Skadden

The Class Action Chronicle

The Summer 2016 edition focuses on rulings issued between February 15, 2016, and May 15, 2016.

Class Certification Decisions

In this issue, we cover three decisions granting motions to strike/dismiss class claims, three decisions denying such motions, 25 decisions denying class certification or reversing grants of class certification, 16 decisions granting or upholding class certification, 12 decisions denying motions to remand or reversing remand orders pursuant to the Class Action Fairness Act (CAFA), and 12 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

***Timoneri v. Speedway, LLC*, No. 1:15CV2423, 2016 WL 2756868 (N.D. Ohio May 12, 2016), 23(f) pet. pending**

Judge Patricia A. Gaughan of the U.S. District Court for the Northern District of Ohio granted a retailer's motion to dismiss the plaintiff's class allegations because the plaintiff failed to plead a viable class in support of his claims under the Americans with Disability Act (ADA). The plaintiff alleged that investigators working on his behalf visited 18 retail locations and identified a variety of ADA violations, which he argued were evidence that the defendant employed inadequate and centralized ADA compliance policies. Although the plaintiff did not define the scope of the putative class in the complaint, it was clear that he intended to seek certification of a class for properties beyond those identified in the complaint: "The scope of the investigation is in no way related to what the ultimate scope of the class that [the plaintiff] will seek to certify might be. [The plaintiff] will not be in a position to make a decision regarding the scope of the class until discovery has been completed." The court held that the plaintiff's own allegations showed that he could not meet the commonality requirement for a class that encompassed all locations. As the court explained, determining liability as to each location would require the court to conduct an individualized analysis of each location's alleged violations. The court therefore struck the class allegations with respect to all locations that the plaintiff had not visited. To the extent the plaintiff sought to pursue a class action regarding the property he had visited, the court held that a determination as to whether the plaintiff satisfied Rule 23 would be more appropriately addressed after discovery.

***In re Syngenta AG MIR 162 Corn Litigation*, No. 14-md-2591-JWL, 2016 WL 1391045 (D. Kan. Apr. 7, 2016)**

Judge John W. Lungstrum of the U.S. District Court for the District of Kansas granted the defendants' motion to strike the plaintiffs' expanded class allegations asserting claims on behalf of a nationwide class of corn producers under the Lanham Act, as well as state law claims on behalf of classes consisting of residents of 22 different states. The gravamen of the lawsuit was contamination of corn through cross-pollination resulting from the use of Syngenta's products. However, the original classes specifically excluded producers who purchased or used Syngenta's products at issue in the case. The court rejected the plaintiffs' attempt to redefine the class to include the previously excluded purchasers and users of certain Syngenta products. The court recognized that it could address the legal viability of class claims at the pleadings stage under Rule 23(d)(1)(D) to avoid the continued litigation of claims that ultimately would not survive. The court held that nonpurchasers would not be typical or adequate representatives for members of the class who did purchase or use Syngenta's products, and that the interests of users and nonusers might conflict. The court therefore struck the new class allegations but granted the plaintiffs leave to amend. The court explained that if the plaintiffs could identify representatives who purchased and used Syngenta's products, it would require that a subclass consisting of purchasers and users be carved from each putative class.

***Green v. Liberty Insurance Corp.*, No. 15-10434, 2016 WL 1259110 (E.D. Mich. Mar. 30, 2016)**

Judge Robert H. Cleland of the U.S. District Court for the Eastern District of Michigan struck class allegations in a putative class action against a defendant insurer where the named plaintiff, a policyholder whose claim was denied, brought both an individual breach-of-contract claim and broader class claims in which he sought to certify a class of policyholders who had been injured by the defendant's unspecified unlawful trade practices, misrepresentations, improper denials of insurance claims and issuance of unconscionable insurance policies. Although the plaintiff argued that the motion for judgment on the class claims was premature, the court held that the plaintiff failed to satisfy the Rule 8(a) pleading standard because his class allegations were bare recitations of the Rule 23 elements and provided no specific facts to support those allegations. Moreover, given the broad description of the class, the court concluded that typicality could not be established because each class member's claim, including the named plaintiff's, would likely hinge on the specific details of his or her policy and the circumstances surrounding each claim.

Decisions Denying Motions to Strike/Dismiss Class Claims

***Legrand v. Intellicorp Records, Inc.*, No. 1:15 CV 2091, 2016 WL 1161817 (N.D. Ohio Mar. 24, 2016)**

Judge Donald C. Nugent of the U.S. District Court for the Northern District of Ohio denied a motion to strike class allegations in a putative class action alleging that, among other things, the defendant credit reporting agency failed to follow reasonable procedures to assure the accuracy of its consumer reports, as required by the Fair Credit Reporting Act. The defendant argued that the court should strike the class allegations because it would be difficult and overly burdensome for the court to sort through discovery to identify the proposed class members. However, the court held that the size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification. The court similarly rejected the defendant's argument that the need for an inquiry into the accuracy of each and every report prepared within the class period would preclude a finding that questions of law or fact common to the members of the class predominate over any questions affecting only individual members. The court explained that such a determination involves a balancing of many factors that generally is not appropriately decided prior to discovery.

***Black v. General Information Services, Inc.*, No. 1:15 CV 1731, 2016 WL 899295 (N.D. Ohio Mar. 2, 2016)**

Judge Donald C. Nugent of the U.S. District Court for the Northern District of Ohio denied a motion to strike class allegations in a putative class action alleging that the defendant credit reporting agency violated the Fair Credit Reporting Act by not ensuring the accuracy of its consumer reports or notifying individuals when it issued reports containing potentially harmful information. The defendant argued that class membership could not be ascertained without performing an individual review of each and every consumer report that the defendant issued within the class period. The court disagreed, finding that U.S. Court of Appeals for the 6th Circuit law required only that the class definition use objective criteria that allows a prospective class member to identify himself or herself based on the description and did not require that the defendant have an easily available list of affected individuals. As to predominance, the court concluded that the relative balance between individual and common issues would be better evaluated after discovery.

***Fitzhenry v. Career Education Corp.*, No. 14-cv-10172, 2016 WL 792312 (N.D. Ill. Mar. 1, 2016)**

Judge John W. Darrah of the U.S. District Court for the Northern District of Illinois denied the defendants' motions to strike class allegations related to this putative class action suit alleging

violations of the Telephone Consumer Protection Act (TCPA). The plaintiff alleged that the defendants violated the TCPA by making nonemergency calls to the plaintiff's cellphone using an automatic telephone dialing system and/or artificial or prerecorded voice. The defendants argued that determining whether each putative class member provided consent to be called and whether each number dialed was assigned to a cellphone would require individualized inquiries. The court held that the defendants' "unsupported speculation" that some of the proposed class members may have consented or that some telephone numbers dialed were not assigned to class members' cellphone numbers did not preclude class certification at the pleadings stage. Moreover, consent was an affirmative defense that the defendants must plead and prove. The court also found that prior to discovery, the defendants' challenge to the adequacy of the class representative based on his consent to a live call and his overall credibility was inappropriate at the pleadings stage. Finally, the court found that whether the plaintiff's damages were "incidental" was a determination that was difficult to make at this stage in the litigation without the benefit of discovery. Accordingly, the motion to strike class allegations was denied.

Decisions Rejecting/Denying Class Certification

***Steimel v. Wernert*, Nos. 15-2377, 15-2389, 2016 WL 2731505 (7th Cir. May 10, 2016)**

The U.S. Court of Appeals for the 7th Circuit (Wood, C.J., Kanne and Rovner, JJ.) affirmed the denial of class certification because the plaintiffs' class definition was too vague. The plaintiffs in these consolidated cases challenged a policy change to health care waiver programs run by the state of Indiana. Following the policy change, the developmentally challenged plaintiffs were moved from an uncapped medical waiver program to a waiver program with a cap on how much money the plaintiffs could receive. The plaintiffs argued that the new assignment violated the ADA's integration mandate because it deprived them of community interaction and put them at risk of institutionalization. The district court found the following class definition too vague: "Any and all persons, current and future, terminated from [one waiver program] as a result of the 2011 Policy Change who require more services each year than are available through the [second waiver program] and who are not enrolled in [a third waiver program]." On review, the court found that the word "require" led to the vagueness of the definition. The court was unclear as to the ways that potential class members "required" more services. The court posited that class members could be medically required, required for regular community interaction or could satisfy "require" in another fashion. Therefore, the court affirmed the district court's decision not to certify the proposed class.

***NEI Contracting and Engineering, Inc. v. Hanson Aggregates*, Inc., No. 12-cv-01685-BAS(JLB), 2016 WL 2610107 (S.D. Cal. May 6, 2016)**

Judge Cynthia Bashant of the U.S. District Court for the Southern District of California granted the defendants' motion to decertify a class based on evidence not before the court upon certification. The case arose out of Hanson Pacific's practice of recording telephone calls from customers placing orders for construction materials. The plaintiff alleged that the recordings violated California Penal Code Section 632.7 because the conversations were recorded without the caller's knowledge or consent. In opposing the plaintiff's motion to certify the class, Hanson Pacific argued that individual issues would predominate because knowledge and consent would require individualized inquiries. Hanson Pacific presented evidence of two putative class members who had actual knowledge of the recordings and the court denied certification, holding that common questions of law or fact would not predominate (discussed in the Summer 2015 *Class Action Chronicle*). However, in a motion for reconsideration, the plaintiff established that the defendants' evidence was not within the class period, and the court granted certification (discussed in the Winter 2015 *Class Action Chronicle*). In support of decertification, Hanson Pacific reviewed an extensive set of recordings and data and put forward nine more examples of customers with actual knowledge of the recording practice during the class period, including a customer who received copies of the recordings to help resolve payment disputes and thereafter placed additional telephone orders. In light of this new evidence, the court decertified the class, holding that individual inquiries into whether each class member provided consent would be necessary and would predominate over common questions of law or fact.

***Circle Click Media LLC v. Regus Management Group LLC*, No. 12-cv-04000-EMC, 2016 WL 1048046 (N.D. Cal. Mar. 11, 2016); 2016 WL 2593654 (N.D. Cal. May 5, 2016)**

Judge Edward M. Chen of the U.S. District Court for the Northern District of California denied the plaintiffs' renewed motion for certification of California and New York classes and subclasses alleging violations of California consumer protection laws and unjust enrichment. The plaintiffs alleged that the defendants failed to adequately disclose service fees when leasing commercial office space. The court assumed without deciding that ascertainability and commonality were satisfied and found that numerosity, adequacy and typicality were satisfied, except for proposed subclasses whose members signed agreements containing a class action waiver, because the named plaintiffs did not sign that waiver. However, the court found that the plaintiffs failed to demonstrate uniform exposure to the challenged business practices, and thus did not satisfy the

predominance requirement for each of their claims. The defendants showed that the form and content of the lease documents changed over time, and that there were substantial variations in the documents presented and how they were described by the defendants' salespersons, including some cases where the disputed fees were affirmatively disclosed. The court later denied leave to file a motion for reconsideration, rejecting, *inter alia*, the plaintiffs' contention that a "document-only" claim could have been addressed separately from claims arising from the defendants' sales practices. The court explained that "even if Plaintiffs were to focus their claim solely on the documents, this does not eliminate the individualized inquiry of whether a person was in fact told about the disputed fees" by salespeople. The court also denied reconsideration, rejecting the plaintiffs' argument that it previously erected an individual reliance requirement with respect to the Unfair Competition Law claims. According to the court, the plaintiffs could not establish predominance in light of the variations in information presented to each class member in the first place, not whether individual class members relied on that information.

***Federal Housing Finance Agency v. SFR Investments Pool 1, LLC*, No. 2:15-cv-01338-GMN-CWH, 2016 WL 2350121 (D. Nev. May 2, 2016)**

Chief Judge Gloria M. Navarro of the U.S. District Court for the District of Nevada denied the plaintiffs' motion to certify a defendant class in an action brought under 12 U.S.C. § 4617, which provides that when acting as conservator, no property of the Federal Housing Finance Agency (FHFA) shall be subject to levy, attachment, garnishment, foreclosure or sale without the consent of FHFA, nor shall any involuntary lien attach to the property of FHFA. The plaintiffs proposed a class of defendants that included, *inter alia*, current record owners of units as to which an "Enterprise Lien" had attached and had not been satisfied at the time of the applicable HOA foreclosure sale. In rejecting certification of the defendant class, the court noted that the case's merits hinged on the extent to which the plaintiffs owned an "Enterprise Lien" at the time of the HOA foreclosure sale. Thus, one of the primary disputes of the case created a highly individualized factual inquiry into class membership. As a result, the court found that the plaintiffs' proposed class was not reasonably ascertainable.

***Herron v. Best Buy Stores, LP*, No. 2:12-cv-092103-TLN-CKD, 2016 WL 1572909 (E.D. Cal. Apr. 19, 2016)**

Judge Troy L. Nunley of the U.S. District Court for the Eastern District of California denied without prejudice the plaintiff's motion for certification of a class of laptop purchasers from any Best Buy brick-and-mortar retail store within California during the class period. The plaintiff alleged that the Best Buy "fact tags" on each laptop, which represented the number of hours of expected battery life for the laptop, identified a battery life that was substantially longer than the class member could reasonably experience, in violation of California's Unfair Competition Law. The court held that numerosity and commonality were satisfied because whether Best Buy's battery-life representations on the fact tag were misleading to a reasonable consumer presented a common question. However, the plaintiff did not demonstrate typicality, as laptop purchasers within the class were exposed to dissimilar labels, and certain manufacturers employed different testing for battery life. As the court recognized, some "fact tags" on the laptops contained a disclaimer about the conditions of the testing used to estimate the battery life, and the varied labeling practice led to a substantial divergence in the evidence required to prove the claims. The court thus excluded purchasers of certain laptops and consumers exposed to the disclaimers from the proposed class. The court also found that individualized questions predominated over common questions, precluding certification under Rule 23(b)(3). This was so because the plaintiff failed to present a damages model tied to his theory of liability. The model presented addressed the relative value of the laptops as opposed to the price premium supposedly attributable to the allegedly misleading battery life representations.

***Inetianbor v. Cashcall, Inc.*, No. 13-60066-CIV-COHN/SELTZER, 2016 WL 1622317 (S.D. Fla. Apr. 19, 2016)**

Judge James I. Cohn of the U.S. District Court for the Southern District of Florida denied the plaintiff's motion to certify a class of consumers who had received allegedly usurious loans from Cashcall, doing business as Western Sky Financial, LLC. The plaintiff sought to certify a class of "[a]ll persons who entered into a loan agreement with Western Sky in Florida substantially similar to Plaintiff's loan agreement ... within the applicable statute of limitations ... ." The court held that the proposed class was not ascertainable because it relied on subjective and individualized criteria. First, ascertaining class members with "substantially similar" loans to the plaintiff's would have required individual inquiries and subjective judgment as to similarity. Second, the plaintiff's proposed method of identifying class members — using the state of residence listed on their loan agreements — was not administratively feasible because class members could have entered into loan agreements in Florida while residing elsewhere. Finally, the statute of limitations element would have required individual analyses as to the timeliness of each claim. However, the court recognized that there could be "viable alternatives" to the proposed "substantially similar" standard, and accordingly denied certification without prejudice.

***Robinson v. General Electric Co.*, No. 09-cv-11912, 2016 WL 1464983 (E.D. Mich. Apr. 14, 2016)**

Judge Victoria A. Roberts of the U.S. District Court for the Eastern District of Michigan denied certification of a class of California residents who purchased GE microwave ovens. The plaintiffs alleged that the microwaves self-started and lacked adequate safety features to prevent smoking and fires. Judge Roberts held that the plaintiffs had failed to satisfy Rule 23's commonality, typicality and predominance requirements. As to commonality, the court explained that "there [was] no evidence that a single design flaw pertaining to safety mechanisms is common across all of the models," unlike in *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838 (6th Cir. 2013), where the plaintiff could point to an identified part and a specific, common design defect. Similarly, the plaintiffs could not prove commonality based on GE's alleged concealment of the defect because the safety notices were worded differently model to model. Moreover, typicality was absent because even if the proposed class representative proved his own claim, "that would not necessarily prove anyone else's claim." As for predominance, model-to-model variations would cause individual issues to predominate. For these reasons, the court denied class certification.

***Harris v. Fisher-Price, Inc.*, No. 1:13-cv-00076-KOB, 2016 WL 1319696 (N.D. Ala. Apr. 5, 2016)**

Chief Judge Karen Owen Bowdre of the U.S. District Court for the Northern District of Alabama issued this decision memorializing the court's denial of the plaintiffs' motion for class certification at a prior hearing. The plaintiffs asserted a variety of claims stemming from the manufacture and sale of allegedly moldy infant sleepers and sought to certify nationwide classes of consumers who had purchased and received the sleepers as gifts, with each class containing subclasses of consumers from eight specific states. The court first denied certification of a majority of the subclasses for threshold reasons, including the lack of a named plaintiff from certain states and state privity requirements precluding certification of breach-of-warranty claims. The court next refused to certify the gift recipient subclasses because they included individuals who had received and resold their sleepers, and accordingly were not injured. Next, the court found that the three remaining subclasses were not ascertainable. The court rejected the plaintiffs' proposal of subpoenaing third-party retailers' sales records to identify class members because the plaintiffs "made no showing of what customer information was actually recorded by third party retailers and provided no evidence to demonstrate how many customers could be identified using these methods." Accordingly, the plaintiffs' proposal was not administratively feasible. Finally, as an additional reason to deny certification, the court concluded that because the plaintiffs did not set out the elements of their claims in their motion for certification, they failed to demonstrate that common questions predominated, as required by Rule 23(b)(3).

***Achziger v. IDS Property Casualty Insurance Co.*, No. C14-5445 BHS, 2016 WL 1276048 (W.D. Wash. Apr. 1, 2016), 23(f) pet. denied**

Judge Benjamin H. Settle of the U.S. District Court for the Western District of Washington denied the plaintiff's motion for class certification in an action alleging breach of contract and violation of the Washington Consumer Protection Act (CPA). The plaintiff brought suit after he sought coverage for his damaged truck under the defendant's insurance policy and the defendant allegedly never informed the plaintiff about the availability of coverage for diminished value nor adjusted the plaintiff's loss to include diminished value. In denying class certification, the court first found typicality lacking as to the breach-of-contract claim since the proposed class members had different insurance policies and coverage from the plaintiff. The court also found the plaintiff to be atypical of the absent class members with respect to his CPA claim given evidence that the defendant's claims handling practices and procedures changed over the proposed class period. Further, because determining whether a vehicle sustained diminished value in the first instance required consideration of several individualized factors, such as driver fault and prior accidents, the court concluded that individualized issues predominated over common ones. Finally, the court determined that the class action method was not superior because class members likely have an interest in individually prosecuting separate actions. The court noted that class members whose vehicles had not sustained prior damage or with significant claims for diminished value would potentially be undercompensated.

***Meyers v. Nicolet Restaurant of de Pere, LLC*, No. 15-C-444, 2016 WL 1275046 (E.D. Wis. Apr. 1, 2016), appeal pending**

Chief Judge William C. Griesbach of the U.S. District Court for the Eastern District of Wisconsin denied the plaintiff's motion for class certification in a putative class action against a restaurant, alleging violation of the Fair and Accurate Credit Transactions Act (FACTA). The plaintiff alleged that the defendant negligently, recklessly and/or willfully printed the expiration date of debit and credit cards on receipts provided to cardholders transacting business with the defendant. The plaintiff's proposed class met the requirements of Rule 23(a) but failed the predominance and superiority requirements of Rule 23(b)(3). The individual questions of whether and when each class member was actually provided with a receipt would require the vast majority of the time and effort yet to be expended in the case, particularly because the defendant would be entitled to cross-examine each

plaintiff to challenge his assertion that he opted to take a copy of the receipt. The proposed class also failed the superiority requirement in large part because so much of the suit would be taken up by individual inquiries into whether potentially thousands of class members were provided receipts. Moreover, the attorney's fees provisions of FACTA provided sufficient incentive for individual suits, and claim or issue preclusion could later save future plaintiffs from having to prove a willful violation of the statutes. Accordingly, the plaintiff's motion for class certification was denied.

***Wright v. City of Wilmington*, No. 13-1966-SLR/SRF, 2016 WL 1275591 (D. Del. Mar. 31, 2016), 23(f) pet. granted**

Judge Sue L. Robinson of the U.S. District Court for the District of Delaware adopted the report and recommendation of Magistrate Judge Sherry R. Fallon denying class certification in this putative class action alleging an unconstitutional pattern and practice by the city of Wilmington's police department. The court concluded that ascertaining members of the proposed class would require "individualized fact-finding and mini-trials" in contravention of 3rd Circuit precedent. Because there had been no prior judicial finding that the arrests at issue in the plaintiffs' proposed class lacked probable cause or reasonable suspicion (unlike distinguishable 3rd Circuit precedent in which a similar class was certified), ascertaining class membership would involve two levels of review: first, sorting through police records to determine which individuals were detained under the conditions set forth in the proposed class; and second, determining which of those individuals were detained based on reasonable suspicion or probable cause.

***Rock v. National Collegiate Athletic Association*, No. 1:12-cv-01019-TWP-DKL, 2016 WL 1270087 (S.D. Ind. Mar. 31, 2016)**

Judge Tanya Walton Pratt of the U.S. District Court for the Southern District of Indiana denied the plaintiff's motion for class certification in a putative class action challenging the National Collegiate Athletic Association (NCAA) rules prohibiting multiyear college athletic scholarships. In this antitrust action, the plaintiff alleged that the NCAA and its member institutions ensured that schools did not have to compete for student-athlete labor by permitting the allocation of only one-year athletic scholarships and limiting the number that could be awarded each year. The plaintiff sought to certify a class of those who were recruited by a particular division of NCAA schools and did not receive their scholarship for the full duration of their undergraduate education for reasons other than those listed in a carve-out provision. On review of the plaintiff's motion for class certification, the court found that the proposed class failed the requirement of ascertainability because of the vague and subjective definition of "recruited." Moreover, the plaintiff presented no evidence that could prove the recruitment of each student-athlete on a classwide basis. Typicality was not satisfied because the named plaintiff faced a number of factual defenses as to whether he was "recruited" and fell within one of the carve-out provisions that was unique to him. Predominance was likewise not satisfied because the facts did not support the claim that all class members would have received multi-year scholarships but for the NCAA policies. Finally, the plaintiff lacked standing for his injunctive relief claim because he was no longer eligible to compete as a student-athlete before he filed his complaint.

***Margulis v. Eagle Health Advisors, LLC*, No. 4:15-CV-1248 JAR, 2016 WL 1258640 (E.D. Mo. Mar. 31, 2016)**

Judge John A. Ross of the U.S. District Court for the Eastern District of Missouri denied the plaintiff's motion for class certification in a putative class action against the defendants for alleged violations of the Telephone Consumer Protection Act. The plaintiff alleged that the defendants placed calls to his and class members' residential telephone lines using artificial or prerecorded voice offerings to sell health insurance-related products without obtaining the plaintiff's or class members' express written consent. Along with his state court complaint, the plaintiff had filed a motion for class certification to protect against individual settlement offers that could potentially moot his claim for classwide relief. The plaintiff requested additional time to complete discovery related to class issues, and rather than permitting the plaintiff's motion for certification to remain pending indefinitely, the court denied the motion without prejudice to allow the plaintiff to refile at an appropriate time.

***Czuchaj v. Conair Corp.*, No. 13-cv-1901-BEN (RBB), 2016 WL 1240391 (S.D. Cal. Mar. 30, 2016)**

Judge Roger T. Benitez of the U.S. District Court for the Southern District of California granted the defendant's motion to decertify a nationwide class of hair dryer purchasers asserting state-law implied-warranty claims, as well as claims under the federal Magnuson-Moss Warranty Act (MMWA). Applying California's choice-of-law rules, the court found that the defendant had demonstrated material differences between the 50 states' laws governing implied warranty, including with respect to privity and statutes of limitations, and that each state had a valid and important interest in applying its own law to the claims at issue. Because the defendant was not headquartered in and did not have business locations in California, the court determined that California's interest did not outweigh any other state's interest. However, in light of the myriad differences in state implied-warranty law, the court reasoned that the predominance and superiority requirements of Rule 23(b)(3) could not be satis-

fied. The court applied the same reasoning with respect to the federal claims under the MMWA because they were derivative of the varying state-law implied-warranty claims. Thus, the court decertified the nationwide class.

***Cielo v. Garrison Property & Casualty Insurance Co.*, No. 8:15-cv-2324-T-23TBM, 2016 WL 1244552 (M.D. Fla. Mar. 30, 2016)**

Judge Steven D. Merryday of the U.S. District Court for the Middle District of Florida granted a motion to strike class allegations stemming from the defendant insurance company's practice of limiting reimbursement of medical expense claims by defining the "reasonableness" of those claims by referencing Medicare fee schedules. The suit arose after Garrison employed this practice to deny full reimbursement of the named plaintiff's medical expenses following a car accident. That plaintiff assigned her claims to her chiropractor, who sued Garrison and three other insurance companies, arguing that the four companies were part of a "group" that adopted the same "practice, policy, and procedure" of limited reimbursement. The court first dismissed the claims against the three other insurance companies for lack of a causal connection between their practices and the named plaintiff's injury, explaining that the named plaintiff must meet all jurisdictional requirements for an individual suit, including standing. Although the court upheld the claims against Garrison, it struck the class allegations because they required individualized inquiries into how much each class member would have been reimbursed without reference to Medicare. Finally, the court held that the plaintiff's claims for declaratory and injunctive relief could not move forward as a class action under Rule 23(b)(2) because the claim for damages, which was not merely incidental, predominated.

***Khasin v. R. C. Bigelow, Inc.*, No. 12-cv-02204-WHO, 2016 WL 1213767 (N.D. Cal. Mar. 29, 2016)**

The plaintiff sought certification of a class of consumers alleging that various green tea products were deceptively labeled. Judge William H. Orrick of the U.S. District Court for the Northern District of California denied the motion. The court held that the plaintiff's primary damages model, which was based on restitution of the full product price, was implausible, because it rested on the dubious premise that consumers did not benefit at all from consuming the tea products. According to the court, the model should have been targeted toward the price premium paid attributable solely to the alleged mislabeling. The court also held that certification of an injunctive relief class under Rule 23(b)(2) was also inappropriate because the plaintiff did not plausibly allege that he intended to purchase the defendant's products in the future or that he would be again misled. Finally, the court noted that there were other serious questions, including with respect to ascertainability, given changes to the labeling at issue, which raises questions as to whether class members could be readily identifiable. The court recognized that these and other issues regarding predominance and appropriate damages modeling were pending before the U.S. Court of Appeals for the 9th Circuit in similar class actions involving food labeling, and that in the event the certification order was appealed, reversed and remanded, that the 9th Circuit would likely have issued useful guidance on those issues in the interim.

***Purdy v. Richland Holdings*, No. 2:11-cv-00211-LDG (CWH), 2016 WL 953238 (D. Nev. Mar. 14, 2016)**

Judge Lloyd D. George of the U.S. District Court for the District of Nevada refused to certify a class of Nevada consumers, who alleged that the defendant debt collector demanded an additional amount to remove debts from the consumers' collection reports. The court first concluded that the numerosity requirement was not satisfied because the plaintiff did not show that it was possible to determine from the defendant's records whether the plaintiff or any other potential class members were charged a fee for deletion of information from their credit reports. Further, the proposed class consisted of all consumers from whom the defendant demanded a fee, not just those who paid the fee, meaning the court could only speculate as to whether all members of the class could be readily identified and receive notice. Finally, the court expressed its concern that the plaintiff was employed by a rival debt collection agency, which itself was represented by class counsel. Based on these facts, the court reasoned that the plaintiff's and class counsel's interests might be antagonistic to those of the class, providing another ground for denying class certification.

***Gustafson v. Goodman Manufacturing Co.*, No. CV-13-08274-PCT-JAT, 2016 WL 1029333 (D. Ariz. Mar. 14, 2016)**

Judge James A. Teilborg of the U.S. District Court for the District of Arizona denied the plaintiff's request for class certification in an action alleging that the defendants knowingly manufactured and sold air-conditioning systems with inherently defective evaporator coils without disclosing the defect to purchasers. The plaintiff's proposed class included all individuals and entities in Arizona who purchased certain products from the defendants and who incurred damages as a result of having to repair the products due to leakage of refrigerant. As a preliminary matter, the court refused to consider whether to certify implied-warranty and unjust-enrichment claims because they were not pleaded in the complaint. The court then went on to hold that the sole claim pled in the complaint — breach of express warranty — was not

suitable for class treatment. According to the court, the class definition was unduly broad because it included purchasers with damages due to leakage of refrigerant unrelated to the alleged evaporator coil defect and therefore encompassed individuals whose leaks were not caused by the alleged defect at issue. Further, because the plaintiff did not incur any labor costs in repairing the allegedly defective evaporator coils, the court held that he was not typical. The court found that common questions existed as to the defects and warranty representations, but that determining whether each class member was in fact injured due to the corrosion of the evaporator coil required arduous individual inquiry, so that predominance under Rule 23(b)(3) was not satisfied. Finally, the court found that the plaintiff's request for injunctive relief under Rule 23(b)(2) was inappropriate because it seemed to be "disguising a true request for future monetary payouts in the event of future product failures."

***McKinnon v. Dollar Thrifty Automotive Group, Inc.*, No. 12-cv-04457-YGR, 2016 WL 879784 (N.D. Cal. Mar. 8, 2016)**

Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California rejected the plaintiffs' second motion for certification of a class of vehicle renters claiming violations of, *inter alia*, California consumer protection laws due to the defendants' failure to provide notice that liability damage waiver (LDW) policies they offered might be duplicative of other policies already held by the plaintiffs (discussed in the Summer 2015 *Class Action Chronicle*). The plaintiffs proposed two narrowed classes of consumers charged for LDW when they had duplicative coverage: (1) a nationwide class of consumers who rented cars at California Dollar locations; and (2) a class of California residents who reserved through dollar.com. With respect to the first class, the court found commonality and typicality were not met because the defendants' signage, oral disclosures and consent procedures varied by location and in time. In addition, the court found that one of the named plaintiffs was not typical or adequate, and possibly lacked standing, because she claimed that she was aware of the duplicative coverage, declined the LDW, but was charged anyway. Not only did the variances in signage in time and location defeat commonality and typicality, but they also rendered the nationwide class unascertainable. This was so, the court explained, because most claimants would not reliably recall the notice they saw, or consent they provided, years later. The court also rejected the bid for class certification as to the second class, holding that the class representative for the dollar.com claims was neither typical nor adequate because he reserved on expedia.com. Finally, the court denied additional class discovery to locate another representative because it was the plaintiffs' second failed attempt at class certification.

***Barrett v. ADT Corp.*, No. 2:15-cv-1348, 2016 WL 865672 (S.D. Ohio Mar. 7, 2016)**

Judge George C. Smith of the U.S. District Court for the Southern District of Ohio denied certification of a class of Ohio recipients of a prerecorded telemarketing call in a putative Telephone Consumer Protection Act (TCPA) class action, citing another district court's denial of certification of a similar nationwide class in an earlier TCPA action against the defendant litigated by the same plaintiff's counsel. The court determined that the proposed class definition was overbroad because it did not limit the class to consumers who did not give prior consent to be contacted by the defendant. Noting that a court may modify class definitions to comply with the requirements of Rule 23, the court concluded that modification would be futile because there was no way to ascertain which class members had provided prior consent without undergoing extensive, individualized fact-finding, making class treatment inappropriate. The court also held that the plaintiff had failed to meet the predominance requirement because the individualized issue of whether each putative class member gave prior consent likewise predominated over any common issues.

***Gelfound v. Metlife Insurance Co. of Connecticut*, 313 F.R.D. 674 (S.D. Fla. 2016)**

The plaintiff, who had purchased an increased benefit rider for his long-term care insurance policy, alleged that Metlife violated the terms of the policy by continuing to charge him premiums after his 86th birthday and sought to certify a nationwide class of policyholders who had been similarly charged. Metlife claimed that extrinsic evidence supported its interpretation of the policies and argued that certification of a nationwide class was inappropriate because whether extrinsic evidence may be considered in interpreting insurance contracts varies by state law. The plaintiff excluded policyholders from the District of Columbia and four states from the proposed class and argued that the remaining 46 states uniformly permitted the use of extrinsic evidence. Judge Kenneth A. Marra of the U.S. District Court for the Southern District of Florida explained that "[i]n a multi-state class action, variations in state law may defeat both the predominance and superiority requirements of Rule 23(b)(3)" and held that the plaintiff failed to show that the remaining 46 states had uniform laws on the issue. Rather than provide "an extensive analysis that credibly demonstrates that there are no material variations," the plaintiff appeared to have relied on a single, distinguishable case's survey of the issue, without conducting his own analysis, resulting in incorrect conclusions about various states' laws. The court accordingly found that individualized legal and factual questions regarding extrinsic evidence would predominate over common issues and denied class certification. In addition, because the case had been removed to federal court under the

Class Action Fairness Act, the court ordered the parties to show cause as to whether jurisdiction remained after denial of class certification.

***Reynolds v. Credit Management Services, Inc.*, No. 8:14CV391, 2016 WL 756469 (D. Neb. Feb. 25, 2016)**

Judge Lyle E. Strom of the U.S. District Court for the District of Nebraska denied a motion for class certification in a putative class action brought against Credit Management Services, Inc. (CMS) for violations of the Fair Debt Collection Practices Act and the Nebraska Consumer Protection Act. The suit arose from the defendants' filing of certain wage-garnishment affidavits in an attempt to collect on consumer debts. The plaintiff alleged that the defendants' practices resulted in his and class members' wages being wrongfully garnished at a rate of 25 percent instead of the lower 15 percent rate that applies to a debtor who qualifies as a head of household under Nebraska law. The court found that the plaintiff's motion met the requirements of Fed. R. Civ. P. 23(a), but the proposed class failed the requirements of both Fed. R. Civ. P. 23(b)(2) and 23(b)(3). The proposed class failed the predominance requirement because the class would require many distinct factual inquiries, including which CMS attorney signed the affidavit; the date the affidavit was signed; whether the individual was a head of household; and what steps were followed by CMS and its attorneys to make the head of household determination. The plaintiff also failed to establish that the primary relief sought was declaratory or injunctive rather than monetary damages under Rule 23(b)(2). Because the court denied class certification under Rules 23(b)(2) and 23(b)(3), the court also denied the plaintiff's request for certification as a hybrid class under those provisions.

***McKnight v. Linn Operating, Inc.*, No. CIV-10-30-R, 2016 WL 756541 (W.D. Okla. Feb. 25, 2016)**

The plaintiffs sought certification of a nationwide class of royalty owners alleging underpayment of royalties arising from the defendants' failing to report and distribute royalty interest on 34,000 leases relating to 1,693 wells in Oklahoma. Judge David L. Russell of the U.S. District Court for the Western District of Oklahoma denied the motion. The court held that the plaintiffs' proposed common questions of fact regarding, *inter alia*, the accounting methods used would require individualized inquiries by class member, well and month, and render class membership unascertainable. The court held that two common questions of law existed with regard to duty to market and marketability of the gas, but concluded that individual issues predominated because of the defendants' complex method of calculating and paying the individual royalties. The plaintiffs' claims were likewise not typical due to the defendants' differing methods of paying the royalty owners and payment methodology. Further, the court questioned the plaintiffs' ability to vigorously prosecute the action, given that they testified that they had never seen or read their leases or check stubs, and did not know the lease's terms. The court also rejected the plaintiffs' contention that the class could be certified under Rule 23(b)(1)(A) to avoid inconsistent or varying adjudications as insufficient because "[i]f the mere threat of inconsistent jury verdicts enabled certification under 23(b)(1)(A), every case involving multiple plaintiffs could fall into this category."

***In re First American Home Buyers Protection Corp. Class Action Litigation*, 313 F.R.D. 578 (S.D. Cal. 2016), 23(f) pet. pending**

Judge Cynthia Bashant of the U.S. District Court for the Southern District of California denied the plaintiffs' motion for certification of a nationwide class of all persons who purchased or were listed as the named insured of a home protection contract issued by the defendant. The plaintiffs asserted various California common law fraud and misrepresentation claims arising from alleged marketing statements that concealed the defendant's alleged routine denials or delays of legitimate claims made under its contracts. The court first rejected the plaintiffs' attempt to apply California consumer protection statutes to a nationwide class. The court reasoned that the allegedly deceptive misstatements were communicated to the putative class members in their respective home states and therefore those jurisdictions had a stronger interest in the application of their laws than California. Further, in evaluating the predominance and superiority requirements under Rule 23(b)(3) for the plaintiffs' claims, the court found that the plaintiffs failed to demonstrate a cohesion among class members as to how they were exposed — if at all — to the various alleged false and misleading representations, since there was no evidence of common representations or omissions having been made to putative class members. The court also refused to certify an injunctive relief class under Rule 23(b)(2) for two reasons: First, the primary relief sought was monetary, and second, none of the named plaintiffs currently had the home protection plans at issue, and there was no evidence that they intended to purchase a plan in the future. Thus, the named plaintiffs failed to establish that they faced an actual or imminent injury in order to have standing to pursue an injunctive relief claim.

***Shular v. LVNV Funding LLC*, No. H-14-3053, 2016 WL 685177 (S.D. Tex. Feb. 18, 2016)**

A plaintiff brought this putative class action against a debt collector for violations of federal and state debt collection statutes. Judge Sim Lake of the U.S. District Court for the Southern District of Texas denied the plaintiff's motion for class certification for a number of reasons. First, the court determined that the plaintiff's proposed class was not ascertainable because

the plaintiff had not shown how he would identify whether each potential class member's debt was "consumer" debt as required by the relevant statutes. Second, the court held that even though the plaintiff established that the defendant had sued 3,768 other individuals, the plaintiff failed to prove numerosity because he could not point to similarities between his claims and those of putative class members or show that the claims were all premised on similar contracts. Third, the court found that the named plaintiff was neither typical nor adequate because he failed to establish that the accounts of other putative class members "shared any of the same contractual elements that allowed Plaintiff to prevail on his lawsuit." Fourth, the court agreed with the defendants that individualized issues like consumer standing, limitations periods, contractual language and damages would predominate. Finally, the court found that the plaintiff failed to establish that a class action would be superior because his arguments on this point were mere conclusory, unbacked allegations.

Decisions Permitting/Granting Class Certification

***Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*, No. 15-1317, 2016 WL 1743037 (8th Cir. May 3, 2016)**

The U.S. Court of Appeals for the 8th Circuit (Smith, Bye and Benton, JJ.) reversed the district court's denial of class certification after the class was not found to be ascertainable. The plaintiff filed a putative class action under the Telephone Consumer Protection Act (TCPA) after receiving an unsolicited fax from the defendant. The plaintiff moved to certify a class of "All persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages regarding lead testing services by or on behalf of Medtox, and (3) which did not display a proper opt out notice." The defendant argued that the class could not be ascertained because multiple persons may claim they "were sent" faxes under the class definition, including the subscriber to the fax number, the owner of the machine or other users. The district court agreed and denied certification because the class definition did not objectively establish who was included in the class. On review, the 8th Circuit found the class was ascertainable. The TCPA prohibits sending an unsolicited fax advertisement to a "recipient," and the best objective indicator of the fax "recipient" was the person who subscribed to the fax number. Available fax logs showing the numbers that received each fax were objective criteria that made the recipient ascertainable. In addressing footnotes by the district court that the plaintiff could not meet the commonality and predominance requirements, the court noted that common questions predominated, including whether class members received an unsolicited fax in violation of the TCPA, whether the faxes violated the TCPA and whether the class member received the unsolicited fax. Accordingly, the court reversed the district court's denial of class certification.

***Herrera v. JFK Medical Center Limited Partnership*, No. 15-13253, 2016 WL 1637826 (11th Cir. Apr. 26, 2016) (*per curiam*)**

The U.S. Court of Appeals for the 11th Circuit (Martin, Carnes, Julie and Anderson, JJ.) issued this *per curiam* opinion reversing and remanding after the district court struck the plaintiffs' class allegations involving unreasonable fees charged for radiological services at hospitals. The plaintiffs were motorists who had purchased personal injury protection (PIP) insurance coverage capped at $10,000, as required by a Florida motor vehicle statute. They alleged that the defendant hospitals' rates were not "reasonable" as required by the statute, and accordingly depleted their coverage and caused them to pay significant sums out of pocket. The district court struck the class allegations, finding that individual issues would have predominated, including whether the rate charged to each putative class member was reasonable. The 11th Circuit held that because there was genuine disagreement as to whether the facts, once developed, could support certification, the district court abused its discretion by adjudicating certification based on the pleadings, rather than ordering limited discovery on class issues. In particular, since the rates charged to PIP patients vastly exceeded those charged to Medicare patients, "[d]iscovery could reveal that it is relatively easy to determine that these rates are unreasonable across the board without having to resort to analyzing subtle differences between hospitals." Finally, while the court recognized that damages would require individual inquiries, based on the pleadings it was not an "extreme case" that would impose an "intolerable" burden on the district court.

***Henderson v. Trans Union LLC*, No. 3:14-cv-00679-JAG, 2016 WL 2344786 (E.D. Va. May 3, 2016)**

In an action alleging violations of the notice requirements of § 1681k of the Fair Credit Reporting Act, Judge John A. Gibney, Jr. of the U.S. District Court for the Eastern District of Virginia certified a class of plaintiffs that loosely tracked the plaintiffs' proposed class. The court noted that the plaintiffs' class, as proposed, may not have complied with the ascertainability requirement for class certification pursuant to Rule 23, which requires the proposed class members to be "readily identifiable." The court questioned whether "mini trials" would have been necessary to determine whether the members qualified as "users" under § 1681k, rendering the class not readily identifiable. Thus, the court modified the class to be limited to those members who were assumed to qualify as users and certified the modified class accordingly.

***Luther v. Convergent Outsourcing, Inc.*, No. 15-10902, 2016 WL 1698396 (E.D. Mich. Apr. 28, 2016)**

Judge Avern Cohn of the U.S. District Court for the Eastern District of Michigan certified a class of individuals in Michi-

gan who received a debt collection letter from one defendant, Convergent Outsourcing, for a time-barred debt owed to the other defendant, Palisades Collection, in a class action asserting claims for violation of the Fair Debt Collection Practices Act (FDCPA). The defendants argued that the class was not ascertainable because individual inquiries would be necessary to determine whether any given debt was consumer debt rather than business debt, which was not covered by the FDCPA. The court rejected this argument in part on the basis that Palisades said it only handled consumer debt in SEC filings and the agreement between Palisades and Convergent was to collect consumer debt. As to commonality and predominance, the defendants argued that individual issues predominated because the court would need to determine for each class member the date and circumstances of last payment. The court rejected this argument too because the defendants' own records provided that information. Further, the court found that the plaintiff was an adequate representative, even though he had a defense to the debt — he claimed identify theft — because he received the same letter and settlement form as the putative class members and debt caused by identity theft is considered to be consumer debt. Finally, superiority was satisfied because of the size of the putative class and each class member's allegedly small individual recovery.

***O'Donnell v. Financial American Life Insurance Co.*, No. 2:14-cv-1071, 2016 WL 1553459 (S.D. Ohio Apr. 18, 2016), 23(f) pet. pending**

Judge Gregory L. Frost of the U.S. District Court for the Southern District of Ohio certified classes of Ohio policyholders in a case alleging that the defendant insurer had denied payments under their policies in bad faith. As to numerosity, the plaintiff had identified hundreds of class members through a status action code on each class member's file. As to commonality and typicality, each class member challenged the defendant's policy of denying claims based on alleged misrepresentations in the insurance application after liability had arisen. And as to adequacy, the court held that the plaintiff's signature on an insurance application with misstatements did not raise credibility issues. Instead, it made her a typical class member. In assessing Rule 23(b), the court determined that common issues would predominate, rejecting the defendant's assertion that the class definition did not differentiate between those class members who satisfied all procedural requirements to submit a claim and those who did not. The court also rejected the defendant's privacy argument, noting that class members would not have their sensitive health information disclosed unless they chose to remain in the class by not opting out. However, the court denied certification of classes under Michigan law because, in contrast to Ohio law, Michigan law required determination of whether the misrepresentation was material, which would cause individual issues to predominate.

***Mullins v. Premier Nutrition Corp.*, No. 13-cv-01271-RS, 2016 WL 1535057 (N.D. Cal. Apr. 15, 2016)**

Judge Richard Seeborg of the U.S. District Court for the Northern District of California granted in part a motion to certify a class of consumers who purchased "Joint Juice," a drinkable supplement that advertised health benefits for cartilage and joints. The plaintiff alleged that the drink could not provide any joint health benefits and moved to certify a nationwide class of consumers bringing claims under California's consumer protection laws. The court found that the plaintiff identified common questions regarding the message conveyed by the product packaging and advertising, and whether that message was likely to deceive consumers. Typicality was present because the plaintiff alleged that Joint Juice provided no benefits; thus, nothing specific to the plaintiff's experience would prevent her from representing all consumers. Common issues predominated, the court determined, because the meaning of the Joint Juice messaging was clear, and whether an ordinary consumer reasonably believed the advertisements and the materiality of the statements was amenable to common proof. Further, the court found that restitution could be measured on a classwide basis, as each consumer was entitled to a full refund under the plaintiff's theory of liability that consumers received no value. Finally, the court concluded that the class was ascertainable despite the class members' lack of proof of purchase because retailers selling the product offered loyalty programs enabling identification of class members. Because the plaintiff established that California had significant contacts to the claims of plaintiffs nationwide, the burden shifted to the defendant to show that foreign law should apply. The court certified a California class, but declined to certify a nationwide class, requesting further briefing on whether differences in the elements of various states' laws would be significantly contested in the case.

***Machesney v. Lar-Bev of Howell, Inc.*, No. 10-10085, 2016 WL 1394648 (E.D. Mich. Apr. 7, 2016)**

Following the U.S. Supreme Court's decision limiting a defendant's ability to moot class claims through unaccepted offers of judgment, Judge Sean F. Cox of the U.S. District Court for the Eastern District of Michigan vacated the prior judgment the court entered in the action and then reconsidered and granted the plaintiff's motion for class certification. In this case alleging Telephone Consumer Protection Act (TCPA) violations, the court determined that commonality and typicality were satisfied because the defendants were alleged to have sent similar unsolicited faxes to the putative class, giving rise to multiple common questions, including whether the faxes included an opt-out notice and whether the defendants' conduct was willful. Further, the court decided that individualized issues would not predominate because the opt-out notices on the faxes at issue were

all very similar in nature and suffered from the same defects. Because the defendants could avoid TCPA liability if they could prove that they had an established business relationship with the recipient and had included an opt-out notice, the failure of the faxes to contain an adequate opt-out notice negated the need to conduct individual inquiries to determine each putative class member's relationship with the defendants. Consequently, the court vacated its judgment dismissing the case for mootness, reconsidered its prior ruling denying class certification and certified the TCPA classes.

***Falco v. Nissan North America Inc.*, No. CV 13-00686 DDP (MANx), 2016 WL 1327474 (C.D. Cal. Apr. 5, 2016), 23(f) pet. pending**

Judge Dean D. Pregerson of the U.S. District Court for the Central District of California certified three classes of purchasers and lessees of certain Nissan vehicles alleging defects and misrepresentations based on the timing chain systems in several models. The plaintiffs filed a motion to certify three classes consisting of: (1) California residents who incurred actual expenses in connection with the diagnosis or repair of the timing chain system in their vehicles; (2) California residents who had not had the timing chain system repaired; and (3) Washington residents who incurred actual expenses in connection with the diagnosis or repair. The court found all three classes presented common questions such as the existence of a design defect and Nissan's awareness of and/or concealment of the defect. The court modified the third class definition by removing the Washington residency requirement, finding that residency is not a substantial requirement under the applicable Washington consumer protection law. The court found that all three classes met the typicality requirement because the legal interests of all potential class members were the same, despite the fact that not all vehicle models or any lessees were represented. Predominance was satisfied because common proof could be used to establish the elements of the violations of California consumer protection laws asserted by the first class, the fraud and breach-of-warranty claims brought by the second class, and the Washington consumer protection violations asserted by the third class. The plaintiffs also sufficiently alleged common damages formulas for all three classes. The class vehicles were alleged to have had a common defect that the first and third classes had repaired, and the repair amounts could serve as an appropriate restitution amount for the second class.

***Gonzalez v. Owens Corning*, Nos. 13-cv-1378, 14-cv-0826, 2016 WL 1252988 (W.D. Pa. Mar. 31, 2016), appeal pending**

Chief Judge Joy Flowers Conti of the U.S. District Court for the Western District of Pennsylvania denied the consumers' motion to certify multiple classes of purchasers of fiberglass asphalt roofing shingles alleging violations of various consumer protection and warranty laws. The plaintiffs sought to certify a Rule 23(b)(1)(B) class of individuals or entities that owned buildings nationwide on which the defendants' shingles were installed and purchased (nationwide class), and a Rule 23(b)(2) injunctive relief class and 23(b)(3) monetary relief class of owners of buildings in four states on which shingles were installed during a specified time period (four-state class). With respect to the proposed nationwide class, the plaintiffs claimed that commonality under Rule 23(a) was satisfied because there was a common question as to whether the defendants' bankruptcy discharged the putative class members' claims, and that the purpose of the class was to obtain a ruling as to which "test" would apply to any challenge from the defendants that the plaintiffs' claims were discharged by bankruptcy. The court held this argument neither satisfied the commonality requirement nor presented a live case or controversy because the 3rd Circuit had already conclusively ruled which test applied. The court also denied certification of the four-state class on a number of grounds. Among other reasons, the court found that there was no evidence that all (or even a majority) of shingles suffered from a common defect, or that the defendants made consistent representations to all class members that the shingles would not, for example, crack, degranulate or fragment. While the plaintiffs argued that the defendants manufactured shingles "at or near" the "low-end" of its product specifications, only approximately half of the warranty claim shingles tested by the plaintiffs measured at this "low end," and the plaintiffs never clarified how near the "low end" of the design specifications a shingle must measure in order to qualify as defectively designed. Additionally, the four-state class was found to lack typicality and adequacy where the plaintiffs failed to propose state-specific subclasses, were subject to unique defenses (including release), did not receive the same alleged misrepresentations as the rest of the class and experienced various degrees of property damage, among other factors.

***Melgar v. Zicam LLC*, No. 2:14-cv-00160-MCE-AC, 2016 WL 1267870 (E.D. Cal. Mar. 31, 2016)**

Judge Morrison C. England, Jr. of the U.S. District Court for the Eastern District of California certified classes of purchasers of homeopathic Zicam cold remedy products in California, Delaware, D.C., Kansas, Missouri, New Jersey, Ohio, Utah, Virginia and West Virginia. The plaintiff alleged that the defendants' marketing and labelling regarding the products' efficacy in prevention and reduction of cold symptoms was deceptive, and asserted various warranty and consumer-protection claims. According to the court, the claims at issue boiled down to the common contention that each class member purchased the products because of the purportedly false statements regarding the products' efficacy. As a result, the court explained, common-

ality and typicality were satisfied because a finding that the statements were in fact false would resolve all the class claims. The court rejected the defendants' adequacy arguments based on the fact that the plaintiff and her attorney were law school classmates, finding their relationship might enhance — rather than undermine — the quality of the representation provided to the entire class. The court also found that the predominance requirement of Rule 23(b)(3) was satisfied because the common questions regarding the advertisements' accuracy and the products' effectiveness were "more prevalent or important" than the few individualized issues – namely, damages and the impact of the misstatements on each class member. Finally, the court rejected the defendants' contention that the superiority requirement was not satisfied because only a small number of customers were dissatisfied and they could obtain refunds. The court noted that many satisfied customers might become dissatisfied upon learning of evidence suggesting the products were only placebos.

***Datta v. Asset Recovery Solutions, LLC*, No. 15-CV-00188-LHK, 2016 WL 1070666 (N.D. Cal. Mar. 18, 2016)**

Judge Lucy H. Koh of the U.S. District Court for the Northern District of California granted the plaintiff's motion for class certification in an action alleging violations of the Fair Debt Collection Practices Act (FDCPA) and the Rosenthal Fair Debt Collection Practices Act (RFDCPA). The plaintiff sought certification of a California class consisting of persons who received a debt collection letter in a glassine window envelope that disclosed personal information that could have been used to identify the plaintiff to anyone who handled the letter while in transit. The parties did not contest that Rule 23(a)'s numerosity, commonality and typicality requirements were satisfied. The court, however, rejected the defendant's contention that the plaintiff was not an adequate class representative, noting that the plaintiff and the putative class possessed the same interest and suffered the same alleged injury from the same conduct. For example, the court held that the plaintiff's alleged visual impairment was immaterial to whether her personal information could be viewed by third parties. Moreover, predominance was satisfied since the collection letters sent by the defendant were substantively identical and the court was required to answer a single question: whether the defendant's practice of sending collection letters in glassine envelopes that disclose identifying information violates the FDCPA and/or RFDCPA. Finally, the court found the class action to be a superior method of adjudication because, *inter alia*, aggregating claims encourages lawsuits that produce the deterrent and curative effect of eliminating abusive collection practices intended by Congress in enacting the FDCPA.

***Thompson v. State Farm Fire & Casualty Co.*, No. 5:14-CV-32 (MTT), 2016 WL 951537 (M.D. Ga. Mar. 9, 2016), 23(f) pet. pending**

Judge Marc T. Treadwell of the U.S. District Court for the Middle District of Georgia granted in part the plaintiffs' request to certify a class asserting claims based on State Farm's uniform policy of refusing to pay for and assess the "diminished value" of damaged but fully repaired homes. As the court explained, under Georgia law, the value of a fully repaired home can nonetheless be diminished by having suffered damage, and home insurers are obliged to assess and compensate claimants for this diminished value. The plaintiffs alleged that State Farm's refusal to both pay for and assess diminished value constituted separate breaches of contract, and proposed two subclasses based on claim date, anticipating that State Farm would raise a statute of limitations defense as to older claims. The court addressed the "failure to pay" and "failure to assess" claims separately and only granted certification as to the latter. As to failure to pay, the court held that whether each claimant's home in fact suffered diminished value — and accordingly whether State Farm breached a duty to pay for that diminished value — required individualized proof and predominated over any common issues of coverage. However, because Georgia law imposes an affirmative duty to assess diminished value notwithstanding whether any diminished value in fact existed, the failure to assess claims predominantly involved common issues and could be certified. Finally, although State Farm did not object to the proposed class subdivision or argue that the named plaintiffs could not satisfy typicality as to class members who were subject to the statute of limitations defense, the court found this issue "troubl[ing]" and rejected the subdivision sua sponte. The court explained that subdividing the class would raise "a host of seemingly unnecessary issues," including whether the named plaintiffs had standing to represent the subclass to which they did not belong.

***Ioime v. Blanchard*, No. 5:15-cv-130-Oc-30PRL, 2016 WL 829111 (M.D. Fla. Mar. 3, 2016)**

Judge James S. Moody, Jr. of the U.S. District Court for the Middle District of Florida certified a settlement class to resolve claims that the defendant violated the Fair Debt Collection Practices Act (FDCPA) and Florida Consumer Collection Practices Act (FCCPA) by sending consumers standard form collection letters that required written responses, threatened legal action, included conflicting debt amounts and sought unauthorized fees. As part of the settlement agreement, the defendant admitted that it sent the same notice the plaintiff received to approximately 219 consumers. Accordingly, the court found that the proposed class was clearly defined and ascertainable and that the numerosity requirement was easily satisfied. The court also found that the plaintiff's claims were typical of the proposed class because the

plaintiff received the same notice as the putative class members. Moreover, the defendant's standardized behavior rendered commonality and predominance easily satisfied, since "a general determination [could] be made as to whether the FDCPA and FCCPA were violated." Finally, superiority was satisfied given the volume of claims, limited statutory damages, need for consistent litigation and class members' unlikely interest in pursuing individual suits.

***Estate of Gardner v. Continental Casualty Co.*, No. 3:13cv1918(JBA), 2016 WL 806823 (D. Conn. Mar. 1, 2016), 23(f) pet. denied**

Judge Janet Bond Arterton of the U.S. District Court for the District of Connecticut granted the plaintiffs' motion for class certification under Rule 23 in an action against a defendant-insurer. The proposed class and subclass consisted of the estates of long-term care insurance policyholders and current policyholders who were refused coverage for stays in managed residential communities or services provided through assisted living services agencies. The court held that the class and subclass met the prerequisites of Rule 23(b)(2) and Rule 23(b)(3), respectively. However, before granting certification, the court grappled with whether the class and subclass met the commonality and typicality requirements for certification, in light of some individualized issues pertaining to medical eligibility. Ultimately, the court found that commonality and typicality existed because "whatever the minor differences in circumstances among the class members, all members of both classes hold one of two identically worded insurance policies and ... have been or likely will be subjected to the same improper interpretation of that policy by [the defendant]." Thus, the classes were certified.

***Eggen v. WESTconsin Credit Union*, No. 14-cv-873-bbc, 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 class certification in a putative class action brought by the plaintiffs against WESTconsin Credit Union under the Driver's Privacy Protection Act and the common law of nuisance. The complaint alleged that the defendant disclosed the putative class members' unredacted driver's license and Social Security numbers in complaints filed in delinquency actions in small claims court. The court initially granted the plaintiffs' motion for class certification after the defendant failed to respond for nearly two months. But when the court later directed the parties to show cause as to why it should not amend the class definition to impose a time limitation and tailor it to include only those who were sued to recover unpaid loan balances, the court learned that the parties had agreed to a lengthy briefing period. The court vacated its previous order, and following briefing, again granted class certification. The plaintiffs adopted the court's proposed class definition of "All individuals whose driver's license numbers defendant WESTconsin disclosed on or after December 16, 2010 in an action filed in Wisconsin circuit court to recover unpaid loan balances." The court found all class members suffered the same injury because they alleged the same conduct or practice: that the defendant published their driver's license numbers without a legitimate reason. Differences in damages were insufficient to deny class certification, and counsel's past professional misconduct did not prevent him from serving as class counsel, as he had been reinstated to the bar and approved as class counsel in approximately 20 cases since then.

***Steigerwald v. BHH, LLC*, No. 1:15 CV 741, 2016 WL 695424 (N.D. Ohio Feb. 22, 2016)**

Judge Patricia A. Gaughan of the U.S. District Court for the Northern District of Ohio certified a nationwide class of individuals who purchased the defendant's electronic pest control device. The plaintiff asserted claims for fraud and breach of express warranty, alleging that the device was marketed as repelling pests but did not do so. In certifying the class, the court determined that the class was ascertainable because the class definition was objective and an individual's assertion of class membership could be verified during the claims process or through affidavits. As to typicality, the court rejected the argument that the plaintiff's claims were atypical because she did not provide the required pre-suit notice of breach of warranty. Instead, the court held that the question whether the lawsuit itself constituted notice of the claim was a common issue for the class that the court did not need to resolve at the class certification stage. With respect to predominance, the court found that because all of the devices contained the same packaging, it would be possible for the plaintiff to prove "uniform" fraud and breach-of-warranty claims on a classwide basis.

Other Class Action Decisions

***Bridgeview Health Care Center, Ltd. v. Clark*, 816 F.3d 935 (7th Cir. 2016)**

The U.S. Court of Appeals for the 7th Circuit (Flaum, Manion and Rovner, JJ.) affirmed the district court's decision not to decertify the class in a suit arising out of unsolicited fax ads sent across multiple states in violation of the Telephone Consumer Protection Act (TCPA). On summary judgment, the district court found Clark liable for violating the TCPA by authorizing fax ads to plaintiffs within 20 miles of his business. The district court conducted a trial on Clark's liability to plaintiffs greater than 20 miles from his business and found Clark was not liable to them.

Clark argued on appeal that the district court should not have lumped all possible plaintiffs together in a single class such that some class members (who did not sue in the first place) would recover while the named plaintiff, who lived greater than 20 miles from his business, could not. The court found, though, that the vast majority of the fax recipients were outside the 20-mile radius and every class member had the same interest — to obtain the $500 per recipient statutory penalty. Therefore, the court found that the district court did not abuse its discretion in certifying one class.

***Lewert v. P.F. Chang's China Bistro, Inc.*, No. 14-3700, 2016 WL 1459226 (7th Cir. Apr. 14, 2016)**

The U.S. Court of Appeals for the 7th Circuit (Wood, C.J., Bauer and Hamilton, JJ.) reversed the district court's grant of a motion to dismiss for lack of standing. After dining at the defendant's restaurants, the plaintiffs learned that the restaurants' computer systems had been compromised. The plaintiffs sought to represent a class of similarly situated customers whose payment data may have been compromised, but the district court dismissed for lack of standing after finding that the named plaintiffs had not suffered the requisite personal injury. On review, the court found that the named plaintiffs had alleged sufficient facts to support standing based on both their present and future injuries. One named plaintiff alleged he had already experienced fraudulent charges and spent time and effort in resolving them, and the other named plaintiff spent time and effort monitoring his statements and other financial information to guard against fraudulent transactions. Further, both named plaintiffs alleged an increased risk of fraudulent charges and identity theft because their data had already been stolen. The plaintiffs plausibly claimed that the restaurant in which they dined was among those hit by the hackers, and a favorable judgment would redress their injuries. Accordingly, the court found that the plaintiffs had alleged enough to support Article III standing, and reversed and remanded the case for further proceedings.

***Weitzner v. Sanofi Pasteur, Inc.*, 819 F.3d 61 (3d Cir. 2016)**

The U.S. Court of Appeals for the 3rd Circuit (Shwartz, Scirica and Roth, JJ.) held that an unaccepted offer of judgment made under Rule 68 prior to a motion for class certification does not moot the plaintiffs' entire action, including the putative class claims, in accordance with the Supreme Court's recent decision in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016). Prior to moving for class certification, the defendants offered to pay the plaintiff and his professional corporation $1,500 for every facsimile advertisement allegedly sent in violation of the Telephone Consumer Protection Act, an offer to which the plaintiffs did not respond. The trial judge denied the defendants' motion to dismiss the claim, holding that by relating class certification back to the filing of the class complaint, the class representative retained standing to litigate issues of class certification even though his individual action was moot. The Supreme Court subsequently addressed this same issue, holding that an unaccepted settlement offer "has no force" and moots neither a plaintiff's individual claims nor the case as a whole.

***In re Vizio, Inc.*, MDL No. 2693, 2016 WL 1402906 (J.P.M.L. Apr. 7, 2016)**

Judge Sarah S. Vance, chair of the U.S. Judicial Panel on Multidistrict Litigation, found that the centralization of various pending putative nationwide class actions against the defendant for privacy violations was appropriate and that the U.S. District Court for the Central District of California was the appropriate transferee district. The actions related to allegations that the defendant violated customer privacy by installing software on its smart televisions that allowed the defendant to collect viewing data. The plaintiffs alleged that the defendant then shared the data with third parties who then pushed targeted advertisements to the defendant's customers. All responding parties agreed that centralization was appropriate but disagreed as to the transferee district. The panel found that the Central District of California was appropriate because eight of the 20 related actions were pending in the district, the defendant's headquarters was located in the district, and the district was a convenient and accessible forum close to potential witnesses and evidence.

***In re Michaels Stores, Inc.*, Nos. 14-cv-07563 (KM)(JBC), 15-cv-02547 (KM)(JBC), 15-cv-05504 (KM)(JBC), 2016 WL 947150 (D.N.J. Mar. 14, 2016)**

This putative class action involved alleged violations of the Fair Credit Reporting Act arising from defendant Michaels' use of certain background check procedures during its hiring process. While Judge Kevin McNulty of the U.S. District Court for the District of New Jersey stayed this action on other grounds, he rejected the defendant's challenge to the plaintiffs' standing based on an unaccepted offer of judgment. Judge McNulty noted that, while the law in the 3rd Circuit had previously held that an unaccepted offer of judgment mooted an individual's claim, the recent Supreme Court case of *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016) settled the issue, making clear that a rejected offer of judgment "had no continuing efficacy" and that the plaintiffs who did not accept the defendant's offer continued to have a stake in the action.

Class Action Fairness Act Decisions

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

***Carter v. Westlex Corp.*, No. 15-20561, 2016 WL 1397648 (5th Cir. Apr. 8, 2016)**

A group of plaintiffs brought suit against a group of automobile dealerships alleging that the plaintiffs' cars suffered heat damage to the dashboard and other interior components. After the defendants removed the case under CAFA, the district court denied the plaintiffs' motion to remand. In doing so, the district court concluded that more than $5 million was in controversy based on expert testimony and the plaintiffs' claim that the class consisted of more than 1,000 members. On appeal, the plaintiffs argued that the district court erred by: (1) relying on the expert's opinion; (2) assuming that all plaintiffs would need both possible repairs; and (3) calculating the maximum allowable exemplary damages. The U.S. Court of Appeals for the 5th Circuit (King, Clement and Owen, JJ.) affirmed the district court's denial because: (1) the expert's opinion was informed by personal knowledge; (2) the petition indicated the vehicles would require both possible repairs; and (3) exemplary damages were properly considered in controversy because they were pled in the complaint.

***Graiser v. Visionworks of America, Inc.*, 819 F.3d 277 (6th Cir. 2016)**

The U.S. Court of Appeals for the 6th Circuit (Guy, Moore and McKeague, JJ.) held that the 30-day window to remove an action under CAFA is triggered when the defendant receives a document from the plaintiff from which it can unambiguously ascertain CAFA jurisdiction. The panel then held that because the plaintiff had never sent the defendant such a document, the 30-day window had never begun to run, and the defendant's removal to federal court was therefore timely. The panel explained that the plaintiff's letter setting out its damages formula did not start the 30-day window because the formula in the letter was applied to a limited set of sales data that did not meet the $5 million amount-in-controversy threshold, and only when the defendant applied the formula to its own up-to-date sales data did it become apparent that the CAFA threshold had been met shortly after the plaintiff's letter was sent. The panel further held that a case is separately removable under CAFA even if the case was originally removable under a different theory of federal jurisdiction. Thus, the fact that the action was removable at the time the complaint was filed based on traditional diversity jurisdiction did not make the subsequent removal under CAFA jurisdiction untimely.

***Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016)**

The U.S. Court of Appeals for the 4th Circuit (Traxler, C.J., Gregory and Diaz, JJ.) held that the district court had subject matter jurisdiction pursuant to CAFA in a suit to compel arbitration. The court found federal jurisdiction to be proper after reviewing the underlying substantive controversy of the putative class action. The substantive matter that was currently in arbitration had an amount in controversy exceeding $5 million, and the demand for arbitration alleged claims encompassing thousands of houses. In addition, the parties were diverse and the respondents had made class action allegations. Thus, federal jurisdiction was proper.

***Argyropoulos v. Ocwen Loan Servicing, LLC*, No. 2:15-cv-04654-SVW-FFM, 2016 WL 1703255 (C.D. Cal. Apr. 27, 2016)**

The plaintiff moved to remand the claims of a class of California consumers alleging that they had been improperly charged late fees on loans serviced by the defendant in violation of California's Unfair Competition Law. Judge Stephen V. Wilson of the U.S. District Court for the Central District of California denied the motion. The court rejected the plaintiff's contention that CAFA's $5 million amount-in-controversy threshold was not met because only a small percentage of the late fees charged by the defendant were improperly charged. To satisfy CAFA's amount-in-controversy requirement, the court explained, the defendant must only establish that the gross amount of charges assessed satisfies the $5 million threshold. Because the defendant offered evidence that it assessed more than $96 million in late charges during the class period, jurisdiction under CAFA was appropriate.

***Jones v. EEG, Inc.*, No. 15-5018, 2016 WL 1572901 (E.D. Pa. Apr. 18, 2016)**

Judge Mark A. Kearney of the U.S. District Court for the Eastern District of Pennsylvania denied the plaintiff's renewed motion to remand his class action against the defendant, a Pennsylvania beauty school, finding that the plaintiff failed to demonstrate that, for purposes of diversity jurisdiction, at least one-third of his proposed class were citizens of the forum state under the local controversy exception. The plaintiff relied entirely on data the defendant produced revealing that at least 58 percent of the defendant's customers since August 2009 listed a Pennsylvania address at the time they received services, rather than introducing evidence of voter registration or census data. Moreover, the plaintiff's class definition was not limited to only Pennsylvania citizens. Thus, the court held that evidence of residency alone was insufficient and unreliable for purposes of applying the local

controversy exception to CAFA, which turns on citizenship of class members, rather than domicile.

***Khath v. Midland Funding, LLC*, No. 14-14184-MLW, 2016 WL 1275606 (D. Mass. Mar. 30, 2016)**

Judge Mark L. Wolf of the U.S. District Court for the District of Massachusetts denied a motion to remand a putative class action removed from federal court on the basis of CAFA jurisdiction. The plaintiff alleged that the defendant had operated as an unlicensed debt collector in Massachusetts and sought injunctive relief vacating all state court judgments in the defendant's favor and monetary damages based on the alleged unjust enrichment. The court held that the defendant had satisfied the $5 million amount-in-controversy requirement by alleging in the notice of removal that it collected more than $53 million from Massachusetts residents in three of the four years that comprised the class period. The plaintiff had argued that the defendant's alleged amount in controversy should be discounted because some class claims would be barred under abstention principles that prohibit a federal court from setting aside state court judgements. The court rejected that argument, however, reasoning that whether the abstention principles applied was an open question more suitable for class certification. Further, the court held that the defendant satisfied the amount-in-controversy requirement even if it accepted the plaintiff's abstention argument. As the court explained, the plaintiff's abstention argument would not apply to the unjust-enrichment claim, which was an independent basis for recovery of the $53 million collected by the defendant from Massachusetts residents over the class period.

***Cabral v. Supple, LLC*, No. EDCV-12-00085-MWF-OP, 2016 WL 1180143 (C.D. Cal. Mar. 24, 2016), appeal pending**

Where the plaintiff lacked standing to pursue injunctive relief under California consumer protection statutes for alleged advertising misrepresentations regarding beverage supplements, the plaintiff sought partial remand of her claims to pursue an injunctive class action in state court. Judge Michael W. Fitzgerald of the U.S. District Court for the Central District of California denied the motion. Because the court had jurisdiction under CAFA at the time of removal, the subsequent finding that the plaintiff lacked standing to obtain injunctive relief did not give the court discretion to remand the entire action. The court also rejected the plaintiff's request for a partial remand of her injunctive relief claims, reasoning that such claim-splitting would waste litigation resources in the form of duplicative discovery, motions and perhaps even trials on the exact same claim in two separate jurisdictions. Finally, the court refused to stay the federal action pending resolution of the plaintiff's injunctive relief claims in state court because refusing "to adjudicate claims falling squarely within its jurisdiction is to circumvent CAFA's goal of providing a federal forum for class actions implicating interstate interests." Thus, the court held, a class action plaintiff wishing to obtain injunctive relief not available in federal court must either narrow the class to take it outside CAFA's purview or proceed in federal court without the prospect of obtaining an injunction.

***O'Brien v. Hartford Accident & Indemnity Co.*, No. 15-14-H-CCL, 2016 WL 1117412 (D. Mont. Mar. 22, 2016)**

The plaintiff moved to remand a putative class action brought on behalf of policyholders required by the defendant insurance companies to purchase personal property coverage valued at 75 percent of the value of the policyholder's dwelling, regardless of the actual value of the insured's personal property. The plaintiff sought return of all excessive premiums. Judge Charles C. Lovell of the U.S. District Court for the District of Montana denied the motion for remand. To satisfy CAFA's $5 million amount-in-controversy requirement, the defendants submitted evidence establishing that they collected $82.8 million in total premiums during the class period, and that personal property coverage comprised anywhere from 19 to 35 percent of those premiums — between $15.9 million and $29.1 million. The court noted that this early in the case, virtually all of the total premium amount collected could ultimately be found to be the overcharge percentage. Because the plaintiff did not introduce counter-evidence, not even as to the extent her own personal property was overvalued, the $5 million benchmark was easily met. The court also found that the plaintiff's naming of the Montana insurance agency that sold the plaintiff her policy did not destroy minimal diversity under CAFA's home state exception, as out-of-state companies were the primary defendants who received the premiums and from whom the plaintiff sought a refund. Indeed, the plaintiff did not even seek damages directly from the Montana agency.

***McElroy v. Cordish Cos.*, No. 3:15-cv-390-DJH, 2016 WL 1069684 (W.D. Ky. Mar. 16, 2016)**

Judge David J. Hale of the U.S. District Court for the Western District of Kentucky upheld CAFA jurisdiction over a putative class action alleging racial discrimination at an entertainment venue. The plaintiff argued that the defendants had failed to prove that the matter in controversy exceeded CAFA's $5 million threshold and, alternatively, that the court was required to decline jurisdiction under CAFA's home state and local controversy exceptions. Judge Hale disagreed. As to the matter in controversy, the court accepted the defendants' estimation, based on the plaintiff's demand and allegations, that each of the supposedly several hundred individuals in the class would only need to recover $2,500 to $3,300 for the amount-in-controversy requirement to be met if a 4-1 ratio of punitive to compensatory damages was

used. Furthermore, because the home state and local controversy exceptions are exceptions to jurisdiction, the plaintiff bore the burden of proving their applicability. Both exceptions require proving that at least two-thirds of the putative class are citizens of the state from which the case was removed, and the plaintiff provided no such evidence.

***Portillo v. National Freight, Inc.*, No. 15-7908 (JBS/KMW), 2016 WL 1029854 (D.N.J. Mar. 15, 2016)**

Chief Judge Jerome B. Simandle of the U.S. District Court for the District of New Jersey denied the plaintiffs' motion to remand this putative class action alleging that the defendant, a delivery service company, misclassified the plaintiff delivery drivers as independent contractors and made unlawful deductions from their wages in violation of Massachusetts law. The plaintiffs challenged the defendant's removal of the case on timeliness grounds and for failure to establish that CAFA's amount-in-controversy requirement was established. While the defendant removed the case 128 days after receipt of the plaintiffs' complaint — well beyond the 30-day removal requirement of 28 U.S.C. § 1446(b)(1) and (b)(3) — the court found that the defendant timely removed the action after independent discovery revealed jurisdictional facts not obvious from the complaint satisfying CAFA's requirements. Additionally, Judge Simandle found by a preponderance of the evidence that the amount in controversy requirement of CAFA was satisfied. The defendant submitted a declaration, the facts and assumptions of which the plaintiffs did not contest, explaining that a review of the records of just 34 of the over 100 independent contractors at issue in the proposed class showed potential damages in excess of $5 million.

***Davy v. Duck Energy Carolinas, LLC*, No. 7:15-cv-4927-MGL, 2016 WL 852696 (D.S.C. Mar. 4, 2016)**

Judge Mary Geiger Lewis of the U.S. District Court for the District of South Carolina denied the plaintiff's motion to remand the putative class action, holding that the local controversy exception of CAFA did not apply. The CAFA local controversy exception provision mandates that a district court refuse jurisdiction over any putative class in which more than two-thirds of the class members are citizens of the state in which the action was originally filed. After the defendant established the basic jurisdictional requirements of CAFA, the plaintiff's mere assertion that "to the best knowledge available to [them], greater than two-thirds of the members of the [p]laintiff [c]lass are South Carolina citizens" was insufficient to meet their burden of establishing by a preponderance of the evidence that the CAFA exception applied. Therefore, Judge Lewis denied the plaintiff's motion to remand.

***Loehn v. Lumber Liquidators, Inc.*, No. 15-01088, 2016 WL 722002 (E.D. La. Feb. 24, 2016)**

Judge Eldon E. Fallon of the U.S. District Court for the Eastern District of Louisiana denied the plaintiffs' motion to remand in a case centered on allegedly defective flooring. The plaintiffs' original petition included class allegations and was removed under CAFA. Following removal, the plaintiffs dismissed their class allegations and filed a motion to remand. The court denied the motion, noting that CAFA jurisdiction existed at the time of removal, and "the filing of a post-removal amended complaint removing class action allegations does not divest the district court of CAFA jurisdiction."

Decisions Granting Motions to Remand/ Finding No CAFA Jurisdiction

***Allen v. Boeing Co.*, No. 16-35175, 2016 WL 2586334 (9th Cir. May 5, 2016)**

The U.S. Court of Appeals for the 9th Circuit (Rawlinson and Callahan, JJ., and Gilman, U.S. Court of Appeals for the 6th Circuit judge sitting by designation) affirmed the district court's remand to Washington state court of the plaintiffs' suit against the defendants Boeing and Landau Associates under CAFA's local controversy exception. The plaintiffs alleged that for several decades, Boeing released toxins into the groundwater around its facility in Auburn, Washington, and that for over a decade, Landau had been negligent in its investigation and remediation of the resulting pollution. The panel found that the plaintiffs adequately pled a negligence claim against Landau and adequately alleged both that they are seeking "significant relief" from the in-state defendant Landau and that Landau's alleged conduct forms a "significant basis" for their claims, as required under the local controversy exception. The panel rejected out-of-state defendant Boeing's arguments that Landau's conduct was insignificant compared to Boeing's alleged conduct, noting that the fact that Boeing created the pollution did not in itself render insignificant the damages caused by Landau's alleged failure to investigate and remediate the spreading pollution, particularly because the plaintiffs' alleged harm was not due to the existence of the chemicals at the facility, but the movement of those chemicals off the property. Moreover, 9th Circuit precedent required that the court evaluate the local controversy exception only on the complaint and not inquire into a defendant's financial viability. As part of its reasoning, the court noted that Boeing's arguments could significantly dilute the local controversy exception, since the arguments could be raised whenever a larger out-of-state defendant is sued alongside a smaller in-state defendant with overlapping responsibilities.

***Watson v. City of Allen, Texas*, No. 15-10732, 2016 WL 2610169 (5th Cir. May 5, 2016)**

The U.S. Court of Appeals for the 5th Circuit (Reavley, Jolly and Elrod, JJ.) reversed the district court's denial of the plaintiff's motion to remand a putative class action challenging the use of red light cameras in Texas. The plaintiff, a Louisiana citizen, received a citation after his vehicle was photographed running a red light in Texas. The plaintiff commenced a putative class action against the state of Texas, several municipalities and various private contractors, asserting violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) and challenging the state's red light camera laws under the Texas Constitution. The case was removed to federal court on the basis of the federal RICO claim and CAFA. After the RICO claim was dismissed, the district court denied the plaintiff's motion to remand because the motion was untimely and the local controversy and home state exceptions to CAFA jurisdiction did not apply. On appeal, the 5th Circuit reversed, holding that because the local controversy and home state exceptions to CAFA "are not truly jurisdictional in nature," Section 1447(c)'s 30-day deadline for removing an action to federal court did not apply. Rather, the appellate court determined that a motion to remand premised on these abstention provisions is untimely "only if it was filed after a reasonable time had elapsed or after the taking of affirmative steps in federal court." The 5th Circuit reasoned that the motion to remand was timely under this standard because while the basis for remand may have been readily apparent at the time of removal, it still remained to collect the evidence, and the plaintiff acted diligently in collecting evidence and filing the motion within 52 days after removal. Further, the court found that the home state exception, which requires remand where two-thirds of class members and the primary defendants are citizens of the state where the action was filed, applied. The primary issue was whether the private companies were "primary defendants" under CAFA. According to the court, these out-of-state defendants were not primary defendants because they were merely contractors, and the main thrust of the litigation was to challenge the legality of Texas' red light camera law. Because the home state exception to CAFA applied and the district court did not have supplemental jurisdiction over the state law claims after the RICO claims were dropped, the Court of Appeals reversed the district court's denial and remanded the case to state court.

***Pazol v. Tough Mudder Inc.*, No. 15-1640, 2016 WL 1638045 (1st Cir. Apr. 26, 2016)**

The U.S. Court of Appeals for the 1st Circuit (Souter, U.S. Supreme Court retired associate justice sitting by designation, and Barron and Lipez, JJ.) determined that, in removing the case to federal court, the defendants did not prove that CAFA's $5 million amount-in-controversy threshold was satisfied in a putative consumer protection class action. The gravamen of the purported class action was that race organizers refused to refund registration fees after moving the location of a race one week before it began. The panel began its discussion by recognizing that the purpose of CAFA was to expand the number of interstate class actions heard in federal court. Nonetheless, the court explained that the defendants must show "a reasonable probability" that there is more than $5 million at issue, which it described as "for all practical purposes identical to the preponderance of the evidence standard," tailored to the pleadings stage. The panel concluded that the defendants did not meet that burden. Although the defendants had established that there was $2.5 million at issue based on registration fees for individuals who were unable to attend because of the new location, the defendants could not establish in a nonspeculative way that the cost of gas and lodging to attend the race due to the change in location would be another $2.5 million. Among other things, the panel noted that the defendants' calculation assumed that every race participant required a hotel room, even though the defendants knew where every race participant lived and conceded at oral argument that those who lived nearby would not need lodging. Consequently, the defendants did not meet their burden of proving there was $5 million in controversy, and the panel instructed the district court to remand the case to state court.

***Adams v. Grefer*, No. 15-31091, 2016 WL 624214 (5th Cir. Feb. 16, 2016)**

The U.S. Court of Appeals for the 5th Circuit (Clement, Elrod and Southwick, JJ.) affirmed the district court's grant of remand (discussed in the Spring 2016 *Class Action Chronicle*) in this action arising from alleged exposure to contamination from an oil field pipe. The defendants argued that the latest amended petition "added hundreds of new plaintiffs and claims," which made the case removable under CAFA. The 5th Circuit affirmed the district court's grant of remand, finding that the amended petition merely substituted, but did not add, plaintiffs.

***Pudlowski v. St. Louis Rams, LLC*, No. 4:16-CV-189 RLW, 2016 WL 2742391 (E.D. Mo. May 10, 2016)**

Judge Ronnie L. White of the U.S. District Court for the Eastern District of Missouri granted the plaintiffs' motion to remand a putative class action brought against the St. Louis Rams, LLC and related entities. The plaintiffs claimed that the defendants misled them regarding the future location of the Rams, causing them to purchase tickets and merchandise based on false promises in violation of the Missouri Merchandising Practices Act. The plaintiffs defined the putative class as "All Missouri residents who were Missouri citizens and remained Missouri citizens when this action was commenced who purchased Rams

tickets and/or merchandise and/or concessions" between certain dates in Missouri. The defendants timely removed the action to federal court. On review, the court found that the defendants had not met their burden to demonstrate that minimal diversity existed under CAFA. The defendants were several LLCs "whose citizenship ultimately [came] down to the citizenship of Mr. Kroenke," the Rams' owner. The plaintiffs provided evidence that Kroenke was a Missouri citizen — namely, his Missouri driver's license and voter registration. In contrast, the defendants merely made the "bald assertion" that Mr. Kroenke was a citizen of Wyoming. Further, because the court's inquiry was limited to the case at the time of removal, the court refused to consider affidavits executed after removal of purported class members who claimed to have moved from Missouri to other states.

***Carzell v. Life of the South Insurance Co.*, No. 1:15-cv-3260-WSD, 2016 WL 1688774 (N.D. Ga. Apr. 26, 2016)**

Judge William S. Duffey, Jr. of the U.S. District Court for the Northern District of Georgia granted the plaintiffs' motion to remand a putative class action alleging breach of contract and bad faith claims related to insurance policies issued on high-interest loans. The proposed class was limited to Georgia consumers, whereas the defendant insurance companies were dual citizens of Georgia and Florida. The court explained that CAFA's minimal diversity requirement is satisfied when any class member is a citizen of a different state from any defendant. However, the court rejected the defendants' argument that their Florida citizenship satisfied this requirement, agreeing with the 4th Circuit's decision in *Johnson v. Advance America*, 549 F.3d 932, 935-36 (4th Cir. 2008), that defendants with dual citizenship "cannot rely on only one citizenship where their other citizenship would destroy minimal diversity." Accordingly, remand was necessary because all class members and defendants were Georgia citizens.

***Urbanczyk v. Wilson Sporting Goods*, No. 15-9796 FMO (GJSx), 2016 WL 1060819 (C.D. Cal. Mar. 17, 2016)**

Judge Fernando M. Olguin of the U.S. District Court for the Central District of California granted the plaintiff's motion to remand a consumer class action alleging that the defendant violated various California consumer protection laws in advertising its tennis balls as the "U.S. Open Official Ball," when those balls were allegedly not the balls actually used at the U.S. Open tennis tournament. Judge Olguin found that the defendant's submission that the amount in controversy was $5.1 million based on an estimated percentage of sales to California retailers, and estimated profit margin applied by its retailers, did not satisfy CAFA. The tennis balls at issue, even if falsely advertised, were not defective or completely worthless to the class members. Instead, the plaintiff sought the excess amount California consumers paid as a premium based on the U.S. Open label as damages, which the defendant did not attempt to value. The court also rejected the defendant's argument that 28 U.S.C. § 1453, which provides an exception to the one-year limitation on removal of class actions, broadly authorized removal of class actions regardless of the other CAFA provisions. According to the court, such a construction "would render the CAFA statute meaningless." Further, removal under other theories was also inappropriate because the defendant had not established the $75,000 amount in controversy required for diversity jurisdiction, and the plaintiff did not assert any federal claim.

***Werkmeister v. Hardee's Restaurants, LLC*, No. 7:15-cv-4598-MGL, 2016 WL 1039350 (D.S.C. Mar. 16, 2016)**

Judge Mary Geiger Lewis of the U.S. District Court for the District of South Carolina granted the plaintiff's motion to remand, finding that the defendant had not carried its burden of establishing the jurisdictional amount in controversy under CAFA. On behalf of himself and all persons similarly situated, the plaintiff alleged that he was exposed to the hepatitis A virus at a South Carolina restaurant. The court rejected the defendant's argument that it was possible that given the unknown size of the class and the wide array of damages, the aggregate recovery could exceed the jurisdictional amount. Because the defendant failed to establish through affirmative evidence that it was more likely than not that the jurisdictional amount was satisfied, remand was appropriate.

***Gallagher v. Johnson & Johnson Consumer Cos.*, No. 15-6163 (JBS/AMD), 2016 WL 1030143 (D.N.J. Mar. 15, 2016)**

Chief Judge Jerome B. Simandle of the U.S. District Court for the District of New Jersey granted the plaintiff's motion to remand this putative class action alleging that the defendant falsely advertised its lotion as clinically proven to help babies sleep better. Because the only claims at issue were brought under the New Jersey Consumer Fraud Act, there was no federal question jurisdiction, leaving CAFA as the only possible grounds for federal jurisdiction. The court found that CAFA's minimum diversity requirements were not satisfied because Johnson & Johnson had a principal place of business in New Jersey, the class representative was also a citizen of New Jersey and had purchased the product at issue in New Jersey, and the class definition included only New Jersey citizens. The defendant urged the court to disregard the actual class definition and instead focus on portions of the complaint indicating that the plaintiff was seeking injunctive relief on behalf of all individuals who purchased the product in New Jersey, not just New Jersey residents. The court was unpersuaded, reasoning that the class

definition controlled under CAFA. Furthermore, the court found that remand was also required under the home state exception to CAFA because two-thirds or more of the proposed class were citizens of the state in which the action was originally filed.

***Lanham v. Nationstar Mortgage, LLC*, No. 2:15-cv-06358, 2016 WL 1057094 (S.D. W. Va. Mar. 11, 2016)**

Judge Thomas E. Johnson of the U.S. District Court for the Southern District of West Virginia granted the plaintiffs' motion to remand this putative class action, finding that the defendant had not met its burden of showing by a preponderance of the evidence that the jurisdictional requirements were met. The defendant argued that jurisdiction existed under CAFA because there were 100 class members and more than $5 million in controversy if the court considered all West Virginia citizens who had loans served by the defendant within the applicable statute of limitations as potential class members. The court disagreed and held that the plaintiffs' proposed class only included borrowers who were assessed unlawful late fees. The court reasoned that the plaintiffs' complaint must be read as a whole to determine the scope of the proposed class, and the plaintiffs' complaint specifically described the defendant's alleged illegal actions as "collect[ing] late fees from the Plaintiff[s] and putative class members." As a result, the defendant's proof of loans serviced generally was insufficient to demonstrate that the proposed class consisted of 100 or more members, and the court could not determine the amount in controversy without evidence of the class size. Based on the foregoing, Judge Johnson granted the plaintiffs' motion to remand.

***Chen v. eBay Inc.*, No. 15-cv-05048-HSG, 2016 WL 835512 (N.D. Cal. Mar. 4, 2016)**

The plaintiffs filed suit in state court after voluntarily dismissing their initial complaint in federal court, asserting California state law claims arising from alleged unfair business practices directed at California eBay sellers, particularly in resolving disputes with potential buyers. The defendants removed the second action to federal court. Judge Haywood S. Gilliam, Jr. of the U.S. District Court for the Northern District of California granted the plaintiffs' motion for remand. The defendants argued that the first complaint was the relevant complaint for removal purposes, and that by voluntarily dismissing their federal action and then refiling in state court, the plaintiffs were improperly amending their complaint post-removal. The court disagreed, finding that voluntary dismissal under Rule 41(a)(1) leaves the parties as though no action had been brought, and in any event, the 9th Circuit allows plaintiffs to amend after removal to clarify issues pertaining to federal jurisdiction under CAFA. The court then found that the new complaint did not meet CAFA's minimal diversity requirement because the complaint confirmed that the class consisted of California citizens and the defendants were citizens of both Delaware and California.

***McNamee v. Knudsen & Sons, Inc.*, No. 4:15-CV-572 (CEJ), 2016 WL 827942 (E.D. Mo. Mar. 3, 2016)**

Judge Carol E. Jackson of the U.S. District Court for the Eastern District of Missouri granted the plaintiff's motion to remand a putative class action brought against defendant Knudsen & Sons, Inc. under the Missouri Merchandising Practices Act. The plaintiff alleged that the defendant's labeling, which prominently displayed the words "Blueberry Pomegranate," was misleading because the product actually contained more apple juice than either blueberry or pomegranate juice. The defendant removed the action based on two grounds: diversity of citizenship and, in the alternative, that removal was proper under CAFA. The court rejected both arguments. The defendant failed to show by a preponderance of the evidence that the $75,000 jurisdictional minimum was satisfied with respect to the plaintiff's individual claim. According to the court, the plaintiff's alleged damages — $3.49 and attorney's fees — were unlikely to satisfy the jurisdictional minimum, which, coupled with a lack of a claim for punitive damages, differentiated the case from those cited by the defendant. Similarly, the defendant failed to show that CAFA's $5 million amount-in-controversy requirement would be satisfied. Because the defendant estimated that Missouri purchases of the product only totaled $186,000, the court could find no set of plausible circumstances in which it would be reasonable to award millions in attorneys' fees, and there were no allegations in the complaint that would merit punitive damages under Missouri law. Accordingly, the plaintiff's motion to remand was granted.

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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