Skadden

The Class Action Chronicle

The Fall 2016 edition focuses on rulings issued between May 15, 2016, and August 15, 2016.

Class Certification Decisions

In this issue, we cover three decisions granting motions to strike/dismiss class claims, two decisions denying such motions, 22 decisions denying class certification or reversing grants of class certification, 22 decisions granting or upholding class certification, seven 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

***Waters v. Electrolux Home Products, Inc.*, No. 5:13CV151(STAMP), 2016 WL 3926431 (N.D. W. Va. July 18, 2016)**

The plaintiffs brought a proposed class action against the manufacturer of purportedly defective washing machines prone to accumulate mold. Judge Frederick P. Stamp, Jr. of the U.S. District Court for the Northern District of West Virginia initially dismissed most of the claims, allowing only the plaintiffs' strict liability claims to proceed to the extent they alleged personal injuries or damage to property other than the washing machine itself. Judge Stamp found that the proposed class was facially uncertifiable under Rule 23. According to the court, no amount of discovery could change the fact that the requirements of typicality, predominance and superiority were lacking in the case. The court reasoned that the plaintiffs could never satisfy the typicality requirement because West Virginia strict product liability law requires individualized proof of damages — *i.e.*, that the purportedly defective washing machine caused personal injuries or damage to property other than the washing machine itself. Because this element would turn on "individual factors such as the nature of each class member's use of their washing machine and steps taken to prevent or get rid of biofilm," Judge Stamp found that the named plaintiffs' evidence would not prove the absent class members' claims. In addition, Judge Stamp highlighted that the named plaintiffs reside in West Virginia but purchased their washing machine in Ohio, potentially foreclosing their representation of the proposed Ohio class, injecting further typicality issues into the case. With respect

to predominance, the court reiterated its concerns regarding the plaintiffs' "unique place of residency and place of purchase," which "create[d] complex choice of law issues" and necessitated a finding that individual issues would predominate any class proceeding. Finally, Judge Stamp held that the issue of superiority could be resolved on the pleadings because the governing law required individualized evidence of damages. Simply put, any benefit from proceeding on a classwide basis would be vastly outweighed by the individual factual questions that would dominate the proceeding.

***Dixon v. Monterey Financial Services, Inc.*, No. 15-cv-03298-MMC, 2016 WL 3456680 (N.D. Cal. June 24, 2016)**

Judge Maxine M. Chesney of the U.S. District Court for the Northern District of California granted the defendant's motion to strike the plaintiff's class allegations on behalf of a nationwide class asserting violations of the Telephone Consumer Protection Act (TCPA). The defendant challenged the proposed class, which was defined as "[a]ll persons within the United States who received any collection telephone calls from [d]efendant" without previous consent, as an impermissible fail-safe class. The defendant pointed out, and the court agreed, that the class was defined in a way that precluded membership unless the defendant's liability was established. Specifically, defining the TCPA class to include anyone who received a call without prior express consent would mean that only those class members who would prevail on this fundamental liability question would be eligible for inclusion in the class. The plaintiff cited no authority to demonstrate that the class was not fail-safe as defined and instead urged the court to delay ruling on the issue until the plaintiff filed for class certification sometime in the future. The court refused, as the plaintiff had not yet filed such a motion or identified a proposed non-fail-safe class on which to base a motion for class certification. In striking the class allegations, the court gave the plaintiff leave to amend to allege a proposed class that is not fail-safe.

***Cassidy v. Ford Motor Co.*, No. 15-2483, 2016 WL 3001131 (E.D. La. May 25, 2016)**

Judge Kurt D. Engelhardt of the U.S. District Court for the Eastern District of Louisiana granted a motion to strike class action allegations and denied a motion to certify class as untimely. Under Local Rule 23, a plaintiff must move for class certification within 91 days of filing the complaint unless the period is extended by the court. A plaintiff must file a motion for class certification and cannot merely rely on class allegations in the complaint. The penalty for failure to comply is dismissal of class allegations. Therefore, the court granted the defendant's motion to strike the class allegations and denied the plaintiffs' motion to certify class, which was filed more than seven months after the deadline.

Decisions Denying Motions to Strike/Dismiss Class Claims

***Regehr v. Greystar Management Services, L.P.*, No. A-15-CA-00501-SS, 2016 WL 3963220 (W.D. Tex. July 21, 2016)**

Judge Sam Sparks of the U.S. District Court for the Western District of Texas denied the defendants' motion to dismiss because the plaintiff satisfied Fed. R. Civ. P. 12(b)(6) and the challenge to the class allegations was premature. The plaintiff alleged that his apartment manager and owner charged extra fees on his water bill in violation of the Texas Water Code. The plaintiff sought to certify a class of current and former tenants who paid a similar fee at apartment houses in Texas where the defendants served as owner or manager. In support of the motion to dismiss, the defendants argued that class treatment was unworkable because many of the apartments named in the complaint were owned by separate companies — not the defendant owner — and charge separate fees through separate billing services. The court found that a challenge to class certification was premature: No motion for class certification was pending, and no discovery had been conducted. At this stage, the plaintiff was required to do no more than set forth a pleading that complied with the requirements of Fed. R. Civ. P. 12(b)(6). Because the plaintiff met this burden, and the challenge to class allegations would be more appropriately addressed once a motion for class certification is pending, the court denied the motion to dismiss.

***In re Celexa & Lexapro Marketing & Sales Practices Litigation*, MDL No. 09-02067-NMG, No. 14-13848-NMG, 2016 WL 3212480 (D. Mass. June 9, 2016)**

In a multidistrict litigation proceeding where discovery had been ongoing for seven years, Judge Nathaniel M. Gorton of the U.S. District Court for the District of Massachusetts denied as premature the defendant pharmaceutical companies' motion to strike class allegations in a putative consumer fraud class action. The defendants argued that the court had already denied class certification of consumer classes in multiple related cases in the multidistrict litigation. The court rejected this argument and reserved the issue until the plaintiffs filed their motion for class certification, noting that striking class allegations is generally disfavored because it requires the court to terminate the class aspects of the litigation based solely on what is alleged in the complaint.

Decisions Rejecting/Denying Class Certification

***Ebert v. General Mills, Inc.*, 823 F.3d 472 (8th Cir. 2016)**

The U.S. Court of Appeals for the 8th Circuit (Wollman, Beam and Gruender, JJ.) reversed a class certification order in a putative class action brought by owners of residential properties in a neighborhood of Minneapolis against General Mills. The plaintiffs alleged that the company caused trichloroethylene (TCE) to be released onto the ground at a former General Mills facility located in the neighborhood where the plaintiffs resided. The plaintiffs further alleged TCE vapors migrated into the surrounding residential area and diminished property values. The plaintiffs sought to certify a class of "all persons and non-governmental entities that own residential property within the 'Class Area'" and asserted various legal claims, including violation of the Comprehensive Environmental Response, Compensation and Liability Act and common law negligence, but excluded individuals asserting personal injury from the class. The district court certified a Rule 23(b)(2) class for declaratory or injunctive relief and a Rule 23(b)(3) class for money damages and adopted a bifurcated trial plan in which only "liability" would be decided in the first phase. The 8th Circuit reversed, holding that by bifurcating the case and restricting the class certification analysis to the issue of liability to be tried in the first phase, the district court artificially "limited the issues and essentially manufactured a case that would satisfy the Rule 23(b)(3) predominance inquiry." As the 8th Circuit explained, the district court's approach defeated any efficiency gains because the remaining individual issues like exposure and causation would still have to be tried. The court further concluded that the district court's certification of a Rule 23(b)(2) class failed for similar reasons in that injunctive relief would not be uniformly appropriate in light of the individualized issues the district court had ignored. Accordingly, the order granting class certification was reversed.

***Adkins v. Morgan Stanley*, No. 15-2398, 2016 WL 3885437 (2d Cir. July 14, 2016)**

The U.S. Court of Appeals for the 2nd Circuit (Jacobs, Raggi and Chin, JJ.) affirmed the denial of class certification because common questions did not predominate over individual issues. The putative class of African American homeowners in the Detroit area alleged that the defendants induced a mortgage company to make costly, high-risk loans to the class at a higher rate than comparable white borrowers. The district court concluded that the plaintiffs failed to satisfy Rule 23's typicality, predominance and superiority requirements. With respect to predominance, the district court concluded that common issues did not predominate over individual issues because, among other things, there were 33 different combinations of risk factors within the class that affected the plaintiffs' loans differently, and causation was not subject to classwide proof. The 2nd Circuit did not identify an abuse of discretion in the district court's predominance conclusion and therefore did not consider the plaintiffs' challenges to the district court's typicality and superiority determinations. Furthermore, the 2nd Circuit agreed with the district court's ruling that permitting the plaintiffs' alternative class proposal made at the late stage of oral argument would "unfairly prejudice" the defendants.

***Crutchfield v. Sewerage & Water Board of New Orleans*, No. 15-30709, 2016 WL 3769303 (5th Cir. July 13, 2016)**

The U.S. Court of Appeals for the 5th Circuit (Costa, Smith and Barksdale, JJ.) affirmed the denial of a motion to certify class because individual causation and damages questions would predominate over issues common to the proposed class. (The district court decision was discussed in the Fall 2015 *Class Action Chronicle*.) The plaintiffs were homeowners and residents in New Orleans, Louisiana, who brought claims for property damage resulting from a variety of construction activities occurring along a 7,000-foot canal over a period of more than five years. In affirming the denial of certification, the court focused its review on the lack of predominance, noting that class members would have to prove causation and damages on an individualized basis. With several defendants performing a variety of construction activities over a large area for several years, a series of mini-trials would be required to establish causation. As for damages, the plaintiffs argued that a single formulaic approach could be used, but they did not offer one. Moreover, any formula would need to take into account the specific characteristics of each damaged property and could not evaluate the plaintiffs' claims for emotional distress damages. The court further explained that, although courts often certify class actions and provide for bifurcated damages trials, the predominance inquiry requires assessing all issues, including damages, and deciding whether the common issues will be more central than the individual ones. Because the lawsuit sought to recover different damages, caused by different acts, committed by different defendants at different times over a five-year period, the district court did not abuse its discretion in concluding that individualized issues of causation and damages would predominate, the 5th Circuit found.

***Garrido v. Money Store*, No. 15-1891, 2016 WL 2956914 (2d Cir. May 23, 2016)**

The U.S. Court of Appeals for the 2nd Circuit (Kearse, Winter and Jacobs, JJ.) affirmed the denial of class certification because the plaintiffs failed to prove that questions of law or fact common

to the class members predominated over any questions affecting only individual members. The plaintiffs alleged common law fraud in connection with the defendants' debt collection practices, claiming that the defendants charged them for attorneys' fees that were never paid to attorneys and that the law firm was unauthorized to practice law. The district court denied class certification, stating that the plaintiffs failed to show that uniform representations (paper and electronic invoices, payoff quotes, etc.) were made to all the putative class members. The 2nd Circuit agreed, holding that "[w]ithout proof of a uniform representation, the [plaintiffs] cannot use class-wide evidence to prove the central disputed issues in a fraud action: a material representation; its falsity; and reliance." The plaintiffs also contended that the alleged misrepresentations could be presumed because the putative class paid the alleged fees, which they would only rationally do if they were told by the debt collector that the fees were owed. However, the plaintiffs cited to no authority that representations of fact could be presumed in a common law fraud action, and therefore the 2nd Circuit concluded that such a presumption was not reasonable. As a result, the 2nd Circuit affirmed the denial of class certification.

***Pentiuk, Couvreur, Kobiljak, P.C. v. Advanced Roofing, Inc.*, No. 16-12863, 2016 U.S. Dist. LEXIS 103883 (E.D. Mich. Aug. 8, 2016)**

The plaintiff filed a motion to certify a class simultaneously with the filing of its putative class action complaint and prior to serving the defendant. Chief Judge Denise Page Hood of the U.S. District Court for the Eastern District of Michigan denied that motion without prejudice to the plaintiff's refiling it after the defendant had been served and had an opportunity to respond to the class allegations, because she could not conduct a rigorous analysis of whether the Rule 23 requirements had been satisfied based only on the allegations in the complaint.

***Humphreys v. Budget Rent a Car System Inc.*, No. 10-cv-1302, 2016 WL 3940807 (E.D. Pa. July 21, 2016), 23(f) pet. denied**

Judge Lawrence F. Stengel of the U.S. District Court for the Eastern District of Pennsylvania denied the plaintiff's motion to certify four nationwide classes and six subclasses involving challenges to the way Budget charges its customers for damage to its rental vehicles and the defendants' collection practices with respect to those charges. The plaintiff argued that Rule 23's commonality requirement was satisfied because all members of the proposed classes used a standardized rental contract and the defendants sent standardized letters attempting to collect payment for damages. The court held, however, that the central questions were not whether Budget breached each contract, but whether (1) the formulas Budget used to calculate damages were invalid liquidated damages clauses and (2) Budget's billing practices violated the covenant of good faith and faith dealing. The court found that these questions would require determining whether there had been a violation of each putative class member's applicable state laws. Under Pennsylvania's choice-of-law rules, this would require individualized analysis of the laws of both the rental state and each individual class member's home state to determine whether there were relevant differences between the two laws. Because the plaintiff did not meet her burden of "credibly demonstrating, through an extensive analysis, that the variations in state laws do not present 'insuperable obstacle[s]' to finding common answers," the court denied her motion for class certification. Moreover, Judge Stengel held that the plaintiff failed to present evidence that she was a member of at least two of the proposed subclasses; thus, because "a class representative must be part of the class and possess the same interests and suffer the same injury as the class members," her motion would have still been denied with regards to those subclasses.

***Atkins v. United States*, No. 4:15 CV 933 CDP, 2016 WL 3878466 (E.D. Mo. July 18, 2016)**

Judge Catherine D. Perry of the U.S. District Court for the Eastern District of Missouri denied a motion for class certification in a putative class action seeking compensation for the government's alleged taking of private property for public use when the Surface Transportation Board authorized use of an abandoned trail line as a recreation trail. The plaintiffs sought to represent a class of more than 325 Missouri property owners whose property was situated along a former railway line that operated through various easements. The plaintiffs argued that, under Missouri property law, the railroad's abandonment of the rail line would terminate the easements, and the property interests would revert to the property owners. On review, the court denied the motion for class certification given the "obvious lack of a predominant common question" under Rule 23(b)(3). Rather, the only common question in the case concerned whether there was government action that affected segments of the railroad line at issue. But the government conceded that point. The issues that remained to be litigated — "whether each plaintiff owns the fee interest in each affected parcel (liability) and, if so, what compensation is just (damages)" — required highly individualized proof. Determining valuation of the properties alone would require appraisers to apply numerous unique variables to each individual property, even if the appraisers used a single methodology to value the properties. Thus, determining "which variables apply to each property would require highly individualized proof." Accordingly, the court denied the plaintiffs' motion for class certification.

***Career Counseling, Inc. v. Amsterdam Printing & Litho, Inc.*, No. 3:15-cv-05061-JMC, 2016 WL 3679345 (D.S.C. July 12, 2016)**

Judge J. Michelle Childs of the U.S. District Court for the District of South Carolina denied certification of a class alleging that the defendants faxed advertisements in violation of the Telephone Consumer Protection Act. The plaintiff filed a "placeholder" motion to certify the class in order to avoid the "'unnecessary gamesmanship' surrounding 'pick-off' attempts" and because the proposed class definition could change after discovery. The court noted, however, that there was no clear indication that the defendants had made, or planned to make, a Rule 68 offer of judgment to the named plaintiff. As a result, without that information, the court stated it would be left indefinitely with a pending, unresolved motion on its docket if it allowed the placeholder motion to linger. Moreover, the court found no precedent to justify the plaintiff's concern that without a pending placeholder motion, the named plaintiff's acceptance of an offer would necessarily moot the class action claims. The court therefore denied the plaintiff's motion without prejudice as premature.

***Family Medicine Pharmacy, LLC v. Perfumania Holding*, No. 15-0563-WS-C, 2016 WL 3680696 (S.D. Ala. July 5, 2016)**

Chief Judge William H. Steele of the U.S. District Court for the Southern District of Alabama denied the plaintiff's motion for preliminary certification of a class alleging that Perfumania violated the Telephone Consumer Protection Act by sending unsolicited "junk fax[es]." The court held that the motion fell "well short" of Rule 23's requirements, while the plaintiff provided "no authority ... that would relax these requirements and lower these burdens where a movant couches his Rule 23 motion in 'preliminary' terms." The court explained that the plaintiff's motion was part of the "gamesmanship and jockeying for position" resulting from the defendants' strategy of making offers of judgment under Rule 68 to "pick off" named plaintiffs' claims in an effort to moot their complaints before a class could be certified. This practice prompts plaintiffs to "rush[] to file 'placeholder' Rule 23 motions as early in a putative class action as possible" to "thwart the defendants' 'pick off' strategy." The court admonished this practice on both sides, explaining that "just as courts (including this one) have frowned on defendants' use of Rule 68 offers and tenders to snuff out class actions in their infancy, so too has criticism rained down on plaintiffs' practice of filing premature, skeletal Rule 23 motions, unsupported by any factual record, to jam a foot in the class action door before a defendant can slam it shut." Because the plaintiff's certification motion was "premature" and "unnecessary," the court denied it.

In a separate opinion issued the same day, 2016 WL 3676601, the court addressed Perfumania's related motion to dismiss the named plaintiff's complaint as moot. The court explained that the U.S. Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), made clear that Rule 68 offers alone do not moot class certification motions but left open whether the result would be different if a defendant simultaneously tendered full settlement funds to the plaintiff, as Perfumania did. Although courts have ruled inconsistently on this issue in the wake of *Campbell-Ewald*, the court found "an emerging consensus against a finding of mootness." The court explained that this result was most consistent with the Supreme Court's requirement in *Campbell-Ewald* that a putative class representative with a live claim "be accorded a fair opportunity to show that certification is warranted." The court cautioned that "[i]f defendants could derail a class action at its inception by picking off named plaintiffs via Rule 68 offers of judgment and tender of settlement checks for relatively trifling sums, before a Rule 23 motion could be filed or decided, the resulting game of whac[k]-a-mole would empower sharp-eyed defendants to prevent a class action from ever getting off the ground." This, the court warned, would "effectively write Rule 23 out of the Federal Rules of Civil Procedure, eviscerate consumer class actions, [and] grant absolute power to defendants to destroy class actions in their infancy via a foolproof, inexpensive 'picking off' strategy that plaintiffs would be powerless to prevent." The court then rejected Perfumania's argument that its tender offer mooted any live controversy between it and the named plaintiff, explaining that the mootness doctrine is "flexible." The court further explained that under the U.S. Court of Appeals for the 11th Circuit's decision in *Stein v. Buccaneers Limited Partnership*, 772 F.3d 698, 704 (11th Cir. 2014), class claims remain live and may be pursued by the named plaintiff even if the plaintiff's claim was extinguished by a Rule 68 offer. Accordingly, the court denied Perfumania's motion to dismiss.

***Tolmasoff v. General Motors, LLC*, No. 16-11747, 2016 WL 3548219 (E.D. Mich. June 30, 2016)**

In response to defendant General Motors' offer to putative class members to provide reimbursement or an extended warranty in exchange for a release, the named plaintiff in a consumer protection action moved for "provisional" certification of an injunctive relief class and a preliminary injunction enjoining the defendant from further communications with potential class members and invalidating any already executed releases. Judge George Caram Steeh of the U.S. District Court for the Eastern District of Michigan declined to certify the class, concluding that certification of an injunctive relief class was not appropriate because the complaint did not request injunctive relief and the plaintiff had not provided any basis for a final injunctive relief claim, as there was no allegation that the alleged misconduct was ongoing. The court further explained that it could order the requested preliminary injunctive relief pursuant to Fed. R.

Civ. P. 23(d) without certifying a class but that it would not do so because the defendant's communications, which included a link to the class action complaint and an explanation of how the reimbursement offer was calculated, were not coercive or misleading. The court also refused to invalidate the already executed releases, which the defendant reported numbered in the tens of thousands, without any evidence that the individuals who executed those releases wanted them voided.

***Geier v. M-Qube, Inc.*, No. C13-354-TSZ, 2016 WL 3458345 (W.D. Wash. June 24, 2016), 23(f) pet. dismissed by stipulation**

Judge Thomas S. Zilly of the U.S. District Court for the Western District of Washington refused to certify a class of Washington cellphone users who were charged by the defendant billing aggregator for services from various content providers but did not access the programs they purportedly subscribed to. The plaintiff brought claims for conversion, unjust enrichment and violation of the Washington Consumer Protection Act. The court held the class was not ascertainable because there were no records demonstrating whether individuals "accessed" a program, a fundamental requirement for membership in the class. Further, the plaintiff could not establish that common issues predominated over individual issues as to whether the alleged misconduct constituted an "unfair" practice — *i.e.*, whether the consumers' injury was "reasonably avoidable." This was so, the court determined, because whether a consumer could avoid harm turned on what information about the terms and conditions of service the consumer saw in the course of subscribing to each service. Such analysis would require examining interactions class members had with dozens of different content providers making varying representations. Finally, the superiority requirement was not met because the class members' cell carriers had settled with federal agencies and created refund pools for affected consumers. As a result, the class members could receive full compensation directly from their carriers instead of litigating a class action over the same issues. Because the class action was seeking to replicate an award of damages already available through regulatory settlements, the court held that future motions for certification would be futile and denied certification with prejudice.

***Roderick v. OXY USA, Inc.*, No. 12-1215-EFM-GEB, 2016 WL 3423133 (D. Kan. June 22, 2016)**

Judge Eric F. Melgren of the U.S. District Court for the District of Kansas granted the defendant's motion to decertify a class of owners of royalty interests in oil and gas wells who claimed that the defendant underpaid their royalty fees by deducting costs associated with rendering the gas into marketable condition. The plaintiffs originally filed their case in Kansas state court, which granted their motion to certify the class. However, the plaintiffs then produced a report from their damages expert that set the damages amount at $6.5 million, which contradicted the plaintiffs' claim that their individual damages would not exceed $75,000 and the amount of class damages would not exceed $5 million. The defendant then removed the case to federal court under the Class Action Fairness Act and moved to decertify in light of new precedent from both state and federal courts following the state court's certification decision that affected the class certification analysis and Kansas oil and gas law. Judge Melgren held that the state court's finding of commonality as to whether the gas at issue was in marketable condition at the wellhead was no longer valid. As he explained, a 2015 Kansas Supreme Court decision held that the marketability of gas was a factual question tied to the purchaser's acceptance of the gas from the seller. Because the defendant distributed gas pursuant to different marketing arrangements, the question of when the gas reached marketable condition would require individual inquiries into each marketing contract. While the court noted that a class action might be proper if the plaintiffs could identify a common question as to marketability consistent with Kansas oil and gas law as laid down by the Kansas Supreme Court, it also noted that "those allegations were not made when this class was initially certified, and are not made here," and it proceeded to decertify the class.

***Mullins v. Premier Nutrition Corp.*, No. 13-cv-01271-RS, 2016 WL 3440600 (N.D. Cal. June 20, 2016)**

Judge Richard Seeborg of the U.S. District Court for the Northern District of California refused to expand a certified class of California consumers who purchased "Joint Juice," a drinkable supplement that advertised health benefits for cartilage and joints but allegedly did not provide such benefits (discussed in the Summer 2016 *Class Action Chronicle*). The plaintiff sought to expand the class to consumers in all 50 states, or alternatively, 10 specific states, pursuing relief under California's Unfair Competition Law (UCL) and Consumer Legal Remedies Act (CLRA). Applying the U.S. Court of Appeals for the 9th Circuit test in *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), the court concluded that neither class could be certified because various states' laws materially conflict with the UCL and CLRA and, on balance, the interests of the states where the advertising occurred outweigh those of California. Specifically, the court found material conflicts in state approaches to reliance, scienter and available remedies for violations of consumer protection laws. The court rejected the plaintiff's proposal to carve out those states with laws that materially conflict with the UCL or CLRA into separate classes based on each statute, given the differences between the UCL and CLRA themselves and the virtual impossibility of delineating which states have material conflicts with the UCL and which have conflicts with the CLRA.

Because the plaintiff did not offer "a proposal that resolves all conflicts cleanly," the class remained limited to California consumers.

***Chambers v. North American Co. for Life & Health Insurance*, No. 4:11-cv-00579-JAJ-CFB, 2016 WL 3625613 (S.D. Iowa June 13, 2016), 23(f) pet. denied**

Chief Judge John A. Jarvey of the U.S. District Court for the Southern District of Iowa denied a motion for class certification in a putative class action brought against the defendant for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) and breach of contract related to the defendant's practices in selling deferred annuities. To support their RICO claim, the plaintiffs alleged at least three different misrepresentations regarding initial sales charges or fees, premium bonuses and the effect of an "interest adjustment." To support their breach-of-contract claim, the plaintiffs contended that the contracts indicated that the annuities would provide "not less than the minimum required by the laws of the state" in which the policy was delivered. In addressing the RICO claim, the court held that the plaintiffs failed to establish that they could effectively prove causation with classwide evidence. The defendant's disclosure statements and marketing materials varied, and its sales agents' varying oral presentations added to this lack of uniformity. Further, in their testimony, the named plaintiffs admitted that they had not read or relied on any alleged misrepresentation by the defendant. Thus, individual questions were likely to predominate over the causation inquiry. As related to the breach of contract claims, the court also found that proving a *prima facie* case would require varying individual evidence based on the type of product purchased, the date of purchase and the controlling state law at the time of purchase such that predominance was not satisfied. Compliance of one state's laws would not guarantee compliance in other states, and some contracts specified that the state law "at the time of issue" was to apply, creating more difficulty with changing state laws. Accordingly, the court denied the motion for class certification.

***Sandoval v. Pharmacare US, Inc.*, Nos. 15-cv-0738-H-JLB, 15-cv-0120-H-JLB, 2016 WL 3554919 (S.D. Cal. June 10, 2016), appeal filed**

Judge Marilyn L. Huff of the U.S. District Court for the Southern District of California denied certification of a nationwide class of consumers who bought the sexual health supplement IntenseX. The plaintiffs alleged violations of California consumer protection and warranty laws and the Magnuson-Moss Warranty Act, claiming that the product is an unapproved aphrodisiac drug and the claims on its label and website are false or misleading. The court found that the class was sufficiently ascertainable, despite the fact that class members would need to self-identify — a problem that exists in all class actions involving low-priced products sold through retail intermediaries. However, commonality and predominance precluded certification, as it was likely that many class members were never exposed to the allegedly misleading statements. Further, the plaintiffs did not submit sufficient evidence that the representations were material; that others similarly found the product lacking; or that IntenseX did not provide the promised effects. Typicality was also lacking, as the plaintiffs' deposition testimony revealed they did not suffer from the sexual health problems they alleged the product falsely claimed to improve; they only relied upon the claims on the product label, not the website; and their purchases were recent, whereas a substantial portion of the proposed class members' claims were likely time-barred. Moreover, the proposed class included consumers with no cognizable injury, including those who obtained full refunds. Finally, a nationwide class was not proper due to material differences in the consumer protection laws at issue that prevented application of California law to the claims of putative class members from other states.

***Mednick v. Precor, Inc.*, No. 14 C 3624, 2016 WL 3213400 (N.D. Ill. June 10, 2016)**

Judge Harry D. Leinenweber of the U.S. District Court for the Northern District of Illinois denied a motion for class certification in a putative class action brought against Precor, Inc. for breach of express warranty under the Magnuson-Moss Warranty Act and for violations of various state consumer fraud laws. The plaintiffs alleged that touch sensors in the defendant's exercise machines failed to provide accurate heart rate readings and contended that Precor committed fraud and breached its warranties by falsely and misleadingly marketing the sensors as a premium feature despite knowing that the sensors were "inherently defective." The plaintiffs sought certification under Rules 23(b)(2) and 23(b)(3). The court held that they could not meet the predominance requirement as to the central issue of whether Precor machines suffer from common design defects. Even assuming that the sensors were unreliable, the court reasoned that the cause of the unreliability may require many individualized questions. For example, the unreliability could be attributed to a defect, simple human error or other external factors such as the user's age, body mass, weight, cardio-physiology, thickness of the skin placed on the sensor, etc. Further, the court noted that the U.S. Court of Appeals for the 7th Circuit has made it clear that multistate fraud and warranty class actions are not appropriate, especially with multiple products, because such actions require the application of numerous, materially different state laws. A Rule 23(b)(2) class was also not appropriate because the plaintiffs' sole injury — their alleged overpayment for the Precor machines — was simply an action for damages.

***Riffey v. Rauner*, No. 10 CV 02477, 2016 WL 3165725 (N.D. Ill. June 7, 2016), appeal filed**

Judge Manish S. Shah of the U.S. District Court for the Northern District of Illinois denied a motion for class certification in a putative class action brought against Gov. Bruce Rauner and SEIU Healthcare, an entity that represents the plaintiffs for the purposes of collective bargaining with the state. The plaintiffs, personal assistants who provide in-home medical care through an Illinois state program, allege that they were compelled to pay a "fair share" fee to the union to support its collective bargaining efforts despite not being members of the union nor public employees. The plaintiffs sought a refund of the fair share fees paid to the union and moved to certify a class of all personal assistants from April 22, 2008, to the present who were not members of the union and who had fair share fees deducted from payments made to them under the Illinois state program without their prior, written authorization. The court found that individual questions predominated on the most important issue of whether and how much money should be refunded to those who had fair share fees deducted from their pay. Because Section 1983 is a tort statute requiring injury, the court found that if a personal assistant wanted to support the union, collecting a fair share fee from him would not result in the requisite injury. Therefore, to prove injury, the plaintiffs would have to prove contemporaneous subjective objection to the compelled payments, a largely individualized inquiry. Accordingly, the court denied the plaintiffs' motion for class certification without prejudice to allow the plaintiffs to revise the class definition or seek certification on nondamages issues.

***Huebner v. Midland Credit Management, Inc.*, No. 14 Civ. 6046 (BMC), 2016 WL 3172789 (E.D.N.Y. June 6, 2016), appeal filed**

The plaintiff alleged that the defendants violated the Fair Debt Collection Practices Act (FDCPA) in attempting to collect a debt that the plaintiff allegedly owed to Verizon. The plaintiff sought to certify a class of "[a]ll persons who, according to Defendants' records (a) have a United States mailing address; (b) within one year before the filing of this action; (c) verbally disputed the debt; and (d) were asked probing questions regarding the reason for the dispute." Judge Brian M. Cogan of the U.S. District Court for the Eastern District of New York denied the plaintiff's motion for class certification. First, the proposed class was not ascertainable because the plaintiff's class definition required a determination of which consumers were asked "probing questions" by the defendants, a task that would require a case-by-case determination and, without transcripts or other evidence of the types of questions asked, would be nearly impossible to prove. Second, the plaintiff was an inadequate representative of the class because the plaintiff would face a defense that was unique to him — *i.e.*, that his FDCPA claims should be rejected because he attempted to entrap the collection agent into violating the statute.

***Romig v. Pella Corp.*, No. 2:14-cv-00433-DCN, 2016 WL 3125472 (D.S.C. June 3, 2016) and *Naparala v. Pella Corp.*, No. 2:14-cv-03465-DCN, 2016 WL 3125473 (D.S.C. June 3, 2016)**

In two related cases, Judge David C. Norton of the U.S. District Court for the District of South Carolina denied the plaintiffs' respective motions for class certification. Each plaintiff brought claims for breach of express warranty against a window manufacturer, alleging that the defendant's windows were uniformly defective because of "inadequate water management design and ... wood preservative." The court found that the plaintiffs' proposed classes satisfied most of the requirements for certification for the narrow purposes of determining whether the defendant's windows were defective. However, the court held that the plaintiffs could not satisfy Rule 23(b)'s "superiority" requirement. According to the court, there were too many individualized issues to resolve for each class member, such as causation and the amount of damages, which outweighed the value of a class trial on whether the windows were defective. In so holding, the court distinguished the plaintiffs' claims from those at issue in *Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010), which found certification appropriate. Specifically, the court explained that the *Saltzman* litigation was "more likely to be advanced by class certification" because there was no indication there that the alleged defect was actually an amalgamation of multiple independent defects; moreover, the plaintiffs there did not assert a claim for breach of express warranty, which added a new set of causation questions. Thus, class certification was denied.

***In re Celexa & Lexapro Marketing & Sales Practices Litigation*, MDL No. 09-02067-NMG, No. 13-13113-NMG, 2016 WL 3102004 (D. Mass. June 2, 2016), 23(f) pet. pending**

In a lawsuit alleging Racketeer Influenced and Corrupt Organizations Act and consumer protection law violations, Judge Nathaniel M. Gorton of the U.S. District Court for the District of Massachusetts denied a motion to certify classes of third-party payers who paid for certain anti-depressant drugs. The plaintiff claimed that the defendant pharmaceutical companies falsely made off-label claims that their drugs, which the U.S. Food and Drug Administration (FDA) had approved for use in adults, were also effective for pediatric use. According to the plaintiff, most of the studies on pediatric efficacy were negative, and all class members had thus paid for ineffective drugs when prescribed for pediatric use. The court denied class certification. It found that the plaintiff could use classwide evidence that the defendants had promoted the drugs to physicians for off-label use in pediatric patients to show proximate causation because there was common

evidence that the defendants intended to persuade doctors to prescribe the drugs for pediatric use. But individualized issues of specific causation, injury, damages and statute of limitations defenses predominated over common questions. As to but-for causation, the court concluded that the plaintiff's expert's model proffered to prove that fraudulent promotion always results in purchases induced by fraud was unrealistic. Accordingly, the plaintiff could not use this model to prove causation on a classwide basis. The court also concluded that proving injury would require individualized assessments of the drugs' efficacy for each patient, particularly because the clinical trial data at issue was not uniformly negative on the question of pediatric efficacy. Finally, the court accepted the defendants' argument that their statute of limitations defense would turn on evidence specific to each class member regarding when they knew or should have known about the negative studies and resulting changes in the FDA-approved labeling.

***Korea Week, Inc. v. Got Capital, LLC*, No. 15-6351, 2016 WL 3049490 (E.D. Pa. May 27, 2016)**

Judge Mark A. Kearney of the U.S. District Court for the Eastern District of Pennsylvania denied the plaintiffs' motion to certify a class of persons or businesses who signed merchant cash advance financing arrangements with the defendants that allegedly violate the Racketeer Influenced and Corrupt Organizations Act. The court found that the commercial financing contracts signed by the named plaintiffs contained an agreement not to serve as a representative plaintiff in a class action; thus, the class representatives had waived their right to bring their claims as a class action. While the plaintiffs argued that the class action waivers were unconscionable, the court found no evidence of unconscionability after a class certification hearing. The court also held that the named plaintiffs did not adequately represent absent class members, as "their interests are patently conflicting with possible absent class members who may not have signed a class action waiver."

***Booth v. Appstack, Inc.*, No. C13-1533JLR, 2016 WL 3030256 (W.D. Wash. May 25, 2016)**

Judge James L. Robart of the U.S. District Court for the Western District of Washington granted and denied in part the defendants' motion to decertify two classes: a class of Washington residents who received prerecorded telephone messages placed by the defendants on their landlines under the Washington Dialing and Announcing Device Act (WADAD) and a nationwide class of individuals who received prerecorded messages on their cellphones under the Telephone Consumer Protection Act (TCPA). Regarding the TCPA class, the court rejected challenges to standing and ascertainability, reasoning that the class definition provided an objective basis to identify class members, and the defendants could challenge class membership based on individual claimants' records. The court also rejected as speculative the defendants' contention that certain class members consented to particular calls given the defendants' admitted inability to demonstrate the number of calls to which class members supposedly consented. As for the WADAD class, the plaintiffs conceded that they could not determine within what state the robocalls terminated. This was legally significant because the "dormant" Commerce Clause bars application of the WADAD "to commercial solicitations using automatic dialing and announcing devices that were both initiated and received outside the State of Washington." Because the defendants were out-of-state, liability could only be established through in-state class members. The plaintiffs proposed amending the class definition to limit it to calls made to landlines that never had call forwarding activated, which would eliminate the uncertainty surrounding the state of termination of the robocalls. However, because many carriers did not retain call-forwarding data, the plaintiffs would not be able to ascertain the members of the class. Given the "intractable individualized issues in ascertaining its members," the court decertified the WADAD class.

Decisions Permitting/Granting Class Certification

***Carriuolo v. General Motors Co.*, 823 F.3d 977 (11th Cir. 2016)**

The U.S. Court of Appeals for the 11th Circuit (Marcus, Wilson and Rosenbaum, JJ.) affirmed certification of a class of consumers who alleged that General Motors Co. (GM) violated the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) by placing window stickers on new 2014 Cadillac CTS models displaying five-star ratings across multiple safety categories, when in fact the National Highway Traffic Safety Administration had not yet rated the vehicle. The district court had held that common issues predominated based on the "essential" common question of whether GM's sticker was a misrepresentation under the FDUTPA. GM argued on appeal that individual issues regarding the putative class members' buying and leasing experiences should have foreclosed certification, including the individual price each plaintiff negotiated and whether they saw the sticker or were aware the ratings were false. The 11th Circuit disagreed, explaining that the consumers' individual experiences with the stickers were irrelevant because FDUTPA claims do not require proof of reliance. Moreover, because damages under the FDUTPA are determined by the difference between the market value of the promised product and the delivered product, the individual plaintiffs' out-of-pocket costs were immaterial to classwide causation and damages determinations. As the court explained, even if a plaintiff subjectively valued the CTS equally with or without the represented safety ratings, "she could have

suffered a loss in negotiating leverage if a vehicle with perfect safety ratings is worth more on the open market." Further, the district court could refine the class when later confronting any individualized damages issues (such as for resellers who recouped the price premium), and in any event, "individualized damages calculations are insufficient to foreclose the possibility of class certification, especially when, as here, the central liability question is so clearly common to each class member." Finally, the court held that these issues did not create a conflict that could defeat typicality or adequacy because "[e]ach class member is connected by the common predominate inquiry" of whether GM's stickers violated the FDUTPA.

***Kleen Products LLC v. International Paper Co.,* Nos. 15-2385, 15-2386, 2016 WL 4137371 (7th Cir. Aug. 4, 2016)**

The U.S. Court of Appeals for the 7th Circuit (Wood, C.J., Bauer and Williams, JJ.) affirmed certification of a class of purchasers alleging violations of the Sherman Act. The plaintiffs alleged that the defendant companies agreed "to restrict the supply of containerboard by cutting capacity, slowing back production, taking downtime, idling plans, and tightly restricting inventory." The acts led to an increase in the price of containerboard that the plaintiffs would not have paid absent the illegal agreement. On review, the 7th Circuit focused on the predominance requirement. The defendants argued that it was not enough for the plaintiffs to prove aggregate injury and overcharging without allocating how much of that overcharge was paid by each individual class member. However, the panel indicated they have never insisted on such a level of proof at the class certification stage. The plaintiffs were not obliged to drill down and estimate each class member's damages at the class certification stage, and the allocation of that total sum among the class members could be managed individually if the case ever reached that point. Further, the plaintiffs pointed to common proof to establish antitrust injury on a classwide basis: They showed actual price increases, a mechanism for those increases, the communications channels the conspirators used and factors suggesting that cartel discipline could be maintained. Finally, a smattering of individual contract defenses — affecting 190 class members out of over 100,000 notices sent out — did not undermine the superiority of the 23(b)(3) class action.

***Eike v. Allergan, Inc.*, No. 12-cv-1141-SMY-DGW, 2016 WL 4272127 (S.D. Ill. Aug. 15, 2016)**

Judge Staci M. Yandle of the U.S. District Court for the Southern District of Illinois granted class certification in a putative class action alleging that the defendants violated the Illinois Consumer Fraud and Deceptive Business Practices Act and Missouri Merchandising Practices Act by packaging and selling eye drops in plastic bottles that produce a drop too large for the eye, thereby creating wastage of medication and forcing the plaintiffs to spend more money on medication. The plaintiffs proposed seven total classes and sought money damages and injunctive relief. The plaintiffs offered two experts: an ophthalmologist who opined that a certain drop size is larger than the capacity of the eye and provides more medication than necessary and a statistician who developed a proposed methodology to calculate the cost to the class. The court found commonality was satisfied due to the prevalence of many common questions: the central question of whether the drops are too large and other questions including whether they lead to wastage, whether it is feasible for the defendants to make smaller drops and whether a larger drop size has any therapeutic effect. The court also found predominance satisfied. While the plaintiffs brought their claims under the two state consumer fraud statutes, they relied on a Federal Trade Commission Unfairness Policy Statement to show unfair practice. There were only two law-related variations in the plaintiffs' claims — the showing of "actual damage" under one law and "an ascertainable loss" under another — that did not predominate over the predominant common questions of whether the defendants engaged in an unfair practice. The basis for damages also was the same across the entire class and included either the mean, median or minimum of the average wasted drops. Therefore, the court granted the motion for class certification.

***Czuchaj v. Conair Corp.*, No. 3:13-cv-01901-BEN-RBB, 2016 WL 4272374 (S.D. Cal. Aug. 15, 2016)**

Judge Roger T. Benitez of the U.S. District Court for the Southern District of California granted in part the defendant's motion to modify New York and California subclasses of hair dryer purchasers asserting state law implied warranty claims. The gravamen of the lawsuit was that the defendant's Pro 1875 Watt model 259 hair dryer contained two defects: a defect to the strain relief in the product's cord and a defect to coils in the barrel of the product. The court narrowed the New York subclass definition to comport with the applicable three-year statute of limitations and defined class membership based on in-state purchases, not New York residency, in light of New York's consumer protection statute. The court also limited the subclass to the plaintiffs alleging coil issues, holding that the named plaintiff lacked standing for any cord defect claims and therefore could not be a typical plaintiff for such claims, because her hair dryer was not from the manufacturer where cord problems arose. The court denied the plaintiff's request to add a new class representative for cord claims, reasoning that such amendment would unduly delay the case and prejudice the defendant following years of defense based on the named plaintiffs in the pleadings. The court also modified the California subclass to include in-state purchasers

rather than California residents given California's Song-Beverly Act but rejected the defendant's proposal to limit the class to members with a cord failure. Because the plaintiffs' theory was that the dryers by particular manufacturers also had inherent defects related to coils, the plaintiff had standing to represent coil complainants, whether or not that defect had actually manifested. Whether such a defect existed was a common, predominate question, and because the plaintiff was alleged to have been injured by that defect, typicality was satisfied.

***Steele v. United States*, No. 14-1523 (RCL), 2016 WL 4197577 (D.D.C. Aug. 8, 2016)**

Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia granted the plaintiffs' motion to certify a class of "[a]ll individuals and entities who have paid an initial and/or renewal fee for a PTIN [preparer tax identification number]," excluding three specific individuals and entities. The court determined that classwide issues predominated over individual issues because the cost of issuing a PTIN was the same, regardless of the recipient; thus, the question of whether the PTIN fee was authorized or excessive would be answered in the same way for each class member.

***Sherman v. Burwell*, No. 3:15-cv-01468 (JAM), 2016 WL 4197575 (D. Conn. Aug. 8, 2016)**

Judge Jeffrey Alker Meyer of the U.S. District Court for the District of Connecticut granted certification for a class of Medicare beneficiaries alleging that the Department of Health and Human Services (HHS) routinely and erroneously denied claims at the first levels of review. The plaintiff contended that the defendant — the secretary of the HHS — had reviewers apply a secret policy of administering and denying claims in violation of the due process clause under the Fifth Amendment of the U.S. Constitution and rights under the Medicare statute. The court held that Rule 23's commonality requirement was satisfied because the "existence, or non-existence, of such a policy is a common question of fact — and the constitutionality of the existence of such a policy is a common question of law." The defendant argued that commonality was defeated because the class included beneficiaries who were denied coverage for many reasons. The court disagreed, however, stating that the question was not whether each of the beneficiary's claims had merits, but rather whether the class all suffered the same harm as a result of the secret policy. The court further held that the numerosity, typicality and predominance requirements were met.

***Lafollette v. Liberty Mutual Fire Insurance Co.*, No. 2:14-cv-04147-NKL, 2016 WL 4083478 (W.D. Mo. Aug. 1, 2016), 23(f) pet. denied**

Judge Nanette K. Laughrey of the U.S. District Court for the Western District of Missouri granted class certification in a putative class action alleging that Liberty Mutual improperly reduced actual cash value (ACV) payments to insureds for payment of a deductible. The plaintiffs sought certification of a class of Liberty Mutual property insurance policyholders in Missouri whose ACV payments were reduced for payment of a deductible. After addressing initial standing arguments, the court granted certification of a 23(b)(3) class. The court first held that commonality was satisfied because all class members' claims revolved around the same question of whether Liberty Mutual properly assessed a deductible on the policyholders' ACV claims. The named plaintiffs were typical of the class because of the common theory surrounding the breach of contract claim, identical base policy terms and common legal framework surrounding the class members' claims. The defendant next argued that the named plaintiffs were not adequate class representatives because their interests conflicted with those of other class members. Specifically, because the named plaintiffs were not current policyholders of Liberty Mutual, any increases in premiums due to the named plaintiffs prevailing in the suit would be borne by current policyholders only. However, the court held that it seemed unlikely that any affected class members would experience a significant rate hike that would create a sufficient conflict of interest. As to predominance, the court found the requirement satisfied because all class members were subject to the same base policy, though the court did create four subclasses to account for the variance in some specific policy endorsements.

***Stanley v. National Recovery Agency*, No. 1:15-cv-239-WTL-MJD, 2016 WL 4088394 (S.D. Ind. July 29, 2016)**

Judge William T. Lawrence of the U.S. District Court for the Southern District of Indiana granted class certification in a putative class action seeking damages under the Fair Debt Collection Practices Act (FDCPA) related to the defendant's form collection letters demanding "costs" that did not represent the actual cost to collect the debt but instead a flat 20 percent fee. The plaintiffs alleged that this was a false, deceptive or misleading statement in violation of the FDCPA. The court held that commonality was satisfied in large part because of the defendant's standardized conduct: The letters in question were form letters that contained the same allegedly improper language. The court noted predominance was likewise satisfied because cases dealing with the legality of standardized documents "are generally appropriate for resolution by class action because the document is the focal point of the analysis." The class action method was superior to all other methods because it would efficiently resolve a potentially large

number of claims sharing a similar set of legal and factual issues. Therefore, the court granted the motion for class certification.

***Johnson v. Navient Solutions, Inc.*, No. 1:15-cv-00716-LJM-MJD, 2016 U.S. Dist. LEXIS 102656 (S.D. Ind. July 27, 2016), 23(f) pet. denied**

Judge Larry J. McKinney of the U.S. District Court for the Southern District of Indiana granted class certification in a putative class action brought under the Telephone Consumer Protection Act. The plaintiff sought certification of a class of "[e]ach person and entity throughout the United States (1) to whom Navient Solutions Inc. placed one or more telephone calls (2) directed to a number assigned to a cellular telephone service, (3) by using an automatic telephone dialing system, (4) after the person or entity informed Navient that it was calling the wrong telephone number, (5) between May 4, 2011 and March 7, 2016." After rejecting initial arguments on standing, the court also rejected the defendant's argument that there were too many differences among the purported class members' individual claims. The defendant argued that these differences would "include difficult damage calculations, individual determinations of who the telephone user was, when the call was made and proof that Navient actually made the calls." The court held, without elaboration, that differences in the amount of damages, users and user habits could be efficiently addressed at a later time. The plaintiff also had claims typical of the class: He received calls after the defendant was told that the party with whom they wished to communicate was no longer available at the number called. Accordingly, the court granted the motion for class certification.

***Hawkins v. S2Verify*, No. C 15-03502 WHA, 2016 WL 3999458 (N.D. Cal. July 26, 2016)**

Judge William Alsup of the U.S. District Court for the Northern District of California certified a nationwide damages class of persons who were the subject of a consumer report containing outdated criminal record information, including about incidents that did not result in a conviction, that the defendant provided to third parties in violation of the Fair Credit Reporting Act (FCRA). The evidence showed that the defendant made "exceptions" to the FCRA prohibition for certain clients who requested that the reports include stale criminal, nonconviction history. Common questions of law and fact existed, including whether the reports sold were "consumer reports" as defined by the FCRA and whether any violations were willful, in light of the "exceptions" made for certain clients. The court found typicality and adequacy were also satisfied, rejecting the defendant's argument that the plaintiff was atypical and inadequate as a class representative based on the plaintiff's criminal convictions years before. The plaintiff also had standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), because improper disclosure of information caused concrete injury by intruding on the plaintiff's privacy interest. Finally, common questions predominated under Rule 23(b)(3) because whether the defendant's practice of providing exceptions to the FCRA standards violated the FCRA, and whether that conduct was willful, could be demonstrated on a classwide basis, and the plaintiff was only seeking statutory, not individualized, damages.

***Labrier v. State Farm Fire & Casualty Co.*, No. 2:15-cv-04093-NKL, 2016 WL 4005998 (W.D. Mo. July 25, 2016), 23(f) pet. granted**

Judge Nanette K. Laughrey of the U.S. District Court for the Western District of Missouri granted class certification in a putative class action alleging breach of contract based on the defendant's practice of deducting labor depreciation when calculating an actual cash value (ACV) payment to be made to an insured. The plaintiff had sought certification of a Rule 23(b)(3) class of State Farm property insurance policyholders in Missouri whose ACV payments were reduced by the withholding of labor depreciation since 2005. Numerosity was satisfied as the defendant itself identified thousands of such payments. Commonality was principally satisfied because of the "overarching, undisputed, and common fact of State Farm's practice of withholding payment from all its insureds for the depreciated labor component of mixed items of loss." The defendant argued that the plaintiff could not demonstrate commonality between those who suffered nonfire losses and those who suffered fire losses, but the court rejected that argument because at a minimum, all class members shared common legal issues: What is the meaning of ACV and can labor be depreciated. Predominance was also satisfied. State Farm's form contract was applicable to all those in the class, and the theory of breach was the same for each class member. Further, the defendant's records contained objective information necessary to identify class members and damages amounts, and damages thus were data driven and could be mechanically calculated. Accordingly, the court granted the motion for class certification.

***Frank v. Walker*, No. 11-C-1128, 2016 WL 3948068 (E.D. Wis. July 19, 2016), appeal pending**

Judge Lynn Adelman of the U.S. District Court for the Eastern District of Wisconsin granted class certification in an action brought by the plaintiffs alleging that Wisconsin's law requiring them to present photo identification at the polls violated the U.S. Constitution and Section 2 of the Voting Rights Act. The court granted class certification under Rule 23(b)(2) for a class of "all those eligible to vote in Wisconsin who cannot with reasonable effort obtain a qualifying photo ID." The court noted that 23(b)(2) classes are generally considered to be the appropriate procedural

vehicle for certifying civil rights claims seeking injunctive relief. While all class members did not face the same high hurdles for obtaining ID, the plaintiffs sought an adequate remedy for the entire class: an injunction requiring the defendants to allow all class members to vote by presenting an affidavit in lieu of a photo ID. The defendants contended that the class was not ascertainable because the term "reasonable effort" is indefinite. But, as applied to the facts of the case, the term was "definite enough." The essential point was that the class "includes anyone who does not currently possess qualifying ID and who, to obtain one, would have to do more than retrieve a birth certificate and related documents from his or her desk drawer and make a single trip to the DMV." The defendants did not need to identify class members to implement the procedure but rather needed to make the forms available to all voters. Accordingly, the motion for class certification and preliminary injunction seeking the affidavit option were granted.

***Kumar v. Salov North America Corp.*, No. 14-CV-2411-YGR, 2016 WL 3844334 (N.D. Cal. July 15, 2016)**

Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California certified a class of California purchasers of Filippo Berio brand olive oil. The plaintiff alleged that the "Imported from Italy" representation on the product label violated various California consumer protection statutes because the oil was produced in Tunisia, Greece and Spain, then shipped to Italy where it was mixed with a small amount of Italian olive oil before being bottled and sold to consumers. The court rejected challenges to the plaintiff's adequacy, noting that her prior felony conviction for driving under the influence was not relevant and her friendship with one of her attorneys did not call into doubt class counsel's ability to act for the class. The claims presented several common questions of fact and law, including whether the label was likely to deceive a reasonable consumer and violated branding requirements promulgated by the Food and Drug Administration. To facilitate ascertainability, the court clarified the class definition to eliminate purchasers of bottles without the "Imported from Italy" language. The court rejected the defendants' arguments that individualized issues concerning the materiality of the statement to the members' purchasing decision, the members' exposure to the statement and understanding of its meaning, and their individualized entitlement to relief predominated. The court held that materiality and reliance could be determined under the "reasonable consumer" standard without individualized evidence. Further, the plaintiff's "diminution in value" methodology to determine the price premium that the consumers paid as a result of the challenged statement was appropriate.

***Opperman v. Path, Inc.*, No. 13-cv-00453-JST, 2016 WL 3844326 (N.D. Cal. July 15, 2016), 23(f) pet. pending**

Judge Jon S. Tigar of the U.S. District Court for the Northern District of California granted in part the plaintiffs' motion to certify a class of Apple device owners seeking relief for purported intrusion upon seclusion and aiding and abetting, arising from the defendant app developers' practice of automatically uploading users' contacts without their notice or consent. The court resolved that California law would govern the nationwide class, reasoning that while there were material differences in the "intrusion upon seclusion" tort among the states, the defendants failed to meet their burden to show that non-California law should apply. According to the court, the defendants did not show how the application of California state law would frustrate the interests of any other state. Further, while the defendants also pointed to the class members' varying subjective expectations of privacy in the data, the court held that California did not require proof of any subjective expectation of privacy to establish intrusion upon seclusion. Instead, California law required only "intrusion into a private place ... in a manner highly offensive to a reasonable person," which could be established by common classwide proof. In addition, because the plaintiffs' claims were based on the private nature of the uploaded information, predominance was not defeated due to differences in each user's data. While predominance was satisfied, the court refused to certify the proposed class as overbroad because it included users who downloaded, but never registered, the app. In other words, the class encompassed individuals whose contacts were never uploaded. The court therefore certified a subclass of users who actually registered and activated the app. However, given the difficulties in assessing the "inherent value of privacy" to establish monetary damages, the court only certified the subclass for purposes of determining the availability of nominal and punitive damages.

***In re Delta/AirTran Baggage Fee Antitrust Litigation*, No. 1:09-md-2089-TCB, 2016 WL 3770957 (N.D. Ga. July 12, 2016)**

Judge Timothy C. Batten, Sr. of the U.S. District Court for the Northern District of Georgia certified a class of consumers alleging that Delta and AirTran's contemporaneous decision to implement a fee for the first checked bag was a price-fixing conspiracy in violation of antitrust laws. The court first considered the degree to which "offsets" — that checked baggage fees were supposedly offset by corresponding reductions in base fares — were relevant to class certification, and in particular whether the presence of consumers who received greater fare reductions than they paid in baggage fees could undermine Rule 23's adequacy and predominance requirements. The court concluded that offsets were relevant to adequacy but could not defeat predominance because such consumers could state viable antitrust claims based on horizontal price-fixing (for which the injury occurs at

the instance of an overcharge); offsets were accordingly only relevant to damages. The court then explained that ascertaining the putative class "potentially consist[ing] of more than twenty-eight million members" was particularly difficult. Specifically, the defendants' ticket records identified only the passenger, not necessarily the consumer who paid the baggage fee, and permitting putative class members to self-identify via their own receipts raised fraud concerns. Nonetheless, the court found the class ascertainable because objective criteria and small claims amounts minimized the likelihood of self-identification fraud and "[t]he fact that some review of files and submission will be required does not defeat certification." Turning to adequacy, the court concluded that any conflict between those putative class members who benefitted from offsets and those who did not was minor and did not defeat certification. Specifically, any benefits from the offsets were not so large and apparent that consumers who received them would lack an incentive to challenge the defendants' practice; nor was there any evidence that class members were subjectively aware of offsetting fare benefits at the time of purchase. Finally, the court found that predominance was satisfied because the litigation centered on the defendants' actions and individual injury, and damages issues could be determined formulaically based on the amount of overcharges paid.

***Fond Du Lac Bumper Exchange, Inc. v. Jui Li Enterprise Co.,* Nos. 09-cv-0852, 13-cv-0946, 13-cv-0987, 13-cv-1061, 2016 WL 3579953 (E.D. Wis. June 24, 2016)**

Judge Lynn Adelman of the U.S. District Court for the Eastern District of Wisconsin granted class certification in a putative class action brought by the plaintiffs against manufacturers of aftermarket automotive sheet metal parts in an antitrust case under the Sherman Act. The plaintiffs alleged that the defendants conspired to fix, raise, maintain and stabilize the prices of such products in violation of the Sherman Act. The court granted class certification under Rule 23(b)(3) for a class of "[a]ll persons and entities in the United States ... that purchased AM Sheet Metal Parts directly from a Defendant between at least as early as January 1, 2003 and September 4, 2009." Numerosity was satisfied in light of the class plaintiffs' previous settlement with other defendants, in which 468 class members filed claims. Differences in relative bargaining power did not lead to a failure of typicality and adequacy because, in part, the defendants offered no reason to believe that such differences would create antagonism between the class representatives and the class. Commonality and predominance were satisfied in light of the required elements of an antitrust claim under the Sherman Act. First, the plaintiffs provided documents purportedly indicating common conspiratorial conduct by the defendants. Next, the plaintiffs' expert performed a multiple regression analysis that was found to have the requisite integrity to demonstrate classwide impact and damages. The expert looked at evidence common to the class, and his analysis determined that anti-competitive conduct would have affected prices generally. The court found that his analysis was reasonable and, if credited by the fact finder, would demonstrate classwide impact.

***McLaughlin v. Wells Fargo Bank, NA,* No. C 15-02904 WHA, 2016 WL 3418337 (N.D. Cal. June 22, 2016), 23(f) pet. denied**

Judge William Alsup of the U.S. District Court for the Northern District of California certified a class of borrowers asserting claims under the Truth in Lending Act (TILA). The plaintiff alleged that Wells Fargo Bank failed to provide the plaintiff with an accurate home mortgage payoff statement because it did not include insurance proceeds held by the bank. The defendant argued that commonality was lacking because determining whether the bank violated TILA would require individualized inquiry into the circumstances of each payoff statement, especially as to whether insurance proceeds were owed to third parties. The court rejected this argument on the ground that TILA's Regulation Z mandated the inclusion of insurance proceeds regardless of third-party claims to the fund. The court also rejected the defendant's argument that the plaintiff was not sufficiently harmed to have standing under the U.S. Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), holding that the inaccurate payoff statement directly affected the plaintiff's ability to pursue options for avoiding foreclosure. The court declined to certify an injunctive relief class for the TILA claims but certified a declaratory relief class, reasoning that the bank has refused to act on grounds that apply generally to the class of borrowers with insurance funds on deposit. The court also found Rule 23(b)(3)'s predominance requirement was met and certified a damages class, noting that the "simple inquiry will be whether or not the payoff statement included the insurance proceeds."

***Dr. Robert L. Meinders D.C., Ltd v. Emery Wilson Corp.,* No. 14-CV-596-SMY-SCW, 2016 WL 3402621 (S.D. Ill. June 21, 2016), 23(f) pet. denied**

Judge Staci M. Yandle of the U.S. District Court for the Southern District of Illinois granted class certification in a putative class action alleging violations of the Telephone Consumer Protection Act (TCPA) and common law conversion related to faxes the defendant sent that did not contain opt-out disclaimers. The court granted class certification under Rule 23(b)(3) for a class of "[a]ll persons in defendant's 'central file' or 'dead file' databases who were successfully sent one or more facsimiles in the four years prior to April 3, 2014 from [the defendant] advertising its goods and services." In addressing numerosity, the court noted that the defendant's two repositories of contact information for sending

faxes contained over 2,000 customers. The plaintiff's proposed class also satisfied Rule 23's commonality requirement because the claims all arose under the same statute and involved common questions, including whether the defendant sent unsolicited fax advertisements in violation of TCPA, whether the defendant had the plaintiff's consent and whether the faxes contained the requisite opt-out language. The defendant argued that individual questions of consent would predominate, but the affidavits of 12 clients attesting to providing such consent was "far from overwhelming" and did not defeat predominance.

***Nepomuceno v. Midland Credit Management, Inc.*, No. 14-05719-SDW-SCM, 2016 WL 3392299 (D.N.J. June 13, 2016)**

Judge Susan D. Wigenton of the U.S. District Court for the District of New Jersey granted the plaintiff's motion for class certification. The plaintiff alleged that the defendants violated the Fair Debt Collection Practices Act by sending letters to consumers purporting to collect credit card debt owed to third parties that (1) included a payment due date without any basis for that date, and (2) included an interest amount in excess of the rate under the consumer's original credit agreement and New Jersey law. The defendants argued, *inter alia*, that the class was not ascertainable because the plaintiff's proposed definition included individuals to whom the defendants sent a statement but did not limit the class to those individuals who actually received a statement. The court found that this argument "conflates the issues of ascertainability, overbreadth (or predominance), and Article III standing" and did not preclude a finding of ascertainability because it did not prevent the identification of individuals that fell within the class definition (those persons to whom the defendant sent a statement). While the defendants argued that the plaintiff was not an adequate class representative because his claim was allegedly subject to an arbitration provision in the original credit agreement, the court rejected this argument as "speculative" because the defendants produced "no evidence of the existence or scope of any such agreement." However, the court held that the plaintiff failed to establish that common questions predominated with respect to the accrued interest claims because individual inquiry into the rate of interest each putative class member was charged under their original credit agreements would be necessary. Thus, the court redefined the proposed class definition to eliminate the accrued interest claims and granted certification of the remaining claims.

***Baez v. LTD Financial Services, L.P.*, No. 6:15-cv-1043-Orl-40TBS, 2016 WL 3189133 (M.D. Fla. June 8, 2016)**

Judge Paul G. Byron of the U.S. District Court for the Middle District of Florida certified a class of consumers who received collection letters from the defendant that sought partial payment on expired debts but failed to disclose that partial payment of a time-barred debt "revives" the debt under Florida law. The plaintiff alleged that the letters violated the federal Fair Debt Collection Practices Act (FDCPA) and sought to certify a class of Florida consumers who received the defendant's letters and a subclass of consumers who made partial payments pursuant to the letters. The court first held that the named plaintiff had standing because she received such a letter and that the Rule 23(a) factors were easily satisfied. The court then held that predominance was satisfied because all putative class members received a similar letter and accordingly "experienced the same factual circumstances which caused this lawsuit." Specifically, individualized inquiries were not necessary to determine whether each plaintiff had an expired debt because the letters explicitly informed the recipients that their debts were time-barred. Moreover, although the FDCPA only applies to consumer (not business) debts, the defendant failed to provide evidence indicating that the putative class members had business debts, rendering this potential issue "more hypothetical than genuine." The court next held that superiority was satisfied in part because "the vast majority of the individual members would likely never assert their FDCPA rights against [the defendant] absent this litigation." Finally, the court denied certification of the proposed subclass because the named plaintiff did not allege that she made a payment pursuant to the defendant's letter and was accordingly not typical of the subclass.

***Campbell v. Facebook Inc.*, No. 13-cv-5996-PJH, 2016 WL 2897936 (N.D. Cal. May 18, 2016)**

The plaintiffs sought certification of a nationwide class of Facebook users challenging Facebook's practice of scanning the contents of its users' private messages for URL attachments in order to increase the number of "likes" for those webpages, sharing the data with third parties and making recommendations to other Facebook users, as violating the federal Wiretap Act and California's Invasion of Privacy Act (CIPA). Judge Phyllis J. Hamilton of the U.S. District Court for the Northern District of California certified an injunctive relief class under Rule 23(b)(2) but denied certification of a Rule 23(b)(3) damages class. According to the court, Facebook did not rebut the plaintiffs' showing that the proposed class was ascertainable by means of a database query identifying senders and recipients of private messages containing URL attachments. The court further held that proof of the Wiretap Act and CIPA's elements would be based on Facebook's uniform conduct, including its internal operations and source code, and its interception and redirection of messages. Because these common issues predominated over individual issues, the court certified a Rule 23(b)(2) injunctive relief class. However, the court held that neither statutory damages nor damages measured by Facebook's profits were

capable of measurement on a classwide basis. The court found that the plaintiffs' profits model did not calculate the profit attributable to each individual interception. Further, the court held that statutory damages would be a disproportionate penalty, given that many class members suffered no harm. Thus, individual issues regarding damages predominated, precluding certification of a damages class.

***Thompson v. State Farm Fire & Casualty Co.*, No. 5:14-CV-32 (MTT), 2016 WL 2930958 (M.D. Ga. May 19, 2016), 23(f) pet. pending**

In this litigation over State Farm's policy of refusing to pay for and assess the "diminished value" of damaged but fully repaired homes, Judge Marc T. Treadwell of the U.S. District Court for the Middle District of Georgia denied the plaintiffs' and defendant's motions for reconsideration of its earlier class certification rulings. The plaintiffs had previously moved to certify a class of all State Farm homeowners insurance policyholders in Georgia, enter a declaratory judgment regarding the scope of their insurance coverage and issue an injunction. The court previously held that the named plaintiffs lacked standing for declaratory or injunctive relief because they could only establish a "mere possibility" that their townhome might suffer damage in the future. The plaintiffs moved for reconsideration, arguing that "probabilistic, not inevitably, injury is all that is required to confer standing." As before, the court held that the plaintiffs failed to show that the likelihood that they would be injured in the future was imminent enough to warrant declaratory relief or an injunction. Although the plaintiffs now cited an article indicating that there was a 10 percent chance that their homes would suffer future damage, they did "not say when their townhouse will suffer a covered loss and thus cannot say their State Farm policy will still be in force when they suffer this possible loss." Accordingly, they still lacked standing to seek declaratory relief or an injunction. State Farm challenged the court's March ruling (discussed in the Summer 2016 *Class Action Chronicle*) certifying a class alleging that State Farm breached insurance contracts by failing to assess diminished value. As before, the court held that because the plaintiffs did not need to prove that they actually suffered a loss in value to bring claims for failure to assess, individualized inquiries as to each plaintiff's loss did not preclude certification. Finally, the court considered whether its prior decision refusing to certify the plaintiffs' failure-to-pay claims, while simultaneously allowing the failure-to-assess claims to proceed on a classwide basis, raised *res judicata* and adequacy-of-representation issues. According to the court, *res judicata* would not bar future failure-to-warn claims by absent claims because they did not have a full and fair opportunity to litigate that claim. The court therefore refused to decertify the class.

Other Class Action Decisions

***Montgomery v. Kraft Foods Global, Inc.*, 822 F.3d 304 (6th Cir. 2016)**

A unanimous panel of the U.S. Court of Appeals for the 6th Circuit (Boggs, Sutton and Cook, JJ.) held that an appeal of a class certification denial was mooted by the named plaintiff's acceptance of the defendants' offer of judgment under Rule 68 on her individual claims after class certification was denied. Although the named plaintiff had expressly reserved her right to appeal the denial of class certification in accepting the offer, the court concluded that accepting the offer, which included attorney's fees and costs, extinguished any individual benefit to the named plaintiff from class certification, thus mooting the appeal.

Class Action Fairness Act Decisions

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

***Pudlowski v. St. Louis Rams, LLC*, No. 16-8009, 2016 WL 3902660 (8th Cir. July 19, 2016) (per curiam)**

The U.S. Court of Appeals for the 8th Circuit (Wollman, Bowman and Smith, JJ.) vacated the district court's decision to remand a putative class action alleging that the Rams violated the Missouri Merchandising Practices Act. After the Rams filed a notice of removal under the Class Action Fairness Act, the plaintiffs moved to remand the case based predominantly on a lack of minimal diversity. The defendants submitted two post-removal affidavits to demonstrate diversity, but the district court expressly declined to consider the affidavits because they were not included as part of the Rams' notice of removal. On appeal, the 8th Circuit reversed, holding that the Rams' notice of removal did not have to be accompanied by evidence, based on the U.S. Supreme Court's decision in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014). According to the appellate court, the rule that jurisdiction is measured at the time of removal means only that facts arising subsequent to removal have no bearing on the court's jurisdictional determination. As such, the court abused its discretion by refusing to consider the post-removal affidavits because the Rams' notice of removal did not need to be accompanied by a submission of evidence. Therefore, the court vacated the district court's order remanding the case to Missouri state court.

***Arrington v. Ana P. Hall Construction, L.L.C.*, No. 2:15cv711-PCH, 2016 WL 4318976 (M.D. Ala. Aug. 12, 2016)**

The plaintiffs in this action alleged that they were harmed by the defendants' failure to properly maintain the apartment complex in which the plaintiffs lived. Judge Paul C. Huck of the U.S. District Court for the Middle District of Alabama denied remand, finding that the requirements of the Class Action Fairness Act's local controversy exclusion were not satisfied. According to the court, the plaintiffs did not allege that their injuries resulted from a single event in Alabama, but rather from a number of maintenance failures over several years. The court discussed cases that have addressed this issue and explained that although the local occurrence exclusion could potentially apply when multiple transgressions culminate in a singular event that injures plaintiffs, it did not apply here because the plaintiffs alleged "numerous separate acts and omissions by the defendants that allegedly injured the various plaintiffs in different ways at different points in time."

***Porras v. Sprouts Farmers Market, LLC*, No. EDCV 16-1005 JGB (KKx), 2016 WL 4051265 (C.D. Cal. July 25, 2016)**

Judge Jesus G. Bernal of the U.S. District Court for the Central District of California refused to remand the plaintiffs' action on behalf of thousands of the defendants' employees, who asserted state invasion of privacy and related claims after their personal financial information was inadvertently disclosed in a phishing scam. The court rejected the plaintiffs' claim that the defendants had not demonstrated that the amount in controversy exceeded the Class Action Fairness Act's $5 million threshold. The defendants introduced evidence that they notified nearly 9,000 current and former employees that their personal information had been comprised and that the in-house counsel had personally confirmed that those employees' records were included in the email transmitting the information to the scammer. Further, the defendants submitted evidence that the cost of providing free credit monitoring for three years to each class member totaled over $5 million. The plaintiffs contended that the monitoring period should be confined to only one year, but the defendants introduced evidence that counsel for the plaintiffs was demanding credit monitoring protection for each class member for 30 years in a related class action against the defendants arising out of the same scam. Thus, the court concluded that it was reasonable to include the cost of providing each class member four years of credit monitoring protection. Because those costs exceeded $5 million, the court did not analyze the defendants' estimate of attorneys' fees.

***Zehentbauser Family Land LP v. Chesapeake Exploration, LLC*, No. 4:15CV2449, 2016 WL 3903391 (N.D. Ohio July 19, 2016)**

The plaintiffs sought to remand a putative class action alleging that the defendants underpaid royalties due on certain oil and gas leases on the grounds that those leases contained a forum selection clause directing that any disputes be resolved in Ohio state court. Judge Benita Y. Pearson of the U.S. District Court for the Northern District of Ohio denied remand because the forum selection clause did not waive the right to remove under 6th Circuit precedent. The court also rejected the plaintiffs' argument that U.S. Supreme Court precedent required that forum selection clauses be enforced in all but extraordinary circumstances because this action had been removed under the Class Action Fairness Act, which created a statutory preference for federal jurisdiction over interstate class actions, while the cases the plaintiffs relied on sought to transfer venue based on inconvenience to the parties or witnesses.

***Robertson v. Chevron USA, Inc.*, No. 15-874, 2016 WL 3667153 (E.D. La. July 11, 2016)**

Judge Susie Morgan of the U.S. District Court for the Eastern District of Louisiana denied a motion to remand a class action alleging personal injury and property damage from alleged exposure to contamination from oil field pipes. The case was removed under the mass action provisions of the Class Action Fairness Act and remanded on September 2, 2015, for the defendants' failure to establish the individual amount in controversy required under 28 U.S.C. § 1332(a) and (d)(11)(B)(i) (discussed in the Winter 2015 *Class Action Chronicle*). The U.S. Court of Appeals for the 5th Circuit reversed the order granting remand and sent the case back to the district court to consider the remaining jurisdictional arguments (discussed in the Spring 2016 *Class Action Chronicle*). Relying on reasoning in *Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007), the court determined that only one plaintiff — and not at least 100 plaintiffs — needs to satisfy the $75,000 amount-in-controversy requirement for Class Action Fairness Act (CAFA) jurisdiction. The court reasoned that any other result would render the aggregate amount-in-controversy requirement of $5 million meaningless, as every action satisfying the numerosity requirement of 100 plaintiffs and the $75,000 amount-in-controversy requirement would exceed the $5 million aggregate requirement. But, because CAFA's mass action provision does not allow for supplemental jurisdiction, the court concluded that it only had jurisdiction over those plaintiffs' claims that did exceed $75,000. The court denied the plaintiffs' motion to remand as filed and allowed for discovery and supplemental briefing so that the plaintiffs could identify which of their individual claims must be remanded for failure to exceed the $75,000 threshold.

***Hostetler v. Johnson Controls, Inc.*, No. 3:15-CV-226 JD, 2016 WL 3662263 (N.D. Ind. July 11, 2016), 1453(c) pet. denied**

Judge Jon E. DeGuilio of the U.S. District Court for the Northern District of Indiana denied the plaintiffs' motion to remand in a putative class action brought against defendants Johnson Controls, Inc. and Tocon Holdings, LLC. The plaintiffs alleged that contaminants originating at a plant formerly owned and operated by Johnson Controls, Inc. prior to its later sale to Tocon Holdings, LLC entered groundwater and migrated onto their properties. The plaintiffs filed the action in state court, and after litigating the case for nearly a year, Johnson Controls filed a notice of removal under the Class Action Fairness Act. In moving to remand, the plaintiffs first argued that removal was untimely because the notice of removal was filed nearly a full year after the complaint was filed. The court found, however, that the complaint did not state or reveal the amount of monetary damages sought or the cost for Johnson Controls to comply with the injunction. Therefore, the 30-day removal clock never began to run, and the notice of removal was not untimely. Second, the plaintiffs argued that Johnson Controls waived its right to remove by actively litigating the case in state court for nearly a year prior to removing the case. However, because the plaintiffs never provided Johnson Controls with clear notice that the requirements for removal were met, Johnson Controls' actions in state court were not indicative of an intentional relinquishment of a known right. The plaintiffs finally argued that the Class Action Fairness Act's local controversy exception applied because over two-thirds of the plaintiffs are citizens of Indiana. The plaintiffs' expert's statistical analysis, however, was found to rest not on a random sample but instead on a "sample of convenience" and was found inadmissible under Rule 702. Therefore, the plaintiffs' motion to remand was denied.

***Rossetti v. Stearn's Products, Inc.*, No. CV 16-1875-GW(SSx), 2016 WL 3277295 (C.D. Cal. June 6, 2016)**

The plaintiff moved to remand the claims of a class of consumers alleging that the defendant's personal care products were falsely marked "Made in the U.S.A." although they contained foreign ingredients, in violation of various California consumer protection laws. Judge George H. Wu of the U.S. District Court for the Central District of California denied the motion on multiple grounds. First, the plaintiff improperly relied on her amended complaint, which asserted claims on behalf of California consumers, when her original complaint sought relief on behalf of a nationwide class. Because the removability of an action is based on the complaint as it exists at the time of removal, and the plaintiff had not demonstrated that two-thirds of the members of the original nationwide class were California citizens, the plaintiff could not invoke the Class Action Fairness Act's (CAFA) home state or local controversy exceptions. The court observed that the plaintiff had not amended her complaint specifically to clarify CAFA jurisdictional issues; rather, the amended complaint was "a wholesale alteration of the class definition and the scope of the case." Second, the court held that the defendant had met the $5 million amount-in-controversy requirement by demonstrating in its opposition to remand that the plaintiff had alleged there were hundreds of thousands of potential class members in California alone. The potential statutory penalties, in addition to the attorney's fees and punitive damages sought by the plaintiff, easily exceeded $5 million, and thus remand was denied.

Decisions Granting Motions to Remand/ Finding No CAFA Jurisdiction

***Bradix v. Advance Stores Co.*, No. 16-4902, 2016 WL 3617717 (E.D. La. July 6, 2016)**

Judge Susie Morgan of the U.S. District Court for the Eastern District of Louisiana granted a motion to dismiss for lack of standing and remanded for lack of subject-matter jurisdiction; the motion to dismiss for failure to state a claim was denied. The plaintiff, who was a former employee of the defendant, alleged that the defendant was duped in an internet phishing-type attack in which a party posing as an employee of the defendant convinced an employee to provide sensitive, personal information about other employees. The plaintiff alleged that this information was used to steal the employees' identities and that, as a result, he had two unidentified inquiries on his consumer credit report. The plaintiff brought claims for negligence, gross negligence, breach of fiduciary duty and invasion of privacy under Louisiana law. The defendant removed the action under the Class Action Fairness Act and then moved to dismiss. The court found that the plaintiff lacked Article III standing because he failed to allege an injury; according to the court, the two credit inquiries were not "injuries-in-fact" as the plaintiff did not allege that they adversely affected his credit score. The court concluded that the proper remedy for lack of Article III standing was remand, not dismissal. The defendant subsequently moved for reconsideration, asking the court to dismiss the case rather than remand. *See* 2016 WL 3671122 (E.D. La. July 11, 2016). The court rejected the defendant's futility doctrine argument, finding that remand would only be futile if the plaintiff's lack of Article III standing necessarily defeated his standing in state court. Because Louisiana courts were not bound by federal justiciability jurisprudence, the court denied the motion for reconsideration, remanding the case for the state court to determine whether the plaintiff had standing to proceed there.

***Lowery v. Iod, Inc.*, No. 2:16-CV-862-RDP, 2016 WL 4247803 (N.D. Ala. Aug. 11, 2016)**

The plaintiffs in this putative class action alleged that the defendants systematically and wrongfully charged a sales tax when providing services involving the collection and reproduction of medical records, even though Alabama only permits a sales tax for sales of goods. The plaintiffs sought just over $2 million in damages on behalf of the putative class. In opposing remand based on a failure to satisfy the Class Action Fairness Act's (CAFA) $5 million jurisdictional threshold, the defendants argued that the remainder of CAFA's threshold was satisfied because the plaintiffs sought an injunction that would result in the defendants being unable to collect sums, that would reach the $5 million threshold over the life of the injunction. In granting the plaintiffs' motion to remand, Judge R. David Proctor of the U.S. District Court for the Northern District of Alabama first noted that based on the defendants' annual figures, they would not exceed the remainder of the threshold until the 11th year of an injunction. The court then explained that the jurisdictional threshold focuses on gains to the plaintiff rather than losses by the defendant, and it was "unclear how injunctive relief prohibiting the collection of these taxes would necessarily inure to Plaintiffs' benefit for purposes of satisfying the jurisdictional threshold." Moreover, because medical records increasingly take electronic form and are more easily accessible, the amount of taxes the defendants would not collect pursuant to an injunction were "speculative." The court additionally explained that the Tax Injunction Act (which "impede[s] federal court interference with state tax systems") and comity concerns favored remand to state court. For all of these reasons, the court granted the plaintiffs' motion to remand.

***Vitale v. D.R. Horton, Inc.*, No. 15-00312 DKW-KSC, 2016 WL 4203399 (D. Haw. Aug. 9, 2016)**

Invoking the court's perpetual obligation to ensure its own subject matter jurisdiction, Judge Derrick K. Watson of the U.S. District Court for the District of Hawaii *sua sponte* ordered briefing addressing the court's jurisdiction pursuant to the Class Action Fairness Act's local controversy exception. The plaintiffs asserted state law claims arising from defective embedded hurricane straps in homes that the defendants developed and sold in Hawaii. The plaintiffs identified 3,300 putative class members based on a list of all homes built by defendants during the class period. Relying on that list and corresponding property tax records, the plaintiffs determined that 2,972 of the 3,300 putative class members who purchased homes built by the defendants during the relevant time period also had a state of Hawaii tax bill mailing address associated with that home within the state. That evidence established a "reasonable inference" that those class members both resided and intended to remain in Hawaii, and they constituted well over the two-thirds citizenship threshold required for the exception to apply. Further, the principal injuries resulting from the conduct alleged in the complaint occurred in Hawaii, and no other class action had been filed asserting the same claims in the three preceding years. Because the plaintiffs sought significant damages from a defendant whose principal place of business was in Honolulu, the court held that the requirements of the local controversy exception were satisfied, mandating remand.

***Smith v. Penn Credit Corp.*, No. 3:16-3514, 2016 WL 4153616 (S.D. W. Va. Aug. 5, 2016)**

The plaintiff filed a complaint alleging violations of the West Virginia Consumer Protection Act, negligence, intentional infliction of emotional distress and invasion of privacy. The plaintiff also filed a signed, notarized and binding stipulation stating that "so long as this case remains in West Virginia Circuit Court or an Article III Court, the Plaintiff shall neither seek nor accept an amount greater than $75,000 in this case, including any award of attorney's fees, but excluding interest and costs." The plaintiff then amended the complaint to include class claims. The defendant removed, arguing that the plaintiff's purported class would drive the potential value of any verdict well over $75,000, and the plaintiff moved to remand. Chief Judge Robert C. Chambers of the U.S. District Court for the Southern District of West Virginia granted the plaintiff's motion. The court first held that the $75,000 amount-in-controversy requirement had not been satisfied. The defendant argued that because there were more than 101 alleged class members, the minimum potential statutory damages under the West Virginia Consumer Protection Act amounted to $101,000. As the court explained, when jurisdiction is based on traditional diversity of citizenship, the defendant cannot aggregate the claims of the class members to satisfy the $75,000 threshold. And although a defendant may show an aggregate amount in controversy in excess of $5 million under the Class Action Fairness Act (CAFA), CAFA was not referenced in the notice of removal, and Judge Chambers held that it could not use CAFA as a post hoc justification for removal. Therefore, CAFA was not a basis for jurisdiction, and the court remanded the action to state court.

***Crookshanks v. Healthport Technologies, LLC*, No. 2:16-cv-03508, 2016 WL 4099296 (S.D. W. Va. Aug. 2, 2016)**

Judge Joseph R. Goodwin of the U.S. District Court for the Southern District of West Virginia granted the plaintiffs' motion to remand their class action against defendants, finding that the action did not satisfy the Class Action Fairness Act's $5 million amount-in-controversy threshold. The plaintiffs alleged that after requesting copies from the defendants of their medical records and bills, the defendants charged the plaintiffs an unreasonable

per-page fee of $0.55 in violation of the West Virginia Code. The defendants argued that the amount-in-controversy requirement was met because it responded to over 35,000 requests for medical records, and that the minimum statutory damages were $200 per violation, thus demonstrating an amount in controversy exceeding $7 million. The court disagreed, noting that the total number of medical requests did not assist in determining the number of plaintiffs who paid for their medical records. The defendants failed to provide any evidence of the number of requests actually paid for. The court was also unpersuaded by the defendants' argument that potential attorneys' fees, a declaratory judgment and punitive damages could be used to satisfy the amount-in-controversy requirement. Accordingly, the court granted the plaintiffs' motion to remand.

***Stone v. Government Employees Insurance Co.*, No. C16-5383 BHS, 2016 WL 4035716 (W.D. Wash. July 28, 2016), 1453(c) pet. pending**

Judge Benjamin H. Settle of the U.S. District Court for the Western District of Washington granted the plaintiffs' motion to remand their putative class action consisting of Washington GEICO policyholders claiming "loss of use" damages while their vehicles were being repaired or replaced. The complaint, filed in June 2015, alleged that the putative class included 5,000 class members with damages totaling at most $700,000. On February 18, 2016, the defendant's corporate representative testified that about 18,000 insureds had filed claims during the class period and that GEICO knew the average price it paid for rental cars during that time. On May 16, 2016, the plaintiffs moved for class certification. The defendant removed the action on May 20, claiming the class had nearly 23,000 members with average damages of $321, bringing the amount in controversy to over $7.3 million. In response to the plaintiffs' argument that the removal was untimely, GEICO argued that an expert declaration submitted with the class certification motion provided the first indication that the amount in controversy exceeded $5 million, triggering a new thirty-day removal period under 28 U.S.C. § 1446(b). The court held that the expert based his calculation of class size and damages in part on the corporate representative's deposition testimony such that GEICO could have reasonably determined the case was removable at the time of the deposition. Because GEICO did not file its notice of removal within 30 days of the deposition, it was untimely.

***Slocum v. Gerber Products Co.*, No. 2:16-cv-04120-NKL, 2016 WL 3983873 (W.D. Mo. July 25, 2016)**

Judge Nanette K. Laughrey of the U.S. District Court for the Western District of Missouri granted the plaintiff's motion to remand a putative class action brought under the Missouri Merchandising Practices Act alleging that the defendant falsely and deceptively marketed a line of infant formula products as the "1st and Only" routine formula endorsed by the U.S. Food and Drug Administration to reduce the risk of developing allergies. The defendant contended that the plaintiff's claim sought damages and fees in excess of the $5 million threshold. While the defendant submitted a declaration estimating that sales exceeded $5 million, the plaintiff alleged that the company sold the formula at a 10.4 percent premium and that compensatory damages were only estimated to be $520,000 — 10.4 percent of the $5 million estimate in sales. The plaintiff also did not seek punitive damages, and under Missouri law, punitive damages cannot be recovered if they are not sought in the petition. The defendant argued that the plaintiff could amend the petition to seek such damages, but the court held that its task is to consider whether it has jurisdiction over an action based on the time of removal. Therefore, punitive damages were not considered. Finally, the court found that stipulations limiting attorneys' fees were no longer permissible in the 8th Circuit and could not guide the amount-in-controversy inquiry. Applying Missouri law, the court found that it was not likely that attorneys' fees would exceed $4.48 million — the amount proffered by the defendant and which was derived from a distinguishable nationwide class action that was litigated for five years. Accordingly, the plaintiff's motion to remand was granted.

***Gibson v. Clean Harbors Environmental Services, Inc.*, No. 16-CV-1035, 2016 WL 3951212 (W.D. Ark. July 20, 2016)**

Judge Susan O. Hickey of the U.S. District Court for the Western District of Arkansas adopted the report and recommendation of Magistrate Judge Barry A. Bryant to grant the plaintiffs' motion to remand the putative class action to a Union County, Arkansas, circuit court because the defendant's removal was untimely. After the filing of the amended complaint and the defendant's answer, the defendant received a settlement letter on March 11, 2016, indicating that there were more than 6,000 potential claims and offering a total payment of $6.5 million to resolve the matter. The defendant argued that the 30-day clock for removal did not start until the plaintiffs provided their expert report on April 21, 2016, which allowed the defendant to unambiguously conclude that there was Class Action Fairness Act jurisdiction and ascertain that the amount in controversy was in excess of $5 million. On review, the court found that the March 11, 2016, settlement letter contained a sufficient basis and justification for support of that figure such that the removal clock began on that date. The letter estimated the total amount of claims, discussed an earlier settlement against the defendant's predecessor and explained why the current matter involved greater damages with more claimants. Therefore, the removal clock began to run on March 11, 2016, and the defendant's May 9, 2016, removal was untimely.

***Strembitskyy v. American Family Mutual Insurance Co.*, No. C16-0691RSL, 2016 WL 3640315 (W.D. Wash. July 8, 2016)**

The plaintiff moved to remand a putative class action on behalf of Washington policyholders on the ground that the defendant had failed to satisfy the Class Action Fairness Act's amount-in-controversy requirement. Judge Robert S. Lasnik of the U.S. District Court for the Western District of Washington granted the motion, taking issue with the defendant's reliance on a single employee's flawed affidavit offered in support of the amount in controversy. According to the court, the data gathered did not reflect the claims alleged in the class definition, and the employee did not provide information regarding the nature of the defendant's records or the specific search terms and parameters used to generate the list of policyholders who fell within the class. Further, the employee based his calculations regarding the amount in controversy on a random sample of 100 files, which he had not reviewed to determine the amount of the deductible actually paid by each policyholder. The employee's assumption that every policyholder paid the standard policy deductible amounts of $400 or $500 was not borne out by the random sample, which showed that 40 percent of the policies did not involve deductibles within the presumed range. Setting aside the errors and admissibility issues in the defendant's evidence, the court held that the amount in controversy was not met in any event, as the potential class damages and attorney's fees totaled approximately $3 million under the defendant's own proposed methodology.

***Rosenblatt v. Nuplexa Group, Inc.*, No. 16-1064 (ES) (SCM), 2016 WL 3546579 (D.N.J. June 29, 2016)**

Judge Esther Salas of the U.S. District Court for the District of New Jersey adopted the report and recommendations of Magistrate Judge Steven C. Mannion and granted the plaintiff's motion to remand a putative class action involving allegations that the defendants misrepresented the benefits of their dietary supplement, Texas Superfood Select. The plaintiff challenged whether the Class Action Fairness Act's (CAFA) $5 million statutory threshold was met, noting that the defendants failed to provide any information about the number of sales made within New Jersey from which the total damages could be calculated. While neither party introduced evidence of damages in the form of, for example, affidavits or declarations, the defendants' failure to do so was "[p]articularly critical." As the removing parties, the defendants had the burden to demonstrate that CAFA's requirements, including the amount in controversy, were met by a preponderance of the evidence, which they failed to do.

***City of Charleston v. West Virginia-American Water Co.*, No. 2:16-01531, 2016 WL 3460439 (S.D. W. Va. June 21, 2016)**

The defendants removed this action under the Class Action Fairness Act (CAFA), alleging that although the plaintiffs' complaint did not explicitly discuss class action claims or a proposed class definition, the nature of the complaint was a "class action in all but name." Specifically, the claims were brought on behalf of the plaintiffs "and on behalf of the residents and businesses of the City of Charleston and Kanawha County." In response, the plaintiffs asserted that removal under CAFA was improper because their action was not pleaded pursuant to Fed. R. Civ. P. 23. The propriety of removal turned solely on whether the action qualified as a class action. Judge John T. Copenhaver, Jr. of the U.S. District Court for the Southern District of West Virginia found that removal was not proper because CAFA only extends jurisdiction to actions "filed under rule 23 ... or similar State statute or rule." The court explained: "While CAFA allows for removal of putative class actions prior to the entry of a class certification order, it does not displace the general principle that plaintiffs are masters of their complaint and may omit claims or parties to avoid federal jurisdiction."

***Cortez v. McClatchy Newspapers, Inc.*, No. 2:15-cv-01891-TLN-EFB, 2016 WL 3181200 (E.D. Cal. June 7, 2016)**

Judge Troy L. Nunley of the U.S. District Court for the Eastern District of California granted the plaintiffs' motion to remand their action alleging that the defendant's billing practices for newspaper subscriptions violated various California consumer protection statutes. Because the class was defined as "[a]ll persons in California who subscribed to any of the Defendant's newspapers," the plaintiffs argued that the Class Action Fairness Act's home state exception applied because at least two-thirds of proposed class members were California citizens. The court held that, despite the plaintiffs' failure to expressly limit the class to California citizens, it was "commonsensical" that a class of persons in California subscribing to local newspapers consisted of at least two-thirds California citizens. The court further cited the plaintiffs' clarification in their remand papers that their class was confined to current California citizens, as well as the plaintiffs' supporting expert declaration that it was "extremely unlikely" that more than one-third of the subscribers no longer resided within California. Thus, the court held that the plaintiffs established by a preponderance of the evidence that two-thirds or more of the putative class were California citizens. Further, the court awarded $4,000 in costs to the plaintiffs, because the defendant had no objectively reasonable basis for removal in light of the class definition. Further, in an effort to avoid the costs of remand briefing, the plaintiffs had apprised the defendant of their intent to invoke the home state exception and asked the defendant to withdrawal the removal, which the defendant refused to do. Accordingly, the plaintiff's motion to remand was granted.

The Class Action Chronicle

Contributors

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

Practice Leader

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

Partners

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

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

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

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

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

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

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

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

Counsel

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

Nina Ramos Rose
Washington, D.C.
202.371.7105
nina.rose@skadden.com

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

Associates

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

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

Jennifer H. Berman
Chicago
312.407.0916
jennifer.berman@skadden.com

Brittany M. Dorman
New York
212.735.3485
brittany.dorman@skadden.com

Catherine Fisher
Boston
617.573.4867
catherine.fisher@skadden.com

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

Benjamin S. Halperin
New York
212.735.2453
benjamin.halperin@skadden.com

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

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

Kasonni Scales
Los Angeles
213.687.5657
kasonni.scales@skadden.com

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

Matthew Stein
Boston
617.573.4892
matthew.stein@skadden.com

Brenna L. Trout
Washington, D.C.
202.371.7176
brenna.trout@skadden.com

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

Nancy D. Zeronda
New York
212.735.3618
nzeronda@skadden.com

Legal Assistant

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