putative class members conceived their children" would make "a unitary resolution" of the plaintiffs' claim "unworkable" due to various nuances in Wisconsin laws regarding parents who conceive through artificial insemination. In addition, because the named plaintiffs would only be members of one of the subclasses, the court found that they could not adequately represent the interests of the other subclasses. Accordingly, the court determined that the "adequacy" requirement of Rule 23 was not satisfied at this time, and that before proceeding with their request for class certification, the plaintiffs would need to amend their complaint to create subclasses and to name class representatives for each proposed subclass.

***Haley v. Kolbe & Kolbe Millwork Co.*, No. 14-cv-99-bbc, 2015 WL 9255571 (W.D. Wis. Dec. 18, 2015).**

Judge Barbara B. Crabb of the U.S. District Court for the Western District of Wisconsin denied the plaintiffs' motion for class certification in a putative product liability class action arising from alleged defects in windows manufactured and installed by the defendant. The plaintiffs moved to certify four national subclasses under Fed. R. Civ. P. 23(b)(3) for monetary damages on behalf of consumers with windows that have exhibited rot and a similar Rule 23(b)(2) class seeking declaratory and injunctive relief on behalf of consumers with windows that have not yet manifested the alleged defects. The court first held that the proposed class definitions were unmanageable, as they "span[ned] 18 years and all 50 states and include[d] multiple claims involving several types of windows with varying design defects." Next, the court found that, with respect to the proposed Rule 23(b)(3) class, individual questions relating to choice of law, notice of breach, privity, accrual, tolling, equitable estoppel, warranty conditions, causation and damage all would predominate over any common questions of fact and law. As to causation, in particular, the court acknowledged the plaintiffs' argument that expert testimony could prove that the alleged defects could cause rot on a class-wide basis, but it made clear that proving the actual cause of rot in each of the class members' windows required individual analysis and proof. The proposed Rule 23(b)(2) class faced similar problems because individual inquiries regarding the defendant's actions and refusals to act, which would be necessary to determine whether the class was entitled to the requested declaratory and injunctive relief, would make the class unmanageable as proposed. In addition, the plaintiffs had failed to demonstrate that a single declaratory judgment or injunction would provide final relief to each member of the class. Although the court acknowledged that these issues could have been remedied by seeking certification only on certain issues of liability, it noted that the plaintiffs had not requested such relief. Accordingly, the court granted the plaintiffs an opportunity to file a renewed request for certification of a limited issue class or classes that addresses the predominance concerns outlined in its opinion.

***In re Dial Complete Marketing & Sales Practices Litigation*, 312 F.R.D. 36 (D.N.H. 2015).**

Judge Steven J. McAuliffe of the U.S. District Court for the District of New Hampshire denied, without prejudice, an attempt to certify consumer classes alleging consumer fraud, breach of warranty, unjust enrichment and various other claims under the laws of eight different states based on the assertion that the defendant misrepresented the antibacterial properties of its soaps. In its decision, however, the court rejected a number of the defendant's arguments as to why the class could not go forward. As an initial matter, the court rejected the argument that the proposed classes were not ascertainable because there was no reliable way to determine who purchased the soap at issue given that consumers are unlikely to have kept receipts for such a low-value item. According to the court, the U.S. Court of Appeals for the First Circuit has indicated that "testimonial affidavits and declarations" are an acceptable method for proving class membership. For similar reasons, the court rejected the defendant's argument that the named plaintiffs were neither typical of nor could adequately represent the proposed class because they failed to keep their receipts. As the court explained, receipts were unnecessary to establish class membership and, in any event, the defendant's ascertainability argument was premised on the assertion that few class members would have saved their receipts, so the defense was not unique to the named plaintiffs. The court did, however, find that three of the proposed class representatives were inadequate: one because he did not recall ever purchasing the product, one because he did not appear for deposition and one because she had filed for bankruptcy after the complaint was filed, and therefore her claims were the property of the bankruptcy estate. After performing a detailed analysis of the elements of the various claims alleged under each state's law, the court ultimately concluded that a number of the plaintiffs' claims could not be proven on a classwide basis because they would require individualized proof of causation, reliance or privity. With respect to the remaining claims, the court determined that certification was inappropriate because the plaintiffs had not provided a sufficient methodology for calculating classwide damages. Specifically, the plaintiffs' experts had failed to provide sufficient detail regarding the basis for their conclusions about the value of the product and failed to identify a reasonable comparator product by which to judge the value of the product absent the allegedly misleading marketing claims. Accordingly, the court denied the motion for class certification with respect to those claims that turned on individualized proof but gave the plaintiffs permission to file an amended motion for class certification of the remaining claims that remedied the deficiencies in their damages model.

***Miller v. Fuhu Inc.*, No. 2:14-cv-06119-CAS-AS, 2015 WL 7776794 (C.D. Cal. Dec. 1, 2015).**

Judge Christina A. Snyder of the U.S. District Court for the Central District of California denied the plaintiff's motion to certify a nationwide class of consumers alleging violations of California consumer protection laws and warranty claims based on their purchase of electronic tablets for children. The plaintiff alleged that contrary to the manufacturer's representations, the tablets had defective power adapters and failed to function while charging. The court found that the class was identifiable and ascertainable because members could be identified by objective criteria, such as the date and place of purchase, and type of purchase. The court also held that common questions of law existed, including whether a reasonable consumer was likely to be deceived by the manufacturer's marketing materials. In response to the defendants' argument that common questions as to the alleged design defect did not exist because it sold tablets during the class period with two different charging designs, the court held that the proposed class could be divided into two subclasses representing each design. Although the plaintiff cleared the commonality requirement, his proposed class failed the predominance inquiry because the plaintiff failed to present an appropriate method for calculating classwide damages. The court denied the motion without prejudice to the plaintiff providing more details regarding his proposed survey to assess damages on a classwide basis.

***Moore v. Apple Inc.*, No. 14-CV-02269-LHK, 2015 WL 7351464 (N.D. Cal. Nov. 20, 2015).**

The plaintiffs sought reconsideration of an order denying certification of a nationwide class of former iPhone users alleging that Apple's iMessage system disrupted the receipt of text messages when the class members switched to non-Apple cellphones (discussed in the Fall 2015 *Class Action Chronicle*). The plaintiffs argued that Judge Lucy H. Koh of the U.S. District Court for the Northern District of California should have certified a narrower class instead of denying the class certification motion for overbreadth and incorrectly applied a "but for" standard in assessing whether Apple's conduct caused the plaintiffs injury for purposes of certifying their tortious interference with contract claims. The court conceded that it erred and should have applied the "substantial factor" causation standard. However, it ultimately held that individualized issues would nevertheless predominate given the "material variations in the proposed class members' wireless service agreements" and whether those contractual rights were breached. The court also noted that narrowing the proposed class to members with unlimited text messaging contracts still presented individualized issues because of differences in the individual services and cell providers, precluding certification of the narrower class.

Decisions Permitting/Granting Class Certification

***McMahon v. LVNV Funding, LLC*, 807 F.3d 872 (7th Cir. 2015).**

The U.S. Court of Appeals for the Seventh Circuit (Wood, C.J., Flaum and Sykes, JJ.) reversed and remanded the district court's denial of class certification in a case brought under the FDCPA, holding that individual issues of causation did not automatically bar certification under Rule 23(b)(3). The district court had denied certification based on its conclusion that even if "the amount of damages due each class member is capable of ministerial determination, causation, *i.e.*, determining whether class members paid the debt because of the letter, out of moral compulsion, or for some other reason, is not." Accordingly, the district court found certification under Rule 23(b)(3) inappropriate. The Seventh Circuit rejected the district court's logic for several reasons. As a general matter, it noted that "[i]t is well established that, if a case requires determinations of individual issues of causation and damages, a court may bifurcate the case into a liability phase and a damages phase." Moreover, the court held that there was "yet another reason why proof of causation [was] irrelevant to determining class membership": The FDCPA is a strict-liability statute, and members of the class would therefore be entitled to statutory damages for a violation of the FDCPA regardless of whether they could prove causation.

***Steele v. United States*, No. 14-1523 (RCL), 2016 WL 525997 (D.D.C. Feb. 9, 2016).**

Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia granted in part and denied in part the plaintiffs' motion for class certification in a putative class action regarding the Department of the Treasury and Internal Revenue Service's (IRS) requirement that compensated tax return preparers both obtain and pay for a preparer tax identification number (PTIN). The plaintiffs, who sought to bring a class on behalf of all individuals and entities who paid fees for a PTIN, challenged the fee, arguing that because the IRS does not confer a "service or thing of value," it is not statutorily authorized to impose a fee for a PTIN. Additionally, the plaintiffs sought restitution or return of the PTIN fees. The court certified the class under Rule 23(b)(2) with respect to the requested declaratory relief for both claims — that the IRA wholly lacked the authority to impose a fee for a PTIN, and that even if the IRS could impose a fee, the fee is excessive and therefore partially invalid. The court rejected the defendant's argument that because the class contained certified public accountants, attorneys, tax specialists and uncertified tax preparers, the interests of class members diverged. The court determined the issue was not how the IRS' actions affected the plaintiffs but the measure of fees itself. Because the same fee was charged to all members of the class, the court found the defendant's actions were generally applicable. The court denied, subject to reconsideration, the plaintiffs' motion to certify the class with respect to their request for restitution because the plaintiffs had not yet demonstrated that the court had subject matter jurisdiction over that aspect of the case. The United States had raised sovereign immunity as an affirmative defense to the plaintiffs' restitution claim, and the court requested that the parties fully brief the issue of subject matter jurisdiction.

***Powers v. Credit Management Services, Inc.*, No. 8:11CV436, 2016 WL 409996 (D. Neb. Feb. 2, 2016), *23(f) pet. denied*.**

Judge Joseph F. Bataillon of the U.S. District Court for the District of Nebraska granted a motion for class certification in a putative class action involving allegations under the FDCPA and the Nebraska Consumer Protection Act (NCPA). The plaintiff alleged that the defendant filed standardized collection complaints that were misleading in that they included amounts for recovery of prejudgment interest and attorneys' fees that are not authorized under Nebraska law and included misrepresentations concerning presenting a demand for payment. The court previously had certified a class comprised of debtors who had received standardized collection complaints and standardized discovery materials from the defendant. On interlocutory appeal, the U.S. Court of Appeals for the Eighth Circuit reversed that ruling, having found that the classes, as certified, did "not meet the commonality, predominance, and superiority requirements of Rule 23." The Eighth Circuit further stated that the classes, as certified, would require individualized assessments of the purported class members' state court collection actions. On remand, the plaintiffs sought certification of two classes, with subclasses created for the statute of limitations periods of one year under the FDCPA and four years under the NCPA. The court found that the common contention among the class members was that complaints filed by the defendant were false or misleading in several particulars, including that the complaints sought interest and attorneys' fees that were not allowed by law and misrepresented the nature of the debt so as to obtain those additional amounts. As the court stated, "[t]he misleading nature of the form complaints is pivotal to the lawsuit and capable of determination in one stroke." Although the case would present individualized damages inquiries that would turn on "the return of the money extracted from" class members as a result of unauthorized prejudgment interest or attorneys' fees paid or as a result of artificially inflated settlements, the court concluded that these individualized damages issues would not predominate over common questions. Accordingly, the court granted the plaintiffs' motion for class certification.

***Fosnight v. Convergent Outsourcing, Inc.*, No. 1:15-cv-00606-LJM-DML, 2016 WL 317678 (S.D. Ind. Jan. 27, 2016).**

Judge Larry J. McKinney of the U.S. District Court for the Southern District of Indiana granted a motion for class certification in a putative class action involving claims under the FDCPA. The plaintiff alleged that the defendants sent him a form collection letter that failed to provide him with an effective validation notice, and he sought to represent a class consisting of all Indiana residents from whom the defendants "attempted to collect a delinquent consumer debt allegedly owed for an Apsire credit card account, via the same form collection letter that Defendants sent to Plaintiff." The defendants primarily argued that individual issues of fact would preclude a conclusion that the class was identifiable. The court rejected that argument, noting that the plaintiff had relied upon the defendants' own contact records to evidence that at least multiple people in Indiana had received the subject letter as the first written communication about the alleged debt. The court further rejected the defendants' arguments that individual answers to multiple factual issues, such as whether or not each class member received the letter and whether or not the letter was in fact the initial communication with the consumer, would defeat the plaintiff's argument that common questions drive the litigation. At this early stage in the litigation, the court refused to speculate as to whether any putative class member was contacted by the defendants by phone and given all of the required information. Finally, the court found the predominance requirement of Rule 23(b)(3) satisfied, noting that "[i]n the context of Plaintiff's FDCPA claim, the key issue in the case — whether or not the letter violates the FDCPA — is identical as to each putative plaintiff." The court thus certified the proposed class.

***Bell v. Dart*, No. 14 C 8059, 2016 WL 337144 (N.D. Ill. Jan. 26, 2016).**

Chief Judge Rubén Castillo of the U.S. District Court for the Northern District of Illinois granted class certification in a putative class action in which the plaintiffs alleged that Cook County and its sheriff had violated their Fourth Amendment rights and the Fourth Amendment rights of other similarly situated women by continuing to detain them after a court had ordered their release. The court found that while the proposed class was "too broad" because it included both detainees who had been fully acquitted and those who were ordered released subject to probation, that issue could be modified by limiting the class sua sponte. Further, the court rejected the defendants' argument that the proposed class was not ascertainable because determining class membership would require an individualized inquiry as to whether each detainee was offered the choice of where to wait for release. According to the court, a detainee could be part of the class regardless of whether she was given such a choice. Finally, the court rejected the defendants' contention that individualized issues would predominate because each detainee had different experiences and each was detained in different ways for different periods of time after being ordered released. As the court explained, the plaintiffs' claims were based on the allegation that the defendants maintained an unfair policy or practice of treating individuals who were entitled to immediate release in the same manner as regular inmates. Although individual inquiries regarding the detainees' experiences may serve as evidence in determining whether such a policy existed, that did "not transform the common question itself into a collection of individual ones." Accordingly, the court granted the motion for class certification.

***Planned Parenthood Arkansas & Eastern Oklahoma v. Selig*, No. 4:15-cv-00566-KGB, 2016 WL 309795 (E.D. Ark. Jan. 25, 2016), *23(f) pet. denied*.**

Judge Kristine G. Baker of the U.S. District Court for the Eastern District of Arkansas granted class certification in a putative class action brought by two anonymous individuals and Planned Parenthood Arkansas & Eastern Oklahoma (Planned Parenthood) against the Arkansas Department of Human Services (ADHS). The complaint alleged that ADHS wrongfully suspended Medicaid payments for nonabortion services provided at Planned Parenthood because of Planned Parenthood's association with abortion. The plaintiffs sought to represent a class consisting of "[all] patients who seek to obtain, or desire to obtain, health care services in Arkansas at [Planned Parenthood] through the Medicaid program." The court found that the plaintiffs' claims turned on the common question of whether ADHS could properly terminate Planned Parenthood as a qualified Medicaid provider without violating the "free choice of provider requirement" in the Medicaid statute. The court further found that the requirements of Rule 23(b)(2) had been satisfied because ADHS had acted on grounds that generally applied to the class as a whole when it terminated Planned Parenthood from the Medicaid program, and that injunctive relief would be appropriate as to the class as a whole if relief were granted. Accordingly, the court granted the plaintiffs' motion for class certification.

***Ryan v. Burwell*, No. 5:14-cv-00269, 2016 WL 158527 (D. Vt. Jan. 13, 2016).**

Judge Geoffrey W. Crawford of the U.S. District Court for the District of Vermont granted the plaintiffs' motion to certify a regional class under Rule 23 in an action alleging that the secretary of Health and Human Services systematically failed to follow her own regulations in appeals of Medicare coverage. The proposed class consisted of all Medicare beneficiaries in the New England states who received coverage for home health

services pursuant to favorable administrative decisions and were subsequently denied, or will be denied, coverage for additional services on the basis of not being considered homebound. In disputing certification of the class, the defendant's core argument was that the plaintiffs could not meet the commonality and typicality requirements of Rule 23(a). However, the court agreed with the plaintiffs that they satisfied commonality because they were challenging the process used to review claims following Medicare administrative decisions rather than the outcome of any particular case. Additionally, the court found that typicality was satisfied because the plaintiffs' claims were capable of a classwide resolution; according to the court, the secretary could be ordered to adhere to proper procedure in reviewing beneficiaries' claims. Thus, the court certified the proposed class.

***Thomas v. FTS USA, LLC,* No. 3:13-cv-825, 2016 WL 94136 (E.D. Va. Jan. 7, 2016).**

Judge Robert E. Payne of the U.S. District Court for the Eastern District of Virginia granted in part and denied in part the plaintiff's motion for class certification in a putative class action involving alleged violations of the FCRA. According to the plaintiff's complaint, the plaintiff applied for an employment position with the defendants, and the defendants ordered a background check on the plaintiff. After receiving the results of the background check, the defendants informed the plaintiff that he was ineligible for the position for which he had applied. The plaintiff never received a copy of the background check prior to the time at which he was told he was ineligible, and he was never provided with a summary of his rights under the FCRA. The plaintiff sought to certify two classes: (1) an "impermissible use class" comprised of individuals who applied for employment with the defendants and as part of that application process were the subject of a consumer report for which the defendants failed to provide the individual with disclosure or authorization, and (2) an "adverse action subclass" comprised of individuals whom the defendants found ineligible for employment based on the consumer report. The court granted certification, with the caveats that the subclass be comprised of individuals for whom the defendants made "adverse" employment decisions (as opposed to all employment decisions), and that the class period be limited to individuals who applied for employment with the defendants within the two years immediately preceding the filing of the complaint. The court found that the case presented common questions of fact and law for purposes of Rule 23, including whether the defendants' standard employment release statement form violated the FCRA. In addition, the court noted that the defendants' practices with respect to the adverse action subclass were uniform and that the commonality requirement was therefore satisfied. The defendants argued that Rule 23's adequacy requirement was not met because the plaintiff chose to forgo actual damages on behalf of the class and instead only sought statutory and punitive damages. The court rejected the defendants' argument, finding that the fact that a plaintiff chose to seek actual damages on his own behalf in another court or lawsuit did not create a conflict of interest or defeat class certification.

Johnson v. Yahoo!, Inc.*, No. 14 CV 2028, 2016 WL 25711 (N.D. Ill. Jan. 4, 2016), 23(f) *pet. denied.

In this putative class action against Yahoo!, Inc., the plaintiffs alleged that Yahoo violated the TCPA by sending an unsolicited text message to the plaintiffs and other consumers explaining why they had received a personalized text message sent by a nonparty. Judge Manish S. Shah of the U.S. District Court for the Northern District of Illinois granted in part and denied in part the plaintiffs' motion for class certification, holding that only one of the two named plaintiffs had claims that were typical of, and could adequately represent, other putative class members, but that the proposed class otherwise satisfied all of Rule 23's requirements. Turning first to questions of adequacy and typicality, the court noted that one of the named plaintiffs had provided her consent to receive the text messages at issue when she had agreed to Yahoo's universal terms and conditions. Because that plaintiff's consent would act as a defense to her TCPA claim, the court agreed with the defendants that she could not serve as a class representative. The other plaintiff, however, alleged that she herself had never agreed to Yahoo's terms and conditions, and Yahoo failed to put forth any evidence that any consent she had provided to an intermediary had been communicated to Yahoo itself. Accordingly, the court found that the second plaintiff was an adequate class representative and had claims that were typical of other class members. The court further concluded that while in some TCPA cases, individualized questions on the issue of consent could predominate over classwide questions, a defendant challenging a TCPA class on these grounds first must put forth specific evidence to show that a significant percentage of the putative class consented to receiving the communications at issue. Because Yahoo failed to put forth any such evidence in the case, the court found that the predominance requirement was satisfied.

***Eggen v. WESTconsin Credit Union*, No. 14-cv-873-bbc, 2015 WL 9581869 (W.D. Wis. Dec. 30, 2015), *superseded by* 2016 WL 797614 (W.D. Wis. Feb. 26, 2016).**

Judge Barbara B. Crabb of the U.S. District Court for the Western District of Wisconsin granted the plaintiffs' unopposed motion for class certification of a putative class action involving claims brought under the federal Driver's Privacy Protection Act (DPPA). In their complaint, the plaintiffs contended that the defendant violated the DPPA and the common law of nuisance by disclosing the plaintiffs' unredacted driver's license numbers

in complaints filed in delinquency actions in small claims court. The plaintiffs sought to represent a class consisting of "[a]ll individuals whose [driver's license numbers] Defendant WESTconsin disclosed in a Wisconsin circuit court filing." In the absence of any objection by the defendant, the court found it reasonable to conclude that the class would be sufficiently numerous, that common questions would predominate over individualized inquiries in determining liability and that a class action would be superior to other forms of adjudication. The court, however, noted two specific concerns that it had with the class definition as proposed. First, it noted that the plaintiffs did not put any time limitations on the proposed class, even though the court previously had ruled that the plaintiffs' DPPA claims had a four-year statute of limitations. In addition, the plaintiffs had not limited their proposed class to individuals who had been sued to recover unpaid loan balances, even though that was the only type of lawsuit discussed in the complaint. Accordingly, the court directed the parties to show cause why the court should not narrow the class definition with respect to time and the type of underlying lawsuit involved. After extensive briefing by the parties, the court reaffirmed its prior ruling granting class certification, rejecting various arguments by the defendant, including that none of the absent class members were injured. According to the court, such an argument implicated subject matter jurisdiction, not the merits of class certification. The court also rejected the defendant's argument that the plaintiffs' claims were not typical of those of the absent class members even though the defendant may have obtained the driver's license information in different ways. And finally, the court found that class counsel was adequate despite having been disciplined by the bar in the past because he had not had any "incidents for several years."

***Karim v. Hewlett-Packard Co.*, 311 F.R.D. 568 (N.D. Cal. 2015), *23(f) pet. granted*.**

Judge Phyllis J. Hamilton of the U.S. District Court for the Northern District of California certified a class of California consumers who brought warranty claims against Hewlett-Packard Company arising from their purchases of laptops from HP's website in reliance on the representation that the wireless card available on certain models would operate on both the 2.4 GHz and 5.0 GHz frequencies, when in fact they operated only on 2.4 GHz frequency. The defendants challenged certification primarily on predominance grounds and argued that the plaintiff could not show that members of the class were "exposed" to the challenged statement. The court determined that as a matter of California law, a buyer need not prove that he actually read the warranty, but only that the statement was made available to him. While a seller can show that a representation "was taken out of the bargain through clear affirmative proof," the court rejected the defendants' survey data purporting to show that most putative class members did not see the challenged statement because the survey was conducted years after the purchases, and its methodology to account for false positives regarding participants' memories of the statement was "transparently self-serving." The court concluded that common issues predominated because each putative class member customized and purchased a laptop in California when the challenged warranty language appeared on HP's website and received a computer with a wireless card that lacked the promised functionality.

***M.D. v. Abbott*, No. 2:11-CV-84, 2015 WL 9244873 (S.D. Tex. Dec. 17, 2015).**

A group of minor children in the Texas Department of Family and Protective Services (TDFPS) brought suit against Texas state officials, alleging that the state had denied them "the right to be reasonably safe from harm while in government custody and the right to receive the most appropriate care, treatment, and services." Three subclasses of plaintiffs had already been certified: two subclasses of children in foster care and one subclass of children receiving only nonemergency, basic services (NEBS). The defendants argued that the various classes of plaintiffs should be decertified because some named plaintiffs had been adopted or were otherwise no longer under the care of TDFPS. Judge Janis Graham Jack of the U.S. District Court for the Southern District of Texas held that decertification would be improper as to the foster care subclasses. When those subclasses were certified, "the unnamed class members acquired a legal status separate from the interest asserted by the Named Plaintiffs." Thus, the mootness of the original named plaintiffs' claims would not require dismissal of these unnamed plaintiffs' claims. As to the NEBS subclass, however, the court found that the named plaintiffs had been placed with their uncle before the class certification order and that there was not sufficient evidence that this was an attempt to "pick off" those named plaintiffs. Accordingly, that subclass of plaintiffs was decertified.

***Dibb v. Allianceone Receivables Management, Inc.*, No. 14-5835 RJB, 2015 WL 8970778 (W.D. Wash. Dec. 16, 2015), *23(f) pet. denied*.**

Judge Robert J. Bryan of the U.S. District Court for the Western District of Washington certified a class and two subclasses of individuals who received a notice of dishonor of check (NOD) from the defendant in connection with an allegedly unpaid check. The plaintiffs alleged that the defendant's NOD form failed to conform to state and federal laws, and as a result, the defendant collected fees it was not entitled to. The court held that the commonality and predominance requirements were satisfied because the question of whether the defendant's NOD form violated Washington and federal laws was a question that

predominated over the litigation and would generate common answers. As for typicality, the court found that the three named plaintiffs were typical of the class and subclasses, rejecting the defendant's contention that all representative plaintiffs must be members of all classes and subclasses. The court also rejected the defendant's argument that unique defenses against the named plaintiffs rendered them atypical, noting that unique defenses against class representatives counsel against certification "only where they threaten to become the focus of the litigation."

***Avio, Inc. v. Alfoccino, Inc.*, 311 F.R.D. 434 (E.D. Mich. 2015), *23(f) pet. pending*.**

Chief Judge Gerald E. Rosen of the U.S. District Court for the Eastern District of Michigan certified a class alleging claims under the TCPA against a restaurant that had hired a third-party marketing firm to send fax advertisements on its behalf. The defendants argued that the class was not ascertainable because (1) the only available records identifying the class were the marketing firm's list of phone numbers that received the fax, which was by this point over 10 years old, and (2) some recipients of the fax may have dined at the restaurant and consented to receiving faxes. The court rejected the former argument on grounds that the marketing firm's lists of phone numbers were objective data that satisfied the ascertainability requirement. With respect to the second argument, the court noted that there was no basis to conclude that fax recipients who had previously dined at the defendant's restaurant would have consented to receive faxes as a result of that relationship. Further, the court noted that the defendant could assert this defense during the litigation even if the class were certified. The court noted that the predominance and superiority requirements were met for similar reasons. Finally, the court rejected the restaurant's argument that the named class representative, a corporation, was inadequate because it had no personal knowledge of receiving a fax from the defendant. According to the court, knowledge of receipts of an unsolicited fax is not a requirement of a TCPA claim and, in any event, many of the proposed class members were likely also unaware that they had received such a fax.

***Mendez v. C-Two Group, Inc.*, No. 13-cv-05914-HSG, 2015 WL 8477487 (N.D. Cal. Dec. 10, 2015).**

Judge Haywood S. Gilliam, Jr. of the U.S. District Court for the Northern District of California certified a class of individuals alleging TCPA violations arising from text messages received from a nightclub managed by the defendants after class members provided their contact information on the nightclub's website. The court found that the class was ascertainable as defined in the plaintiff's briefing for class certification, and that amending the complaint was unnecessary. The court also found that numerosity and typicality were satisfied and that the defendants did not contest that several common questions predominated, such as whether the TCPA applied to the software used by the marketer and the defendants' vicarious liability for their marketer's actions. Further, the court found the plaintiff's failure to remember when and how she learned about the nightclub was not indicative that she lacked credibility. Finally, in finding superiority satisfied, the court rejected the defendants' reliance on a senator's statement in a congressional debate suggesting that TCPA actions belonged in small claims courts, not as class actions, because "the views of a single legislator ... are not controlling" and the senator did not suggest "that the TCPA is intended to divest federal courts of authority to hear TCPA claims."

***Beley v. City of Chicago*, No. 12 C 9714, 2015 WL 8153377 (N.D. Ill. Dec. 7, 2015), *23(f) pet. denied*.**

Judge John Robert Blakey of the U.S. District Court for the Northern District of Illinois granted the plaintiffs' motion for class certification in a putative class action against the City of Chicago challenging the Chicago Police Department's purported policy of refusing to register homeless sex offenders. The complaint alleged that this purported practice contravened the Illinois Sex Offender Registration Act and violated the sex offenders' due process rights under the Fourteenth Amendment. The court first concluded that although the plaintiffs could not conclusively demonstrate how many individuals would qualify for class membership, the city's criminal registration logs demonstrated that there likely were enough individuals who had been turned away from the sex offender registration process such that individual joinder would be impracticable. In addition, the court rejected the defendants' ascertainability argument, noting that although it may be administratively difficult to determine whether a particular person was a class member, those concerns should be addressed through tailored case management and not by denying class certification at the outset. The court next determined that a class action would likely generate common answers to common questions of fact and law, and that the court would not need to examine the unique facts of each interaction between the police and each class member to determine liability. Rather, as recent U.S. Court of Appeals for the Seventh Circuit precedent teaches, an alleged citywide policy is appropriate for a class challenge because any exercise of discretion by employees at the bottom of the chain of duty are influenced by the citywide policy. For similar reasons, the court determined that common questions would predominate over individualized issues regarding each sex offender's attempts to register preclude a finding of predominance. In short, the court concluded that the "[p]laintiffs' claims [would] turn on the uniform manner in which the Chicago Police Department purportedly refused to register homeless sex offenders regardless of their individual

circumstances, and that issue [would] predominate[] over any individual issues." Accordingly, the court granted the plaintiffs' motion for class certification.

***In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, 311 F.R.D. 532 (N.D. Cal. 2015), *23(f) pet. denied*.**

Judge Claudia Wilken of the U.S. District Court for the Northern District of California certified a class of NCAA Division I football and basketball student-athletes who alleged that the NCAA and its member institutions violated federal antitrust law by capping compensation that a school may provide to a student-athlete. The plaintiffs alleged that absent such a cap, the schools would compete in recruiting students and provide more generous grants. Judge Wilken rejected the defendants' assertion that the claims of the proposed class representatives were moot insofar as they were no longer eligible to participate in NCAA athletics because the claims were transitory enough that there was insufficient time to obtain a ruling on certification before the representatives' interest in injunctive relief expired. The defendants also challenged the adequacy of the named plaintiffs for two reasons: first, the "substitution effect" would mean less-valued student athlete class members would lose their full grant-in-aid as a result of other student-athletes receiving greater compensation; and second, the "economics of superstars effect" would result in certain players receiving high compensation due to their higher talent level, leaving many more players with much less compensation. The court rejected both theories as speculative, because they assumed that the injunction sought would create a completely unrestricted open market. Judge Wilken also rejected the defendants' argument that class members would be better off under the current system, noting that "such preference for non-competition does not justify denying injunctive relief class certification."

***Ehret v. Uber Technologies, Inc.*, No. 14-cv-00113-EMC, 2015 WL 7759464 (N.D. Cal. Dec. 2, 2015).**

Judge Edward M. Chen of the U.S. District Court for the Northern District of California certified a consumer class alleging that Uber violated California consumer protection laws by misrepresenting that it would charge a 20 percent "gratuity" on behalf of the drivers, when in fact a substantial portion of the gratuity went to Uber. The court narrowed the class definition to include only those consumers who received an email with the alleged misrepresentation and then arranged and paid for rides through Uber. The plaintiff alleged 12 common questions of law and fact, including whether the 20 percent additional charge was gratuity only, rejecting the defendants' contention that whether individuals saw any representation, or considered it material, created too many dissimilarities and individualized issues. Moreover, the plaintiff's claims were typical, because regardless of the plaintiff's subjective reasons for using Uber, the general claim challenged Uber's conduct under an objective test and was sufficiently coextensive with the remainder of the class. Finally, classwide exposure could be inferred because the customers who received emails that included the alleged misrepresentation were highly likely to have seen and been exposed to the statement about the 20 percent tip. Thus, the proof focused on Uber's conduct, which applied to the whole class.

***Martinez-Santiago v. Public Storage*, No. 14-302 (JBS/AMD), 2015 WL 7253819 (D.N.J. Nov. 16, 2015).**

Chief Judge Jerome B. Simandle of the U.S. District Court for the District of New Jersey granted the plaintiff's motion for class certification in this action challenging four provisions of the defendant's lease agreements that allegedly violated the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act. The contested requirements of Rule 23 were commonality, predominance and superiority. The court found that because the claims involved the interpretation of form contracts, the focus was not on the conduct of individual class members, and proof would not vary by class member. However, Judge Simandle did find that commonality was lacking for putative class members who entered into their leases after October 21, 2014, when "substantial" changes were made to each of the contested clauses. While the defendant argued that a class action was not superior to individual actions because "resolving the class claims here would require this Court to issue broad, categorical pronouncements about the scope and enforceability of contractual ... provisions," the court disagreed, finding that class certification was appropriate because a case-by-case inquiry was not necessary.

Other Class Action Decisions

***Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), *as revised* (Feb. 9, 2016).**

Supreme Court Justice Ruth Bader Ginsburg, writing the Court's opinion, held that a consumer's complaint that an advertiser violated the TCPA was not rendered moot by an unaccepted offer of judgment. The defendant, prior to the plaintiff's deadline to file a motion for class certification, proposed to settle the plaintiff's individual claim and filed an offer of judgment pursuant to Rule 68. The plaintiff refused the offer, and the defendant then moved to dismiss the case for lack of subject-matter jurisdiction, arguing that its offer mooted the plaintiff's individual claim and that because the plaintiff failed to move for class certification before his individual claim became moot, the putative class claims were moot as well. The district court denied the motion,

and the U.S. Court of Appeals for the Ninth Circuit agreed that the plaintiff's case remained live. The Supreme Court affirmed. Justice Ginsburg began by recognizing that this question was reserved in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013), because the plaintiff did not dispute that her individual claim was mooted. Justice Elena Kagan, however, dissented in that case, reasoning that she would have reached that threshold question and would have held that "an unaccepted offer of judgment cannot moot a case." 133 S. Ct. at 1533. There, Justice Kagan reasoned that a plaintiff's interest in the lawsuit remains the same after she rejects an offer, however good the terms. In deciding the instant case, Justice Ginsburg adopted that reasoning, concluding that a case does not become moot as "'long as the parties have a concrete interest, however small,'" in the litigation's outcome. 136 S. Ct. at 669 (quoting *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013)). Under this scenario, the defendant's settlement bid and Rule 68 offer of judgment, "once rejected, had no continuing efficacy." With no settlement offer operative, the parties remained adverse. Indeed, "both retained the same stake in the litigation they had at the outset." Justice Ginsburg also addressed Chief Justice John Roberts' dissent, in which he asserted that the majority decision "transfers authority from the federal courts" and "hands it to the plaintiff." "Quite the contrary," Justice Ginsburg quipped, "[t]he dissent's approach would place the defendant in the driver's seat."

***Clarke v. Baptist Memorial Healthcare Corp*, No. 14-5906, 2016 WL 520046 (6th Cir. Feb. 10, 2016).**

A unanimous panel of the U.S. Court of Appeals for the Sixth Circuit (Siler, Gibbons and Rogers, JJ.) reversed a district court's denial of a motion by class members to intervene in a putative antitrust class action after the named plaintiffs settled their claims for the purpose of appealing a denial of class certification. Under *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), the Supreme Court held that absent class members timely intervened to appeal the denial of class certification when they intervened within 30 days after the entry of final judgment following a settlement by the named plaintiffs, explaining that earlier intervention would have no purpose because it remained possible that the named plaintiffs would pursue their claims to a final judgment and then appeal the denial of class certification themselves. In *Clarke*, the district court held that *McDonald* did not apply, and the motion to intervene after final judgment was untimely because the named plaintiffs had not sought interlocutory review pursuant to Rule 23(f) — apparently reasoning that this decision not to seek interlocutory review should have signaled to absent class members that the named plaintiffs did not intend ever to appeal the denial of class certification. The Sixth Circuit reversed, holding that *McDonald*'s rule still applied because named plaintiffs might have good reasons for putting off appellate review of the class certification ruling until the end of the case. Having found that the motion to intervene was timely, the Sixth Circuit remanded the case to the district court to determine whether the remaining requirements for intervention under Rule 24 had been met.

***Family Health Chiropractic, Inc. v. MD On-Line Solutions, Inc.*, No. 15-3508, 2016 WL 384823 (6th Cir. Feb. 2, 2016).**

A unanimous panel of the U.S. Court of Appeals for the Sixth Circuit (Rogers and White, JJ., and Hood, district judge sitting by designation) upheld the denial of a motion to dismiss a putative class action due to mootness based on an unaccepted settlement offer. The Sixth Circuit held that the Supreme Court's recent ruling in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), applied to both expired Rule 68 offers of judgment and unaccepted (but not expired) settlement offers. Thus, the named plaintiff's claims had not been mooted by the rejected settlement offer.

***Compressor Engineering Corp. v. Thomas*, No. 10-10059, 2016 WL 438963 (E.D. Mich. Feb. 3, 2016).**

Relying on the Supreme Court's recent ruling in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), Judge Paul D. Borman of the U.S. District Court for the Eastern District of Michigan denied a motion to dismiss a putative TCPA class action due to mootness based on an unaccepted Rule 68 offer of judgment made after a motion for class certification had been fully briefed but not decided. The court then stayed any further proceedings pending the Supreme Court's decision in *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (Apr. 27, 2015), on the issue of whether Congress can confer Article III standing on a plaintiff with no concrete injury by authorizing a private right of action based on a violation of a federal statute. Although the plaintiff pleaded that it had suffered actual harm and sought specific damages, the court concluded that *Spokeo* could affect the plaintiff's requests for statutory damages and injunctive relief for itself and the class.

***In re Polyurethane Foam Antitrust Litigation*, No. 1:10 MD 2196, 2016 WL 320182 (N.D. Ohio Jan. 27, 2016), *appeal pending*.**

Judge Jack Zouhary of the U.S. District Court for the Northern District of Ohio approved a settlement in an antitrust action over objections to the structure of the negotiated settlement, including objections that any remaining funds would be paid to unidentified *cy pres* beneficiaries. The court distinguished the settlement at issue from earlier cases where courts found class notices that did not identify the *cy pres* beneficiaries inadequate, noting that in those cases, the *cy pres* distribution was in the millions of dollars, while in the current action any *cy pres* distribution would

be *de minimis*, as the value of the claims submitted exceeded the value of the settlement fund. Nevertheless, the court agreed that identifying the *cy pres* beneficiaries before the claims administration process concluded was the better practice and ordered that lead class counsel submit proposed beneficiaries within 30 days. The court rejected an objection that *cy pres* distributions should only be made after each class member received full compensation, including treble damages, because under the settlement, a *cy pres* distribution would only be made if a further distribution to the class members was not economically feasible.

***Williams v. Amazon.com, Inc.*, No. 15 C 7256, 2015 WL 8013501 (N.D. Ill. Dec. 7, 2015).**

In a putative class action brought against the online retailer, Judge Gary Scott Feinerman of the U.S. District Court for the Northern District of Illinois denied the plaintiff's motion to strike the defendant's offer of judgment, holding that Rule 68 offers of judgment are not invalid in putative class actions. After the plaintiff filed his class complaint, but before he moved for class certification, the defendant made an offer of judgment that it stated would have given the plaintiff complete relief for his claims. The defendant then attached its offer to its summary judgment motion, arguing that the complete offer of judgment mooted the plaintiff's claims. The plaintiff responded to that motion by moving to strike the offer of judgment altogether, arguing that the offer was invalid because Rule 68 did not apply to putative class actions. The court flatly rejected that argument, holding that "[n]othing in the text of Rule 68, Rule 23, or any other rule or statute supports the existence of such an exception." Although the court acknowledged that certain district courts in other circuits had refused to apply Rule 68 in putative class actions, it noted that it was obligated to follow U.S. Court of Appeals for the Seventh Circuit precedent. The court explained that although the Seventh Circuit's recent holding in *Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015), made clear that an unaccepted Rule 68 offer could not moot an entire putative class action, the appeals court "has no problem applying Rule 68 in putative class actions" for nonjurisdictional purposes. Accordingly, the court denied the plaintiff's motion to strike the defendant's offer of judgment.

Class Action Fairness Act Decisions

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

***Reece v. AES Corp.*, No. 14-7010, 2016 WL 521247 (10th Cir. Feb. 9, 2016).**

A unanimous panel of the U.S. Court of Appeals for the Tenth Circuit (Holmes, Matheson and McHugh, JJ.) affirmed the district court's denial of remand in a case involving claims of trespass, nuisance and negligence arising from alleged environmental pollution from coal mining and oil drilling. After the defendants removed the case to federal court under CAFA, the plaintiffs twice sought remand under the local controversy exception but were denied. On appeal, although neither party raised the issue, the Tenth Circuit first determined *sua sponte* it had jurisdiction to review a denial of a remand motion after entry of final judgment and then held that the plaintiffs failed to establish that more than two-thirds of the class members were Oklahoma citizens, as required under the local controversy exception. As defined, the class included Oklahoma "citizens and/or residents and/or property owners," but mere residence and property ownership in a state "may not be equated with citizenship." Moreover, the proposed class extended back in time at least 20 years, but the plaintiffs offered only summary evidence of current property owners residing in the class area, from which past citizenship could not be inferred. The Tenth Circuit also rejected the plaintiffs' expert testimony in the "renewed" remand motion because while a showing of citizenship requires both residency and the "intent to remain indefinitely," the expert addressed only residency. Finally, the court affirmed the lower court's rejection of the plaintiffs' offer to limit the class to Oklahoma citizens after the first remand motion was denied, because post-removal amendments cannot divest a federal court of jurisdiction.

***Hill v. National Insurance Underwriters, Inc.*, No. 15-14967, 2016 WL 158850 (11th Cir. Jan. 14, 2016).**

The U.S. Court of Appeals for the Eleventh Circuit (Wilson, Jordan and Carnes, JJ.) vacated and remanded a district court's order remanding an action to state court under CAFA's local controversy exception. District courts are directed under this exception to decline to exercise jurisdiction when, *inter alia*, a local defendant's conduct provided a "significant basis" for the claims asserted. After the plaintiff sued several insurance companies alleging that she was charged fees for superfluous coverage, the defendants removed the action to federal court under CAFA. The district court initially remanded the action *sua sponte* upon finding that one of the defendants did not consent to removal but vacated its remand order after being reminded that CAFA permits one defendant to remove the action without the other defendants' consent. The district court then remanded the action based on the local controversy exception, accepting the plaintiff's contention that claims against local defendant National Insurance Underwriters, Inc. (NIU) accounted for over 65 percent of the class members and 81 percent of the damages in the case. After first finding that appellate jurisdiction existed, the court held that the district court either assigned the incorrect burden of proof or failed to adequately explain itself in applying the local controversy exception. Although the party seeking remand has the

burden to prove that the local controversy exception applies, the district court appeared to accept the plaintiff's "bare assertions" that NIU's conduct was significant, while ignoring the defendants' evidence to the contrary. Accordingly, the action was remanded so that the district court could make specific findings of fact in requiring the plaintiff to prove NIU's significance in bringing about the claims.

***Arbuckle Mountain Ranch of Texas, Inc. v. Chesapeake Energy Corp.*, 810 F.3d 335 (5th Cir. 2016).**

The plaintiffs, a class of alleged post-foreclosure owners of oil and gas interests, brought suit claiming that "the defendants' oil and gas leases automatically terminated upon foreclosure and the defendants' continued operation of these wellheads constituted trespass and conversion." The defendants removed the case to federal court under CAFA, and the district court remanded under the CAFA local controversy exception. In reaching that conclusion, the district court relied on the narrower of two alternative class definitions contained in the petition. The U.S. Court of Appeals for the Fifth Circuit (Clement and Southwick, JJ., Elrod, J. (dissenting)) reversed and remanded. The Fifth Circuit held that the broader of the two class definitions should have been applied because (1) that definition was more authoritative, being preceded in the petition by "Plaintiff seeks and requests the certification of a class ('the Class' or 'Class Members') comprised of the following," and (2) where an exception to CAFA jurisdiction is asserted, the court should "resolve lingering doubts in favor of exercising federal jurisdiction." Under the broader class definition, there was not sufficient evidence that at least two-thirds of plaintiffs resided in Texas, as required under CAFA's local controversy exception. Accordingly, the Fifth Circuit reversed the district court's grant of remand.

***Robertson v. Exxon Mobil Corp.*, No. 15-30920, 2015 WL 9592499 (5th Cir. Dec. 31, 2015).**

The U.S. Court of Appeals for the Fifth Circuit (Graves, Higginson and Costa, JJ.) reversed the district court's grant of the plaintiffs' motion to remand in this action alleging damages stemming from oil pipe-cleaning operations. At issue was whether the defendants had succeeded in proving the individual amount-in-controversy requirement under CAFA's mass action provision. The Fifth Circuit noted that even though the removing party bears the burden of proving that at least one plaintiff's damages exceed $75,000, this does not prohibit the court from making common sense inferences. For example, one plaintiff claimed that she developed emphysema and suffered the wrongful death of her husband from lung cancer, which the Fifth Circuit concluded would imply damages over the $75,000 threshold as a matter of common sense. Indeed, counsel for the plaintiffs acknowledged that at trial he would be asking the jury for "a whole lot more than $75,000." Accordingly, the Fifth Circuit held that the defendants had met their burden of proving the individual damages requirement under CAFA. The Fifth Circuit remanded the matter to the district court to determine whether the aggregate amount in controversy was satisfied and to address the plaintiffs' statutory exceptions.

***Kinney v. CNX Gas Co.*, No. 5:15-CV-160, 2016 WL 482075 (N.D. W. Va. Feb. 5, 2016).**

Judge John Preston Bailey of the U.S. District Court for the Northern District of West Virginia denied the plaintiffs' motion for remand in this putative class action asserting causes of action for declaratory judgment, unjust enrichment and fraud. The claims were brought on behalf of two named plaintiffs and all individuals with West Virginia mineral rights who had received royalty payments from the defendants, a gas company and an energy company, in which a flat rate of post-production costs had been subtracted, though the plaintiffs claimed they had not actually been incurred and were not reasonable. The plaintiffs sought a declaration stating that the flat-rate, post-production costs are illegal under West Virginia law and must be terminated from all mineral rights contracts with the defendants; a declaration that all such costs already subtracted from their royalty payments must be reimbursed by the defendants; compensatory, general and punitive damages; prejudgment and post-judgment interest; and attorneys' fees and costs. The court held that the amount-in-controversy requirement was satisfied because aggregating the named plaintiffs' damages and accounting for future payments under the lease (which has not yet expired), the amount in controversy exceeded the $75,000 threshold for the claims of the plaintiffs.

***Rauschkolb v. Chattem, Inc.*, No. 15-cv-1176-DRH-DGW, 2016 WL 403495 (S.D. Ill. Feb. 3, 2016).**

Judge David R. Herndon of the U.S. District Court for the Southern District of Illinois denied the plaintiff's motion for remand to state court in a putative class action brought against a mouthwash manufacturer under the Illinois Consumer Fraud and Deceptive Business Practices Act. The plaintiff's complaint alleged that the defendant's labeling, which represented that its mouthwash "rebuilds tooth enamel" was unfair and misleading because it is, in fact, impossible for the human body to rebuild tooth enamel. Although the plaintiff initially brought her action in Illinois state court, the defendant removed the action to federal court under CAFA. In her motion for remand, the plaintiff argued that jurisdiction was lacking because the amount in controversy did not meet the statutory threshold of $5 million. Rather, the plaintiff alleged that each putative class member's

actual damages were only $5 — the retail price of a bottle of mouthwash — and that the amount in controversy thus would be less than $5 million. The court, however, rejected this argument because it failed to take into account the costs of prospective relief — which could include, among other things, a corrective advertising campaign, a label change and removing products from the shelf — and/or punitive damages, which could be up to five times the actual damages. Accordingly, the court found the amount in controversy requirement satisfied.

***Hoffman v. Teleflora LLC*, No. 15-4810 (CCC), 2016 WL 423648 (D.N.J. Jan. 19, 2016), *report and recommendation adopted by* 2016 WL 438962 (D.N.J. Feb. 3, 2016).**

Judge Claire C. Cecchi of the U.S. District Court for the District of New Jersey adopted the recommendation of Magistrate Judge James B. Clark to grant the plaintiff's motion to remand this case, involving the defendant's alleged practice of sending unsolicited marketing emails without a proper opt-out function, for lack of federal jurisdiction under CAFA. The court held that the appropriate standard to assess the amount in controversy, the single factor disputed by the parties, was the preponderance of the evidence standard asserted by the plaintiff. Under this standard, the proof presented by the parties did not establish the amount in controversy, as the defendant failed to submit any facts substantiating its amount in controversy calculation. The court found the lack of evidence particularly notable where the defendant failed to provide the actual number of consumers in New Jersey to whom it sent its emails, information within the defendant's sole possession.

***Dammann v. Progressive Direct Insurance Co.*, No. 15-3149 (MJD/FLN), 2015 WL 9694633 (D. Minn. Nov. 20, 2015), *report and recommendation adopted by* 2016 WL 128135 (D. Minn. Jan. 12, 2016).**

Judge Michael J. Davis of the U.S. District Court for the District of Minnesota adopted the recommendation of Magistrate Judge Franklin L. Noel to deny the plaintiffs' motion to remand. The plaintiffs, all Minnesota residents and purchasers of automobile insurance policies through the defendant, filed a class action in Minnesota state court, alleging that the defendant violated the Minnesota Consumer Fraud Act, the Minnesota Deceptive Trade Practices Act, the Minnesota Declaratory Judgments Act, and Minnesota state common law by selling insurance policies with benefits that fell below the minimum required by the Minnesota No-Fault Insurance Act. The defendant subsequently removed the action to federal court, asserting CAFA jurisdiction. The plaintiffs then sought remand to state court, arguing that the defendant could not meet its burden to prove that the amount in controversy exceeded $5 million. The court approached the amount-in-controversy question by first noting that, in the U.S. Court of Appeals for the Eighth Circuit, "[o]nce the proponent of federal jurisdiction has explained plausibly how the stakes exceed $5 million ... then the case belongs in federal court unless it is legally impossible for the plaintiff to recover that much." Here, the defendant argued that the plaintiffs' allegations put at issue more than 1.2 million personal automobile insurance policies sold over the past six years to Minnesota residents, with premiums of more than $78 million in the aggregate premiums. Because the plaintiffs sought a declaration that the subject policies were illegal and requested disgorgement of the premiums, the defendant argued that the plaintiffs had put at least a possible $78 million in controversy. The court credited this argument, and therefore determined that the defendant had met its initial burden to plausibly show that more than $5 million were at issue. Since the plaintiffs could not demonstrate that it would be impossible for them to recover more than $5 million, the court denied their motion to remand.

***Anderson v. SeaWorld Parks & Entertainment, Inc.*, No. 15-cv-02172-JSW, 2016 WL 125510 (N.D. Cal. Jan. 12, 2016), *1453(c) pet. denied*.**

The plaintiffs sought reconsideration of the court's finding that it had jurisdiction under CAFA over the plaintiffs' claims that SeaWorld made misrepresentations about its treatment of orcas. The court had held that the injunctive relief sought exceeded $5 million in negative value to SeaWorld in lost ticket sales and reputational damage and, as an additional basis for jurisdiction, that remand would frustrate the purposes of CAFA because the plaintiffs were the same plaintiffs named in a similar suit pending in federal court against SeaWorld (discussed in the Winter 2015 *Class Action Chronicle*). Without challenging the legal standard applied by the court, the plaintiffs argued that the court's findings regarding potential lost ticket sales were inherently speculative, and that the injunction merely would require SeaWorld to comply with the law. Judge Jeffrey S. White of the U.S. District Court for the Northern District of California, to whom the matter was reassigned after the retirement of Judge Samuel Conti, declined to reconsider Judge Conti's denial of remand, explaining that the plaintiffs were seeking an affirmative acknowledgement that SeaWorld made the alleged misrepresentations at issue. If the plaintiffs obtained that injunction, it would not be unreasonable to conclude that ticket sales would decline further. Judge White granted reconsideration in part of Judge Conti's finding that the plaintiffs were the same as those in similar class action litigation pending against SeaWorld in the U.S. District Court for the Southern District of California, accepting the plaintiffs' evidence that the counsel and named plaintiffs in that litigation were different. Nevertheless, Judge White expressed concern that the state suit had been filed strategically to undermine the

federal cases and that the limitation of the requested relief to an injunctive remedy was intended to artificially divest federal courts of jurisdiction. In any event, because Judge White had sustained Judge Conti's ruling that the amount in controversy was satisfied, the court maintained jurisdiction regardless of the identity of the plaintiffs.

***Hockenbury v. Hanover Insurance Co.*, No. CIV-15-1003-D, 2016 WL 54213 (W.D. Okla. Jan. 5, 2016).**

Judge Timothy D. DeGiusti of the U.S. District Court for the Western District of Oklahoma denied the plaintiff's motion to remand his class action on behalf of insurance holders, alleging that the defendant insurance company violated Oklahoma state laws in failing to conduct a fair and reasonable investigation and intentionally underpaying class members for damage claims. The plaintiff contended that the amount in controversy did not meet the $75,000 for diversity jurisdiction or CAFA's $5 million threshold because his complaint explicitly asserted actual damages of less than $75,000 on his individual claim and less than $5 million in total damages on the class claims. However, the court noted, determining the amount in controversy required consideration of the plaintiff's request for punitive damages and attorneys' fees as well as his claim for actual damages. Because the allegations in the complaint established that the amount in controversy was not limited to damages sustained by the plaintiff prior to filing suit but also included damages to remedy the defendant's alleged unjust enrichment and malicious/reckless conduct, diversity jurisdiction was established. In light of this finding, the court held that it need not decide whether jurisdiction exists under CAFA and simply exercised supplemental jurisdiction over the class claims.

***Brew v. University Healthcare System, LC*, No. 15-4569, 2015 WL 8259583 (E.D. La. Dec. 9, 2015).**

Judge Martin L.C. Feldman of the U.S. District Court for the Eastern District of Louisiana denied the plaintiffs' motion to remand in a case in which the plaintiffs alleged that a health care provider violated Louisiana law by billing patients directly for services that were covered by the patients' health insurance. The defendant health care provider submitted an affidavit stating that there are over 100,000 insured patients who were billed, that those patients have mailing addresses across 17 states and that the total amount billed exceeds $5 million. The plaintiffs objected to this evidence because the purported class only included those patients who were improperly billed, not all patients who were billed. The court rejected this argument because such a class definition would require resolution of the merits of individual claims to determine whether a particular person is a class member. Similarly, the complaint put into controversy all of the defendant's "direct billings to its insured patients." Thus, the defendant had satisfied its burden to prove that (1) there were more than 100 plaintiffs, (2) the parties were minimally diverse, and (3) the amount in controversy exceeded $5 million.

***Owens v. Dart Cherokee Basin Operating Co.*, No. 12-4157-JAR-JPO, 2015 WL 7853939 (D. Kan. Dec. 3, 2015).**

Judge Julie A. Robinson of the U.S. District Court for the District of Kansas denied the plaintiff's second motion for remand of a class of royalty owners in oil and gas leases, claiming the class members were underpaid because the defendant took numerous deductions before the gas products were in marketable condition and deceptively deducted a "conservation fee." The court had originally granted remand because the defendant had failed to introduce evidence of the amount in controversy with its notice of removal, but that holding was eventually overturned by the Supreme Court in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014), which held that a notice of removal "need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold" and does not require extrinsic evidence. In opposition to a second remand motion, the defendant introduced evidence establishing that alleged damages totaled at least $14.2 million. In response, the plaintiff argued that a "subsequent revelation" showed that two portions of his claims were not recoverable, which meant his total damages were $3.6 million. Judge Robinson rejected this contention because the CAFA jurisdictional inquiry focuses on the sum demanded in the complaint at the time it is filed in state court, and dismissal is only warranted when "subsequent revelations" show that the required amount was not in controversy at the commencement of the action. Because both of the claims that the plaintiff asserted were now unrecoverable were included in the scope of the allegations in the complaint, remand was not warranted.

***Rowell v. Shell Chemical LP*, No. 14-2392, 2015 WL 7306435 (E.D. La. Nov. 18, 2015), *1453(c) pet. denied*.**

Judge Carl J. Barbier of the U.S. District Court for the Eastern District of Louisiana denied the plaintiffs' re-urged motion to remand in a case arising from the alleged emission of noxious fumes from a chemical refining facility in Louisiana. The plaintiffs had previously moved to remand under the local controversy exception to CAFA, and the court ordered discovery into the defendant's principal place of business. Following discovery, the plaintiffs filed a second remand motion. The plaintiffs argued that the defendant company's principal place of business was in Louisiana because that is where it was headquartered and there were only two executives working in New York at the time of removal. The court relied on the test laid out in *Hertz Corp.*

v. Friend to conclude that the defendant company's principal place of business was New York because its CEO, chief financial officer and board controlled the company from there. 559 U.S. 77, 92-93 (2010). Accordingly, the local controversy exception under CAFA was not proven, and the court had jurisdiction over the case.

***Papurello v. State Farm Fire & Casualty Co.*, No. 15-1005, 2015 WL 7177235 (W.D. Pa. Nov. 16, 2015).**

Chief Judge Joy Flowers Conti of the U.S. District Court for the Western District of Pennsylvania denied the plaintiffs' motion to remand this insurance class action, finding that federal jurisdiction was proper under both diversity jurisdiction, supplemental jurisdiction and CAFA. There, the insureds asserted claims for breach of contract and bad faith against an insurance company, alleging that the insurer should not have subtracted depreciation from the estimated replacement costs issued to an insured for partial home damage. Because the defendant was able to establish complete diversity among the parties, CAFA's requirement of minimal diversity was satisfied by a preponderance of the evidence. The defendant established the amount in controversy by submitting an uncontroverted declaration showing that even in just one year of the five-year class period, the plaintiffs' claimed damages were equal to approximately $27 million, well above the $5 million minimum. The defendant's declaration similarly established class membership upwards of 100 members, computations that "[b]eyond bare criticism, plaintiffs fail[ed] to rebut." Thus, federal jurisdiction was appropriate.

Decisions Granting Motions to Remand/Finding No CAFA Jurisdiction

***In re Dr. Durrani Medical Malpractice Cases*, No. 1:16-cv-004, 2016 WL 591608 (S.D. Ohio Feb. 13, 2016).**

Judge Thomas S. Black of the U.S. District Court for the Southern District of Ohio remanded to state court 227 medical malpractice actions against various hospitals that had been removed pursuant to the mass action provisions of CAFA. The cases arose from surgeries performed by the same physician at multiple hospitals. The hospitals had removed the cases after a status conference in the state court action where the plaintiffs' counsel requested that the cases be set for a single combined trial or several group trials. Although the plaintiffs argued that removal was not timely because they had asked for a joint trial prior to the status conference, they did not provide any documentation of those prior requests, and the court found removal was timely. However, the court held that the CAFA mass tort provisions, which applied to single actions with more than 100 plaintiffs, were not applicable here, where no single case had more than 100 plaintiffs, and declined to follow out-of-circuit cases that permitted actions set to be tried jointly to be treated as a single action. The court emphasized that the medical malpractice cases at issue presented quintessentially localized claims, unlike the nationwide products liability actions at issue in the out-of-circuit cases. The court also declined to accept jurisdiction under the CAFA totality-of-the-circumstances exception, noting both that the majority of the statutory factors favored remand and that the hospitals only sought removal after the state court judge issued rulings unfavorable to them and set trial dates beginning in February 2016.

***Fleet v. Trion Worlds, Inc.*, No. C 15-04721 WHA, 2016 WL 122855 (N.D. Cal. Jan. 12, 2016).**

Judge William Alsup of the U.S. District Court for the Northern District of California granted the plaintiffs' motion to remand their putative class action alleging violations of California consumer protection laws due to misrepresentations in advertising of an online role-playing game. While the plaintiffs conceded that the defendant had satisfied the CAFA requirements in removing the action, the plaintiffs nonetheless argued that the forum selection clause of the end-user licensing agreement controlled, which stipulated that any California state law cause of action should be brought in the Superior Court for the County of San Mateo. The court agreed, observing that although the diversity jurisdiction provision of CAFA (and the consequent right to removal) gives federal courts "original" jurisdiction over such actions, it does not provide exclusive jurisdiction in federal courts for such actions. Furthermore, the court surveyed the case law and noted that every decision addressing the conflict between a mandatory forum-selection clause and the right to removal under CAFA enforced the forum-selection clauses at issue, CAFA notwithstanding. Thus, Judge Alsup held, remand was warranted because "CAFA does not trump a valid, enforceable and mandatory forum-selection clause by which the parties agreed to litigate in state court."

Autoport LLC v. Volkswagen Group of America, Inc.*, No. 2:15-cv-04260-NKL, 2016 WL 123431 (W.D. Mo. Jan. 11, 2016), *1453(c) pet. denied.

Judge Nanette K. Laughrey of the U.S. District Court for the Western District of Missouri denied the plaintiffs' motion to remand to state court their putative class action against Volkswagen Group of America. The plaintiffs, operators of used car dealerships in St. Louis County, sued Volkswagen in Missouri state court, asserting claims for fraudulent misrepresentation and fraud on the market based on Volkswagen's

alleged manipulation of its emissions software. In support of removal, Volkswagen pointed to the plaintiffs' allegation that there were approximately 6,325 motor vehicle dealers registered in Missouri and argued that even assuming moderate damages of $2,500 per vehicle, and even assuming only one-third of those Missouri dealers ever owned a class vehicle, the amount in controversy would exceed the $5 million threshold. In their motion to remand, the plaintiffs argued that Volkswagen had premised its assumptions on a misunderstanding of the putative class, which, according to the complaint, consisted of all dealers that owned an affected vehicle as of September 18, 2015 — the date on which the Environmental Protection Agency issued its notice requiring Volkswagen to alter its emissions software — not all dealers that "ever owned" an affected vehicle. The court agreed that Volkswagen's theory of removal was based on a "plainly overbroad reading of the [p]laintiffs' alleged class." According to the court, Volkswagen had failed to submit any evidence in support of its view of the amount in controversy, while the plaintiffs had submitted several exhibits indicating that the class size was significantly smaller than what Volkswagen had contended. Thus, the court determined that Volkswagen did not carry its burden of establishing that the amount in controversy exceeded $5 million, resulting in remand of the action.

***Sloan v. Soul Circus, Inc.*, No. 15-01389 (RC), 2015 WL 9272838 (D.D.C. Dec. 18, 2015).**

Judge Rudolph Contreras of the U.S. District Court for the District of Columbia granted the plaintiff's motion to remand a putative class action alleging violations of the D.C. Consumer Protection Procedures Act (CPPA). The plaintiff alleged that the defendant, a touring circus troupe, made false and misleading claims that it was committed to the proper treatment of animals and opposed to cruelty or mistreatment of animals, and that these false and misleading statements caused her and other D.C. residents to purchase tickets to the defendant's shows. The defendant removed the action to federal court based on traditional diversity jurisdiction, and the plaintiff moved to remand. In response to the plaintiff's motion, the defendant sought to amend its notice of removal and assert jurisdiction under CAFA. The court found that the defendant had failed to establish the $75,000 amount in controversy under traditional diversity jurisdiction or the $5 million threshold under CAFA. The court explained that while it may not apply an anti-removal presumption given the Supreme Court's pronouncement in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014), the court resolved that the defendant must still prove the aggregate amount in controversy by a preponderance of the evidence. The defendant failed to satisfy this standard, the court explained, because it aggregated an inflated set of claims by including in its estimates claims of ticket purchasers to whom the plaintiff's class definition may not extend. In addition, the defendant improperly assumed that multiple CPPA violations, in connection with a single purchase, meant that a consumer can receive multiple $1,500 statutory damages awards. In other words, the defendant's estimated class size was likely too large, which made its estimated amount in controversy "exceptionally speculative." The court therefore granted the plaintiff's motion to remand.

***Kendall v. CubeSmart L.P.*, No. 15-6098 (FLW)(LHG), 2015 WL 7306679 (D.N.J. Nov. 19, 2015).**

Judge Freda L. Wolfson of the U.S. District Court for the District of New Jersey denied the plaintiff's motion to remand this putative class action involving allegedly improper lease agreements for storage spaces. The plaintiff claimed the matter was improperly removed under CAFA because the defendant failed to plausibly allege that the putative class consisted of at least 100 members and that the amount in controversy exceeded the jurisdictional minimum. The court found that the class could contain at least 51,200 members, based on a declaration submitted by the defendant identifying the number of individuals who entered into leases meeting the plaintiff's class definition that the plaintiff failed to contradict. Assuming each putative class member would only recover the minimum civil penalty of $100 under the relevant state statute, as the plaintiff pleaded, and assuming a 30 percent attorneys' fee award where such a fee was provided for by the statute, the court found that the amount in controversy totaled approximately $6.7 million, and that subject matter jurisdiction under CAFA was therefore proper.

***Logan v. Club Metro USA LLC*, No. 15-6773 (JLL), 2015 WL 7253935 (D.N.J. Nov. 17, 2015), *1453(c) pet. denied*.**

Judge Jose L. Linares of the U.S. District Court for the District of New Jersey granted the plaintiff's motion for remand to state court under the local controversy exception to CAFA. The sole disputed issue was whether the plaintiff met the sixth "no other class action" prong of the exception, which provides that no other class action had been filed during the preceding three years asserting the same or similar factual allegations against any of the defendants. Under a plain reading of CAFA, this requirement was not met because another class action (*Ardino*) had been filed in New Jersey Superior Court in 2014 that alleged similar factual allegations and shared a common defendant. In accordance with the U.S. Court of Appeals for the Third Circuit's instruction to "construe the phrase in light of the goals of CAFA," however, Judge Linares held that denying remand would directly frustrate the statutory intent of CAFA — to prevent defendants from facing "copycat, or near copycat, suits in *multiple* forums." Because both actions were filed in New Jersey state court,

alleged strictly New Jersey causes of action, based upon conduct occurring in New Jersey, against primarily New Jersey-based defendants, and were brought on behalf of primarily New Jersey residents, the court held that the plaintiff satisfied the "no other class action" provision of the local controversy exception.

***Zarelli v. Encompass Insurance Co.*, No. C15-5607 BHS, 2015 WL 7272260 (W.D. Wash. Nov. 17, 2015), *1453(c) pet. denied*.**

Judge Benjamin H. Settle of the U.S. District Court for the Western District of Washington granted the plaintiff's motion to remand his suit for breach of contract and violation of the Washington Consumer Protection Act, brought on behalf of a putative class of Washington insureds alleging that the defendant did not adequately compensate them for diminished value in their repaired vehicles. The plaintiff estimated that the class would include 316 class members with average damages of $1,460, for a total amount in controversy of $461,360. The court rejected the defendant's contention that the availability of treble damages and attorneys' fees meant the amount in controversy exceeded CAFA's $5 million threshold, because trebling the damages and adding attorneys' fees brought the amount in controversy to only $2.7 million. The defendant also argued that the amount in controversy should include compensatory damages sought by the plaintiff's counsel in another diminished value suit pending in the same court against Allstate, which was part of the same "corporate family" as Encompass, because the plaintiff's counsel was filing "piecemeal lawsuits" against members of the same corporate entity. The court refused to include the Allstate compensatory damages and remanded to state court, because while the two cases "are similar, each suit has different plaintiffs, different proposed class members, and different defendants."

***Adams v. Chevron USA, Inc.*, No. 15-4360, 2015 WL 7272192 (E.D. La. Nov. 17, 2015), *aff'd*, No. 15-31091 (5th Cir. Feb. 16, 2016).**

In this case, the plaintiffs alleged personal property and property damage claims arising from exposure to contamination from oil field pipe. The initial suit was filed in 2002, and the operative petition, which substitutes survivors in the place of now-deceased original plaintiffs, was filed on August 12, 2015. In granting the plaintiffs' motion to remand, Judge Susie Morgan of the U.S. District Court for the Eastern District of Louisiana noted that CAFA applies only to civil actions commenced on or after February 18, 2005. Under Louisiana state law, this case was commenced with the initial filing in 2002. The defendants argued that the court should extend the U.S. Court of Appeals for the Fifth Circuit's *Braud v. Transport Service Co. of Illinois* CAFA exception, which states that amending a pleading to add a defendant commences the action as to that defendant. 445 F.3d 801 (5th Cir. 2006). The court declined to extend this rule to include the substitution of the plaintiffs and granted the plaintiffs' motion to remand.

Other CAFA Decision

***Tyler v. Michaels Stores, Inc.*, No. 11-10920-WGY, 2015 WL 8484421 (D. Mass. Dec. 9, 2015).**

Judge William G. Young of the U.S. District Court for the District of Massachusetts held that CAFA provisions governing the calculation of attorneys' fees in settlements involving coupon payments apply where the class receives vouchers that can only be redeemed at the defendant's stores. Noting that CAFA did not define coupons and the U.S. Court of Appeals for the First Circuit had not addressed the issue, the court held that a settlement consists of coupons for the purposes of CAFA when class members must transact business with the defendant to obtain the benefit of the settlement. Having determined that CAFA applied, the court held that, under CAFA, the court had discretion to choose between two methods of calculating class counsel fees: a percentage of the redeemed coupon value (but not the face value of all coupons distributed) or a fee based on the amount of time reasonably expended by class counsel. The court adopted the latter method because the percentage-of-recovery method would result in a substantial reduction from the requested attorneys' fees, which the court determined was unwarranted as class counsel had obtained binding precedent from the Massachusetts Supreme Judicial Court that would influence conduct beyond the case at issue.

The Class Action Chronicle

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

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