Skadden

The Class Action Chronicle

This edition focuses on rulings issued between August 15, 2016, and November 15, 2016, and begins with an article regarding recent decisions applying the U.S. Supreme Court's *Spokeo* ruling.

Nationwide Class Actions Based on Federal Claims — in State Court?

In *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), the U.S. Supreme Court appeared to hand a victory to defendants facing lawsuits under federal statutes that impose stiff penalties regardless of proof of injury. In that case, the plaintiff sought relief under the federal Fair Credit Reporting Act (FCRA), arguing that he was entitled to statutory penalties regardless of whether the alleged misreporting of his financial information caused him any concrete injury. The Supreme Court disagreed, holding that a plaintiff proceeding under the FCRA must prove not only that his or her statutory rights were violated but also that the violation caused him or her "'concrete' injury" (though the injury might be either "tangible" or "intangible"). *Id.* at 1549. And not every FCRA plaintiff can prove concrete injury — indeed, *Spokeo* hypothesized that dissemination of an erroneous statement concerning a plaintiff's zip code might possibly violate the FCRA, but "[i]t is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm." *Id.* Thus, *Spokeo* appeared to confine relief under the FCRA and similar federal statutes to concretely injured plaintiffs.

Instead, *Spokeo* may in effect have reopened the door to nationwide class actions in state court because of its footing in principles of federal jurisdiction, as two recent decisions illustrate. In *DiSalvo v. Intellicorp Records, Inc.*, the plaintiff sued Intellicorp in state court, asserting one count under the FCRA. According to the plaintiff, Intellicorp, a consumer reporting agency, violated the act by failing to obtain required certifications prior to furnishing consumer reports to its users. No. 2016 WL 5405258, at *1 (N.D. Ohio Sept. 27, 2016). DiSalvo sought penalties for himself and a nationwide class of similarly situated individuals, but he did not allege any concrete harm to himself. *See id.* at *2, 4.

Intellicorp removed the case to federal court and then sought dismissal with prejudice on the ground that jurisdiction was lacking in light of the ruling in *Spokeo*. *Id.* at *2-3. The plaintiff did not even attempt to argue that he had alleged concrete injury, instead contending that the court should remand rather than dismiss the case, relying on 28 U.S.C. § 1447(c), which provides that, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." *See id.* at *3.

Intellicorp disagreed, arguing that the district court should dismiss the case with prejudice because remand would be futile given DiSalvo's conceded lack of concrete injury. *Id.* It further argued that remand of a nationwide class action to state court would also contravene congressional policy in enacting the Class Action Fairness Act (CAFA), citing legislative history making it clear that CAFA was intended to prevent plaintiffs from "'gam[ing]' the procedural rules" to "keep nationwide or multi -state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." *Id.* at *4 (citation omitted).

The court agreed with DiSalvo and remanded the case rather than dismiss it with prejudice. It explained that the "mandatory language of § 1447(c)" left it no choice, emphasizing *dicta* in a Supreme Court case that "the literal words of § 1447(c) on their face, give no discretion to dismiss rather than remand an action." *Id.* (Internal quotation marks, citation and alterations omitted.) As such, the court concluded that it was powerless to rely on a futility doctrine or statements of congressional policy to avoid remand.

Applying the same reasoning, the same judge, Patricia A. Gaughan, remanded rather than dismissed another FCRA claim pending before her in *Schartel v. One Source Technology*, No., 2016 WL 6024558 (N.D. Ohio Oct. 14, 2016). And the U.S. Court of Appeals for the 9th Circuit employed similar reasoning in remanding a putative class action brought under the California Consumers Legal Remedies Act in *Polo v. Innoventions International, LLC*, 833 F.3d 1193 (9th Cir. 2016).

These rulings have potentially profound implications, at least for putative class actions brought under the FCRA and similar federal statutes that provide for penalties without proof of concrete injury. Going forward, enterprising plaintiffs' lawyers will have every incentive to file putative class actions under these statutes in state court in jurisdictions with flexible standing requirements (or, at least, flexible trial court judges); intentionally omit allegations of concrete injury; and seek remand after such cases are removed to federal court. Assuming other federal courts follow a similar course, this strategy may succeed in launching a new raft of nationwide class actions in state court, based entirely on federal causes of action.

It is difficult to imagine a development more at odds with the congressional purposes in enacting CAFA. As the legislative history cited in *DiSalvo* makes clear, the principal aim of CAFA was to keep class actions of interstate import away from the provincial whims of state trial courts. *DiSalvo* adds insult to injury sending putative class actions back to state court that are not only nationwide in scope but also implicate entirely federal questions.

It does not have to be this way. Courts should not be so quick to reject the futility doctrine, and indeed, not all of them have, as the 9th Circuit acknowledged in *Polo.* 833 F.3d at 1197-98 (noting that the 9th Circuit's prior cases provide "some support" for a futility exception to Section 1447(c)'s remand requirement but concluding that remand of the California state law question at issue might not be futile). Congressional action is necessary to eliminate embarrassing conflicts between standing decisions that result in remands in cases based on the FCRA and similar statutes and Congress' clearly expressed intent in CAFA to keep interstate class actions out of state courts. Finally, and at a minimum, parties that find themselves defending federal putative class actions that are remanded to state court should be prepared to attempt re-removal if subsequent developments reveal that the plaintiff did sustain a concrete injury or if a class is certified (in which case the absent class members may provide an alternative basis for federal jurisdiction).

Class Certification Decisions

In this issue, we cover three decisions granting motions to strike/dismiss class claims, three decisions denying such motions, 20 decisions denying class certification or reversing grants of class certification, 16 decisions granting or upholding class certification, nine decisions denying motions to remand or reversing remand orders pursuant to the Class Action Fairness Act (CAFA), and 11 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

***Colley v. Procter & Gamble Co.*, No. 1:16-cv-918, 2016 WL 5791658 (S.D. Ohio Oct. 4, 2016)**

Judge Timothy S. Black of the U.S. District Court for the Southern District of Ohio struck class allegations in a putative multistate class action alleging that the defendant had failed to warn customers that some consumers experienced serious adverse health effects when using Old Spice deodorant. The court struck the plaintiffs' personal injury and medical-related class claims because the claims by their nature were fact-intensive and state law-specific, precluding findings of commonality, predominance, typicality and superiority. As to predominance, the court noted that the plaintiffs did not allege that the product failed to provide a benefit to the class as a whole, but rather that some small number of potential class members had been injured when using the product, which raised individualized issues of fact. The court also noted that a class definition limited to only those customers who suffered personal injury from Old Spice products was not

viable because it was a fail-safe class (where the proposed class is unworkable, because it includes only those entitled to relief and so cannot be defined until the case is resolved on the merits) and because defining class membership by injury and causation would require a mini-hearing on the merits of each claim to determine class membership. In addition, the court found that individual questions of law would predominate because the claims would require the application of the laws of at least 42 different states and the plaintiffs had not offered a workable solution for grouping the various claims, instead seeking to certify 44 state subclasses. Finally, the proposed classes were overbroad because they included millions of customers who had purchased the product but suffered no injury.

***Flynn v. DIRECTV, LLC*, No. 3:15-cv-1053 (JAM), 2016 WL 4467885 (D. Conn. Aug. 22, 2016)**

Judge Jeffrey Alker Meyer of the U.S. District Court for the District of Connecticut granted and denied in part the defendants' motion to dismiss class allegations. The plaintiffs, owners of residential rental property with tenants who had purchased television services from the defendants, alleged state law claims of common law trespass and violations of the Connecticut Unfair Trade Practices Act (CUTPA). The plaintiffs claimed that the defendants installed satellite dishes on the exterior of the plaintiffs' property without their consent and in accordance with a business practice that was designed to circumvent their right to withhold consent. Although the defendants moved to strike — rather than dismiss — the class allegations, the court treated the motion as a motion to dismiss. The court granted the defendants' motion to dismiss as to the plaintiffs' trespass claims because issues of individual consent predominated over any common issues. However, the court held that it was premature to conclude that the plaintiffs could not satisfy the commonality and ascertainability requirements for their CUTPA claims. The court therefore denied the defendants' motion to dismiss as to the CUTPA claims.

***Dixon v. Monterey Financial Services, Inc.*, No. 15-cv-03298-MMC, 2016 WL 4426908 (N.D. Cal. Aug. 22, 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 class allegations in the plaintiff's second amended complaint asserting violations of the Telephone Consumer Protection Act (TCPA). The court previously struck a class definition that included all persons who received calls from the defendant without "previous[] consent[]" as an impermissible fail-safe class predicated on the defendant's liability being established (discussed in the fall 2016 *Class Action Chronicle*). In the second amended complaint, the plaintiff modified the definition to include members who had "revoked any prior express consent," which the court rejected as "a distinction without legal significance" because the amended definition still depended on whether the class member prevailed on the merits of the TCPA claim. The court granted the plaintiff's request for leave to file a third amended complaint to remove the consent requirement from the definition and thus eliminate the fail-safe class concerns. Rejecting the defendant's objection that amendment was futile absent a common question, the court observed that the common factual and legal questions were "unclear" but that such concerns were more appropriately addressed after the amendment of the complaint, when the plaintiff will be required to demonstrate her ability to meet all Rule 23 requirements.

Decisions Denying Motions to Strike/Dismiss Class Claims

***Rose v. Friendly Finance Corp.*, No. 2:15-cv-1032, 2016 WL 6436667 (S.D. Ohio Nov. 1, 2016)**

Magistrate Judge Terence P. Kemp of the U.S. District Court for the Southern District of Ohio denied a motion to strike class allegations in a lawsuit claiming that the defendant lenders allegedly improperly charged borrowers for automobile insurance when financing their vehicle purchases. The defendants asserted that numerosity could not be met because their business practices ensured that almost all of the relevant agreements contained arbitration and class action waiver provisions. The court instructed the parties to review a representative sample of potential class members' files to identify borrowers whose files did not include an arbitration agreement or class action waiver. That review identified nine potential class members, suggesting a potential class of between 40 and 60 members, which the court considered sufficient to present a viable question on whether a Rule 23 motion should be granted. Noting that it was unwilling at this stage to accept the defendants' argument that the missing arbitration agreements were most likely misfiled, the court directed the parties to review the remaining 963 accounts for which documentation existed. If that review identified 40 to 50 class members, the action could proceed to the class certification stage.

***Slovin v. Sunrun, Inc.*, No. 15-cv-05340 YGR, 2016 WL 5930631 (N.D. Cal. Oct. 12, 2016)**

Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California denied the defendants' motion to strike the plaintiffs' class allegations in an action asserting violations of the Telephone Consumer Protection Act. The defendants argued that the class allegations should be stricken because the proposed class contained members who lacked standing, the classes were not ascertainable, individualized issues precluded a finding of predominance, the named plaintiffs' claims were not

typical of the class and a class action was not a superior method of adjudication. The court observed that the defendants essentially sought to litigate Rule 23 class certification and held that the motion was premature given that discovery was ongoing and no motion for class certification had been filed. The court further concluded that the allegations were not "redundant, immaterial, impertinent, or scandalous" and denied the motion to strike without prejudice to the defendants bringing another motion to strike the class allegations at the close of discovery or once a motion for class certification has been filed.

***Henderson v. Corelogic National Background Data, LLC,* No. 3:12CV97, 2016 WL 4611571 (E.D. Va. Sept. 2, 2016)**

Judge Robert E. Payne of the U.S. District Court for the Eastern District of Virginia denied the defendant's motion to strike the plaintiffs' proposed subclasses. The defendant argued that the proposed subclasses represented a new legal theory and that the plaintiffs were bound by the class certification theory alleged in their complaint. Judge Payne concluded that the plaintiffs were not pursuing a new legal theory, nor did the proposal unfairly surprise or prejudice the defendant, simply because they relied on a new source of evidence. Moreover, Judge Payne reasoned that if Rule 23(c)(1)(C) gives courts discretion to amend or decertify unworkable classes before final judgment, then courts also have discretion to consider subclasses that could improve the "manageability and viability" of a putative class, notwithstanding deviation from the operative complaint.

Decisions Rejecting/Denying Class Certification

***Ibe v. Jones*, 836 F.3d 516, 522 (5th Cir. 2016)**

The U.S. Court of Appeals for the 5th Circuit (Stewart, C.J., Jones and Dennis, JJ.) affirmed denial of certification for three putative classes of ticketholders for Super Bowl XLV who were either displaced, relocated or unable to view the field due to the unfinished construction of the Dallas Cowboys' football stadium. The plaintiffs sought certification for three classes: (1) the "Displaced Class," consisting of all ticketholders who were left without seats, (2) the "Relocated Class," consisting of all ticketholders who were relocated to a different seat or were significantly delayed in getting to their seats, and (3) the "Obstructed-View Class," consisting of all ticketholders whose view was obstructed. The district court had denied certification for all three putative classes. On appeal, the 5th Circuit affirmed the denials of certification. For the Displaced Class, the district court did not abuse its discretion in determining that the putative class did not meet the numerosity requirement of Rule 23(a)(1). For the Relocated Class, the district court did not abuse its discretion in ruling that the common issue of contract interpretation was overwhelmed by individual issues of whether the replacement seats were actually inferior and, if so, what the extent of the damages from the inferior seats was. Finally, for the Obstructed-View Class, the court again held that the district court was within its discretion in deciding the common issues of whether there was an obstruction and the extent to which that obstruction would overwhelm any common issues.

***Harnish v. Widener University School of Law*, 833 F.3d 298 (3d Cir. 2016)**

The plaintiffs brought suit alleging that Widener University School of Law defrauded a putative class of law students by publishing misleading statistics about its graduates' employment (reporting that 90 to 97 percent of its students were employed after graduation, where in reality only 50 to 70 percent of graduates held full-time legal positions), causing the students to pay "inflated" tuition rates. The district court denied the motion for class certification, finding that, *inter alia*, the plaintiffs failed to meet the predominance requirement of Rule 23(b)(3) because putative class members' employment outcomes varied (*i.e.*, some graduates did obtain full-time legal employment), and the plaintiffs' proposed classwide theory of damages relied on a "fraud-on-the-market" theory, which New Jersey courts have rejected outside of the federal securities fraud context. The U.S. Court of Appeals for the 3rd Circuit (Chagares, Krause and Barry, JJ.) affirmed the decision, holding that, although the lower court erred by considering the putative class members' own employment outcomes, which were unrelated to the plaintiffs' "out-of-pocket" theory of damages in the case, the error was harmless because the plaintiffs were still unable to demonstrate damages on a classwide basis. The plaintiffs' nonreliance-based "price-inflation" theory of harm, like the reliance-based "fraud-on-the-market" theory that the district court mistakenly believed applied, has also been rejected by New Jersey courts outside the fraud securities context. Thus, because the plaintiffs were unable to resolve the fact of damages — a crucial issue in the fraud case — in a classwide fashion, the 3rd Circuit affirmed the dismissal of the case.

***Doyle v. Chrysler Group, LLC,* No. 15-55107, 2016 WL 6156062 (9th Cir. Oct. 24, 2016)**

A unanimous panel of the U.S. Court of Appeals for the 9th Circuit (Trott, Owens and Friedland, JJ.) reversed certification of a class of consumers alleging violations of California consumer protection laws for failure to disclose a defect in window regulator replacements for certain Jeep Liberty vehicles. The panel initially observed that the plaintiff had standing because if the defect had been disclosed, he either would not have purchased the replacement regulator or would have paid less for it. However,

the class did not satisfy Rule 23(b)(3)'s predominance requirement because the plaintiff's "partial reimbursement" approach to calculating damages did not offer a model for determining what percentage of the purchase price the reimbursement should be or demonstrate that this approach "measures damages that are solely attributable to the theory of liability." Further, typicality was unsatisfied. The class included both individuals who purchased a replacement regulator and individuals who had one "installed," which meant that the plaintiff, who paid for his replacement regulator while others did not, was not typical of the entire class. Moreover, in seeking reimbursement for the purchase of a replacement regulator, the plaintiff failed to adequately represent members who had a replacement regulator installed, because such individuals had no purchases to be reimbursed and would be better off with a lawsuit seeking payment of the cost of future repairs. The panel reversed the certification decision and remanded for further proceedings.

***In re Modafinil Antitrust Litigation*, 837 F.3d 238 (3d Cir. 2016), as amended (Sept. 29, 2016)**

A putative class of 22 drug wholesalers brought this antitrust action against a manufacturer of brand-name drugs and four generic pharmaceutical companies, alleging that reverse-payment settlements among the manufacturers were anti-competitive for delaying marketing entry of a generic drug. The U.S. District Court for the Eastern District of Pennsylvania granted the motion for class certification. In evaluating the numerosity requirement, the district court placed "great weight" on the judicial economy factor because the alternative — joinder — would likely require additional rounds of discovery, which would only further delay a trial date. The U.S. Court of Appeals for the 3rd Circuit (Smith and Jordan, JJ., Rendell, J. (concurring in part and dissenting in part)) reversed, finding that the district court abused its discretion by improperly emphasizing the late stage of the proceeding and failing to consider the ability and motivation of individual class members to pursue their cases though the use of joinder. Though the 3rd Circuit declined to set a "floor" at which a putative class would fail the numerosity requirement, it did note that "inquiry into impracticability should be particularly rigorous when the putative class consists of fewer than forty members." Dissenting in part, Judge Marjorie Rendell held that the district court's focus on judicial economy, especially the efficient management of litigation so as to minimize duplication of effort and avoid wasting the judiciary's time and resources, was entirely appropriate. As to the other class certification requirements, the 3rd Circuit rejected the defendants' argument that predominance was lacking, holding that there was no need to pursue individualized inquiry into how each individual agreement harmed each individual class member. Thus, the 3rd Circuit reversed and remanded for further consideration of whether joinder of all class members was impracticable.

***Dickens v. GC Services Limited Partnership*, No. 8:16-cv-803-T-30TGW, 2016 WL 6681468 (M.D. Fla. Nov. 14, 2016), appeal filed**

The plaintiff brought a putative class action alleging that the defendant violated the Fair Debt Collection Practices Act (FDCPA) by failing to explicitly state in its initial debt-collection notice that debtors' rights must be invoked in writing. Judge James S. Moody, Jr. of the U.S. District Court for the Middle District of Florida held that class certification was not appropriate because the adequacy-of-representation requirement was not satisfied. The plaintiff was only seeking statutory damages, which was in conflict with putative class members who could potentially assert actual damages. Furthermore, the court held that the plaintiff's class certification motion should also be denied because it was not the superior method of adjudication. On the contrary, the court held that the class action method would be uneconomical, thereby making the method unfair and inferior. First, the court concluded that the statutory award under the FDCPA would be nominal, and the costs of certifying the class would dwarf these damages. Second, the court could not definitively determine whether any class members were adversely affected by the defendant's noncompliance; but even if some members were adversely affected, they would be precluded from recovering actual damages if the class was certified. Based on the foregoing, the court denied the plaintiff's motion for class certification.

***McKinnon v. Dollar Thrifty Automotive Group, Inc.*, No. 12-cv-04457-YGR, 2016 WL 6582045 (N.D. Cal. Nov. 7, 2016)**

Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California rejected the plaintiffs' third attempt at certification of a nationwide class of vehicle renters claiming violations of, *inter alia*, California consumer protection laws due to the defendants' failure to provide notice that liability damage waiver (LDW) policies they offered might be duplicative of other policies already held by the plaintiffs (discussed in the fall 2015 and summer 2016 *Class Action Chronicle*). The plaintiffs sought to certify a single class of consumers who obtained rental cars from Dollar and Thrifty locations at three California airports that failed to post signage regarding LDW policies. The court found commonality was not met because the evidence demonstrated that the signage varied across the seven-year class period and the plaintiffs failed to sufficiently limit the class

definition to times and locations where a lack of signage could be established with common evidence applicable to the entire proposed class. Nevertheless, the court *sua sponte* narrowed the proposed class to satisfy commonality and considered whether the named class representatives could represent these court-defined classes. The court held that typicality was not satisfied because each of the plaintiffs' claims required a showing of causation, but neither could show that the lack of signage caused them to purchase LDW policies; instead, both plaintiffs had stated they did not want to purchase LDW policies but were charged for them anyway. Because this was the plaintiffs' third attempt at class certification, the court denied the plaintiffs' motion with prejudice.

***Medical Protective Co. v. Center for Advanced Spine Technologies, Inc.*, No. 1:14-cv-05, 2016 WL 6139115 (S.D. Ohio Oct. 21, 2016), appeal filed**

Judge Timothy S. Black of the U.S. District Court for the Southern District of Ohio decertified a defendant class in a lawsuit brought by a doctor's malpractice insurers seeking declarations that they had no duty to defend or indemnify the doctor in pending lawsuits against him because he fled to Pakistan and, contrary to the terms of his policies with the insurers, refused to cooperate in defense of those lawsuits. (The court's certification order was discussed in the fall 2015 *Class Action Chronicle*.) On the insurers' motion for summary judgment, the court determined that Ohio law required that in order to void their insurance coverage, the insurers must show they had been prejudiced in the defense of the lawsuits by the doctor's lack of cooperation and that this prejudice was an issue of fact that must be decided on a case-by-case basis. Having held that prejudice, a determinative issue, could not be resolved on a classwide basis, the court concluded that commonality could not be met and the class must be decertified. (The court then declined to exercise jurisdiction over the action, noting that the state courts hearing the underlying litigation were the more effective forums to decide the issue of insurance coverage.)

***Cave v. Saxon Mortgage Services, Inc.*, Nos. 11-4586, 12-5366, 2016 WL 5930846 (E.D. Pa. Oct. 11, 2016)**

Judge John R. Padova of the U.S. District Court for the Eastern District of Pennsylvania denied the plaintiffs' motion to certify two classes, each seeking declaratory relief: (1) an "issues class" (Cave I) under Rule 23(c)(4) of Pennsylvania homeowners with mortgage loans that entered into Trial Period Plan (TPP) agreements with the defendant, made all payments and complied with documentation requirements, but did not receive a permanent Home Affordable Modification or timely written notification explaining the reason for the denial, and (2) a damages class (Cave II) of borrowers who entered into TPP contracts that were substantially similar to lead plaintiff William Cave's TPP contract that the defendant counter-signed and returned to the borrowers, and made all required payments but did not receive permanent Home Affordable Modifications by the effective date set forth in their respective contracts. While the ascertainability requirement applied only to the Rule 23(b)(3) damages class, the court noted that it must first determine that the issues class was "sufficiently cohesive." The court found that, while the Cave II class satisfied the ascertainability requirement, the Cave I class was "too individually focused" to satisfy the cohesiveness requirement because (1) the underlying claim was based on the reasonableness of the timing of the defendant's denial decision, (2) a denial decision was based on each class member's compliance with the defendant's requests for documentation, and (3) the class definition required that each putative class member "timely" make required payments. After evaluating the remaining certification requirements, the court found that the Cave II class could not be certified either, as the named plaintiff was not typical of the class he sought to represent and common issues of law and fact did not predominate.

***Muhammad v. PNC Bank, N.A.*, No. 2:15-cv-16190, 2016 WL 5843477 (S.D. W. Va. Oct. 4, 2016)**

Judge Joseph R. Goodwin of the U.S. District Court for the Southern District of West Virginia denied certification of a class alleging that the defendant's assessment of fees related to a home-secured loan violated the West Virginia Consumer Credit and Protection Act. The court denied the plaintiff's motion because the named plaintiff was not a member of the defined classes and therefore could not represent the classes in the action. The complaint defined both proposed classes as "all West Virginia citizens at the time of the filing of this action." The action was filed in 2015, and the named plaintiff admitted that he had not lived in West Virginia since 2013. The court denied the plaintiff's request to redefine the class as "consumers whose loans were secured by real property in West Virginia" because it was unable to locate any authority supporting the proposition that a court could limit or modify proposed class definitions. Accordingly, the plaintiff's motion for class certification was denied.

***Hughes v. Ester C Co.*, No. 12-CV-0041 (PKC), 2016 WL 6092487 (E.D.N.Y. Sept. 30, 2016), 23(f) pet. pending**

Judge Pamela K. Chen of the U.S. District Court for the Eastern District of New York denied certification of a class alleging the defendants' labeling of their supplements as "The Better Vitamin C" was unlawful, deceptive and misbranded in violation of state consumer protection statutes. The plaintiffs claimed that scientific studies demonstrated that the product "was not more bioavailable than simple ascorbic acid." The plaintiffs sought to certify a nationwide class as well as California and Missouri subclasses. The court held that the plaintiffs failed to satisfy the ascertainability requirement of Rule 23(a) because putative class members may not have retained documentation of purchase and may not recall whether they purchased the product actually licensed by the defendants. Moreover, the court held that the plaintiffs failed to satisfy the predominance requirement of Rule 23(b) because damages were not calculable on a classwide basis. Thus, class certification was denied.

***Lucas v. Breg, Inc.*, No. 15-cv-00258-BAS-NLS, 2016 WL 6125681 (S.D. Cal. Sept. 30, 2016)**

Judge Cynthia Bashant of the U.S. District Court for the Southern District of California refused to certify a nationwide class and California subclass of consumers who purchased or rented a prescription-only "cold therapy" device intended to reduce postoperative swelling. The plaintiffs asserted that the device's advertising and instructions concealed a risk of bodily injury in violations of California consumer protection and warranty laws. The court held that Rule 23(b)(3)'s predominance requirement was not met. Specifically, the materiality and reliance elements of the plaintiffs' claims required consideration of what advice each class member received from the prescribing physician and how it factored into their decision to purchase or rent the device. Moreover, whether class members were economically harmed required review of medical and insurance records to determine whether each class member paid out of pocket or whether the insurance company paid on the individual's behalf. In addition, whether the discovery rule and/or the doctrine of fraudulent concealment applied for statute of limitations purposes would require individualized determinations as to what warnings and instructions class members were exposed to and when, and whether the warnings should have given class members reason to suspect wrongdoing. The court also refused to certify a Rule 23(b)(2) injunctive relief class because the named plaintiffs lacked Article III standing, as they did not face a real and immediate threat of future harm, and further, were seeking primarily monetary relief. Finally, the proposed classes were not ascertainable because they were defined by subjective criteria that depended on class members' memories of interactions with their physicians regarding risks and their exposure to the statements or instructions, and medical and insurance records would not assist in that determination.

***Todd v. Tempur-Sealy International, Inc.*, No. 13-cv-04984-JST, 2016 WL 5746364 (N.D. Cal. Sept. 30, 2016), 23(f) pet. denied**

Judge Jon S. Tigar of the U.S. District Court for the Northern District of California denied the plaintiffs' motion for certification of a class of purchasers in 10 states, alleging violations of state consumer protection laws for alleged false and misleading representations regarding the presence of allergens in the defendants' mattresses and other bedding products. The court first determined that the Rule 23(a) requirements of numerosity, typicality and adequacy were met, rejecting as irrelevant the defendants' contention that the plaintiffs were not typical because they did not remember seeing the various marketing materials at issue in the case and because the plaintiffs only bought certain models of the defendants' products. The court reasoned that lack of recollection may undermine credibility but did not relate to typicality and that slight differences between the mattresses purchased by the class members were not relevant to the plaintiffs' claims of injury by alleged misrepresentations made regarding all of the products at issue. Nevertheless, commonality and Rule 23(b)(3)'s predominance requirement were not met because the plaintiffs' allegations of a massive advertising campaign were not supported by evidence that the marketing at issue was sufficiently extensive to infer exposure on a classwide basis. The court also noted that "it cannot be assumed that mattress customers buy a product based on any particular marketing representation that they viewed or heard prior to their purchase," as opposed to their impressions while shopping. Further, because more than 90 percent of the defendants' products were sold by third-party retailers, the plaintiffs needed to, but did not, demonstrate that the third-party retailers showed the defendants' marketing materials to class members. Because the plaintiffs did not put forth evidence that would allow an inference of classwide reliance, the class could not be certified.

***Torrent v. Ollivier*, No. CV 15-02511 DDP (JPRx), 2016 WL 5429644 (C.D. Cal. Sept. 27, 2016)**

Judge Dean D. Pregerson of the U.S. District Court for the Central District of California refused to certify a class of California purchasers of goji berries asserting claims under California consumer protection laws because they were allegedly misled by the defendants' packaging to believe the berries were harvested in the Himalayas. The court found the plaintiff failed to satisfy Rule 23(b) by merely reciting the rule's requirements, with no supporting evidence. Further, the plaintiff failed to meet Rule 23(a)'s requirements by stating, without evidence, that the plaintiff purchased "Himalania brand goji berries," because the defendants introduced counterevidence that they sold several different types and flavors of goji berries in nearly two dozen different types of packaging. Finally, while the plaintiff argued that he did not need to demonstrate ascertainability to certify a class under Rule 23(b)(1) or b(2), he did not cite any authority

for that contention. Moreover, his claim that he was not seeking damages was contrary to his claims for restitution. The court noted that the plaintiff's claims for restitution were not incidental to the injunctive relief sought, particularly because the defendants had already modified their packaging to eliminate the representations at issue.

***Robinson v. General Electric Co.*, No. 09-cv-11912, 2016 WL 4988013 (E.D. Mich. Sept. 19, 2016)**

Judge Victoria A. Roberts of the U.S. District Court for the Eastern District of Michigan denied the plaintiffs' request to file a supplemental expert report and a renewed motion for class certification in a consumer protection action alleging that General Electric (GE) sold defective microwave ovens without adequate safety mechanisms. The court had previously denied a motion to certify a California class of purchasers of scores of oven models, in part because of a lack of commonality (potential class members had purchased different models). The plaintiffs now sought to certify California, Michigan and multistate classes of purchasers of four specific models and file a supplemental expert report opining that those four models had materially similar defects. The court denied the plaintiffs' request to file a supplemental expert report because the plaintiffs sought to include new factual detail and analysis that could have been offered earlier, and allowing them to supplement the report at a late stage of the litigation would substantially prejudice GE. Turning to class certification, the court first denied the request to renew the motion to certify a California class, noting that the plaintiffs had already had a chance to narrow the number of models in the proposed class definition as to that class. As to the proposed multistate class, the court noted that the plaintiffs did not identify the states potentially involved or present a manageable trial plan for the multistate class. Finally, the plaintiffs could not satisfy commonality or typicality as to the proposed Michigan class: Without the supplemental expert report, the plaintiffs had no evidence that the four models had similar design defects and the named class representative, who did not live in Michigan, had only purchased one of the three models.

***Hobbs v. Brother International Corp.*, No. CV 15-1866 PSG(MRWx), 2016 WL 4734394 (C.D. Cal. Sept. 8, 2016)**

Judge Philip S. Gutierrez of the U.S. District Court for the Central District of California refused to certify a California class of consumers who purchased multifunction printers. The plaintiff asserted that the defendant misrepresented the printer's capabilities on its website in violation of California consumer protection laws. The court held that Rule 23(b)(3)'s predominance requirement was not met because the reliance and damages elements of the plaintiff's claims required consideration of numerous individual questions. First, the court noted that the plaintiff had not demonstrated that the misstatements involving the printer's scanning capabilities would induce a substantial number of consumers to purchase the printer, or that a significant portion of consumers would have behaved differently if the alleged misrepresentations were excised from its materials. Further, the misstatements were not uniformly made across outlets and retailers, and the court rejected applying a more permissive standard that would find consumers uniformly exposed to statements on the defendant's website. Second, the court held that the plaintiff had failed to show that the class would be entitled to a common damages award. The printers retailed at various prices in various locations, and an expert witness provided by the defendant testified that there was no premium placed by consumers on the capabilities that were allegedly misrepresented. Thus, the court denied certification.

***Henderson v. Corelogic National Background Data, LLC*, No. 3:12CV97, 2016 WL 4611570 (E.D. Va. Sept. 2, 2016)**

Judge Robert E. Payne of the U.S. District Court for the Eastern District of Virginia denied certification of a class alleging that the defendant violated the Fair Credit Reporting Act by failing to maintain strict procedures to ensure that the public records it provided to its customers were "complete and up to date" and by failing to notify consumers when such records were provided about them. The court held that the plaintiffs failed to meet their burden of proving that common questions predominated because determining whether records were "up to date" would necessarily require an individualized inquiry. Therefore, the court held that certification of the proposed class was inappropriate.

***Ruffo v. Adidas America Inc.*, No. 15 Civ. 5989 (AKH), 2016 WL 4581344 (S.D.N.Y. Sept. 2, 2016)**

Judge Alvin K. Hellerstein of the U.S. District Court for the Southern District of New York denied certification of a nationwide class and New York subclass alleging violations of the New York Deceptive Acts and Practices Act, and similar state statutes, as well as claims for breach of warranty and unjust enrichment. The plaintiff claimed that a sneaker manufactured by the defendant was defectively designed and manufactured. The court held that the plaintiff failed to satisfy the ascertainability requirement of Rule 23 because "the identification of class members [would] be near impossible." The defendant manufactured nearly a million pairs of the type of sneaker at issue in the case and had no records of the consumers who purchased the shoes. Moreover, the court held that the predominance requirement was not satisfied for any of the causes of action because a wide range of individualized issues would need to be established for every plaintiff. For example, under New York law, a claim for

express breach of warranty requires a plaintiff to show reliance on advertising and marketing. This element would therefore need to be established for each plaintiff in order to prevail. Furthermore, the court found that there were variations in the 46 warranty and consumer protection laws. As a result, the court denied class certification.

***In re Facebook Privacy Litigation*, No. 10-cv-02389-RMW, 2016 WL 4585817 (N.D. Cal. Sept. 2, 2016)**

Judge Ronald M. Whyte of the U.S. District Court for the Northern District of California refused to certify a nationwide class of Facebook users in claims regarding privacy and web advertisements. The plaintiff asserted two causes of action under California law: breach of contract and fraud. Numerosity and commonality were satisfied, as common questions existed regarding Facebook's promise not to disclose users' personal information to advertisers and its alleged breach of that promise. The defendant challenged typicality and adequacy, arguing that the plaintiff's prior felony embezzlement conviction, lack of knowledge of the litigation and inability to travel did not satisfy either prong. The court rejected these arguments, noting that the conviction did not disqualify her from acting as class representative, that the plaintiff had sufficient knowledge of the litigation and that her ability to sit for a full-day deposition showed that she could serve as class representative. The court, however, found that individual issues predominated with respect to the defendant's breach of misrepresentation, the injuries to the class members caused by the breach or misrepresentation and each member's reliance on any such misrepresentation. The defendant introduced evidence that demonstrated that the plaintiff did not show that the online advertising operated in the same manner for each user. Thus, the plaintiff did not meet the predominance requirement of Rule 23(b)(3).

***Harden v. Autovest, L.L.C.*, No. 1:15-cv-34, 2016 WL 4408905 (W.D. Mich. Aug. 19, 2016)**

In a Fair Debt Collection Practices Act (FDCPA) case, Judge Robert Holmes Bell of the U.S. District Court for the Western District of Michigan denied a motion to certify a class of consumers whom the defendant debt collector had sued more than four years after default, which the plaintiffs argued was after the statute of limitations expired. The court concluded that commonality was satisfied because the claims raised common questions of whether lawsuits filed four years after default were timely and whether filing untimely lawsuits was an FDCPA violation. However, the court determined that the named plaintiff could not met Rule 24(a)'s typicality and adequacy requirements. The court reasoned that the named plaintiff's claim was subject to a unique defense (that the debt was not consumer debt because it was allegedly incurred to purchase a vehicle with commercial plates), and he alleged that he was not a party to the contract at issue, so his claim arose under a different legal theory from the proposed class. Moreover, the named plaintiff undermined his credibility by claiming that he was not a party to the contract at issue. That raised questions about whether he was an adequate class representative, because his position was contradicted by documents in the record, including the installment contract, which bore his name and a signature similar to his own.

***Coleman v. Commonwealth Land Title Insurance Co.*, Nos. 09-679, 09-841, 2016 WL 4705454 (E.D. Pa. Aug. 16, 2016)**

Judge Joel H. Slomsky of the U.S. District Court for the Eastern District of Pennsylvania denied the plaintiff homeowners' motion to certify a putative class action against title insurers, alleging that they were overcharged when they purchased homeowner's title insurance in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) and Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL). To establish liability under the UTPCPL, the plaintiffs were required to prove that the defendant made a misrepresentation to each plaintiff, each plaintiff justifiably relied on it and each plaintiff's reliance caused an ascertainable loss. Because "determining justifiable reliance requires individual inquiries into each class member's transaction," the plaintiffs were unable to meet the requirements of commonality and predominance. The court rejected the plaintiffs' argument that justifiable reliance could be presumed on a classwide basis pursuant to a narrow exception created where a fiduciary relationship existed between defendants and class members, holding that, under Pennsylvania law, neither an insurer nor its agents have a fiduciary duty to their insureds. With respect to the plaintiffs' RICO claims, the court held that the plaintiffs were required to establish reliance because their claims were based on fraudulent misrepresentation. While reliance could be inferred if the plaintiffs were able to show a common scheme through the use of common evidence, they were unable to do so here. Further, the court found that ascertainability was lacking because an in-depth analysis of individual files, currently within the control of over 1,000 independent agents and not available or readily accessible to either party, would be required to determine class membership. Thus, class certification was inappropriate.

Decisions Permitting/Granting Class Certification

***Torres v. S.G.E. Management, L.L.C.*, 838 F.3d 629 (5th Cir. 2016)**

Sitting *en banc*, the U.S. Court of Appeals for the 5th Circuit affirmed certification for the plaintiffs bringing claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) as the alleged victims of a pyramid scheme. In an opinion written by circuit Judges Jacques L. Wiener, Jr., and Gregg Costa, the court held that the question of whether the defendants' fraud caused the plaintiffs' injuries was common to the class. The defendants resold electricity to consumers in deregulated markets through a midlevel marketing program in which "independent associates" would be compensated both for selling electricity to consumers and recruiting others to become independent associates. The district court certified the plaintiffs, all independent associates, as a class for their claims that the alleged pyramid scheme constituted federal mail and wire fraud, which in turn provided the predicates for RICO violations. (This decision was covered in the spring 2014 *Class Action Chronicle*). On appeal, a 5th Circuit panel reversed, holding that even though a plaintiff asserting RICO claims predicated on mail or wire fraud need not show individual reliance to establish causation, individual issues of causation would predominate because other factors could have broken the chain of causation. (This decision was covered in the winter 2015 *Class Action Chronicle*). For two reasons, the *en banc* court disagreed. First, causation was foreseeable for all the plaintiffs because pyramid schemes are inherently deceptive. Second, causation could be reasonably inferred for all the plaintiffs because the defendants held their program out as legitimate when it in fact was allegedly a pyramid scheme. While the court acknowledged that a plaintiff's awareness of the fraudulent nature could disrupt the causal chain established under the two preceding theories, it found that the defendants had failed to produce any evidence of this occurrence. In three separate opinions, Judges E. Grady Jolly, Edith H. Jones, Edith Brown Clement, Priscilla R. Owen and Catharina Haynes dissented.

***Petersen v. Costco Wholesale Co.*, No. SA CV 13-1292-DOC (JCGx), 2016 WL 6768911 (C.D. Cal. Nov. 15, 2016)**

The plaintiffs alleged injury as a result of the risk of exposure to the hepatitis A virus after consuming a frozen berry and pomegranate seed mix purchased at Costco in nine states. Judge David O. Carter of the U.S. District Court for the Central District of California previously certified a class comprised of nine single-state subclasses for determining liability for claims of strict liability, negligence and breach of warranties. The defendants moved to decertify the class on the grounds that class representatives were no longer typical and individual issues predominated. With regard to typicality, the defendants argued, *inter alia*, that class representatives were atypical because they could not establish economic damages. Rejecting this argument, the court noted that the same showing of liability would entitle both the named plaintiffs and the absent class members to recover any economic damages incurred. The defendants also argued that the class representatives were atypical because they could not prove exposure to a contaminated product. The court, however, noted that the plaintiffs' theory of strict liability did not require such a finding, and that even if the defendants' theory was correct, it did not follow that class representatives' claims were not typical, only that the claims of the class were unmeritorious. The defendants also argued against predominance on the ground that each plaintiff would have to show that his or her berry mix was contaminated. The court observed that this argument had not been developed through discovery, and it expected the issue to be more fully briefed in the upcoming motion for summary judgment. Thus, the court refrained from ruling on this issue and conditionally denied the defendants' motion to decertify the class.

***Fangman v. Genuine Title, LLC*, No. RDB-14-0081, 2016 WL 6600509 (D. Md. Nov. 8, 2016), 23(f) pet. denied**

Judge Richard D. Bennett of the U.S. District Court for the District of Maryland granted certification of a class alleging that the defendant was involved in a home mortgage kickback scheme in violation of the Real Estate Settlement Procedures Act. The court held that the plaintiffs satisfied the numerosity, commonality and typicality requirements of Rule 23(a), and the predominance and superiority requirements of Rule 23(b). The lender defendant contested that the plaintiffs satisfied the adequacy requirement of Rule 23(a), arguing that the plaintiffs were only "superficially involved" and were relying too heavily on their attorneys. Specifically, the defendant noted that the plaintiffs were never informed that two of the three claims they asserted against the defendant were dismissed. The court, however, held that Rule 23 "does not require the representative plaintiffs to have extensive knowledge of the intricacies of litigation, rather, the named plaintiffs must have a general knowledge of what the action involves and a desire to prosecute the action vigorously." As a result, the court granted the plaintiffs' motion for class certification.

***Rhodes v. National Collection Systems, Inc.*, No. 15-cv-02049-RE-B-STV, 2016 WL 6583714 (D. Colo. Nov. 3, 2016)**

Judge Robert E. Blackburn of the U.S. District Court for the District of Colorado certified a class of Colorado residents alleging the defendant violated the Fair Debt Collection Practices Act (FDCPA) by leaving repeated voicemail messages that neither identified the defendant as a debt collector nor stated the purpose of the call was to collect a debt. The defendant argued that there was no administratively feasible way to determine membership of the class, as its records did not indicate when a voicemail was left, nor did representatives operate from a standard script. The court disagreed, noting that because the defendant admitted that it did not inform its representatives of their legal obligations under the FDCPA, it was reasonable to infer that the representatives did not make the required representations in multiple communications with the plaintiff. The court also found that the defendant made no real effort to determine whether it could identify class members (some of the defendant's representatives' notes reflected that messages were left) and noted that ruling for the defendant would invite other debt collectors to adopt "similarly lax procedures as an easy end run around class action lawsuits." The court certified the class under Rule 23(b)(3). The defendant did not meaningfully challenge numerosity or adequacy, and common questions of fact and law predominated as to whether voicemails were left and whether those voicemails violated the FDCPA. The court found a class action was superior because statutory damages were limited to $1,000, and individual class members would be unlikely or unable (due to the difficulty of engaging counsel interested in such small claims) to pursue such cases on their own.

***In re Lenovo Adware Litigation*, No. 15-md-02624-RMW, 2016 WL 6277245 (N.D. Cal. Oct. 27, 2016)**

Judge Ronald M. Whyte of the U.S. District Court for the Northern District of California granted in part the plaintiffs' motion to certify three classes of laptop computer purchasers asserting claims under federal, New York and California law, alleging software installed by Lenovo on the laptops created performance, privacy and security issues. The plaintiffs sought to certify a nationwide class of direct purchasers, a nationwide class of indirect purchasers and a California class of consumers who purchased laptops from third-party retailers. Commonality was satisfied, despite Lenovo's arguments that the classes included unharmed persons, because even a well-defined class may include unharmed individuals. The class representatives' claims were typical, and any claimed differences in their experiences with the laptops would merely affect the extent of damages. Ascertainability was established, including for indirect purchasers who could self-identify or be identified through registration and repair records. Under Rule 23(b), the plaintiffs' unauthorized access claims under federal and New York law presented individualized questions as to whether unauthorized access occurred and caused harm, which outweighed the common questions. The plaintiffs' California consumer protection claims, however, were subject to common proof. The court rejected an argument that differences in state law would defeat superiority because the parties had stipulated to proceed only with respect to federal, California and New York claims, and whether California law would apply to the nationwide indirect purchaser class could be resolved on a classwide basis. The court denied certification of the direct purchaser class, given the individualized questions of New York law, which applied to their claims; granted certification of the California class; and granted certification of the indirect purchaser class without prejudice to a motion to decertify should California law not apply across the class.

***Fraser v. Wal-Mart Stores, Inc.*, No. 2:13-cv-00520-TLN-DB, 2016 WL 6208367 (E.D. Cal. Oct. 24, 2016)**

Judge Troy L. Nunley of the U.S. District Court for the Eastern District of California denied the defendant's motion to decertify a class of persons in California asserting claims under the Song-Beverly Credit Card Act based on Wal-Mart's alleged requesting and recording of customers' ZIP codes in its California retail stores. Wal-Mart argued that the class was not ascertainable, that it did not have a uniform policy of requesting and recording the ZIP codes during the class period and that individual issues predominated. The court held that evidence that Wal-Mart's point-of-sale system did not prompt customers to provide their ZIP codes during a credit card transaction did not resolve the common question of whether customers were otherwise requested and required to provide their ZIP code, and thus commonality was satisfied. The ascertainability requirement was also met, as potential class members could provide reliable records, including credit card statements and receipts. The court rejected the defendant's due process argument, based on a purported inability to raise every available defense since class members could not necessarily be identified at the time of certification, because every potential member need not be identified at the commencement of the action. Common questions predominated under Rule 23(b) because whether customers were requested to, and did, provide their ZIP codes could be resolved on a classwide basis and transaction-specific defenses did not predominate. However, the court eliminated a class representative who was asked for a ZIP code when paying more than $50 with an American Express card, which was permissible under the act.

***Patel v. Trans Union LLC*, No. 14-cv-00522-LB, 2016 WL 6143191 (N.D. Cal. Oct. 21, 2016)**

Magistrate Judge Laurel Beeler of the U.S. District Court for the Northern District of California denied the defendants' motion to decertify two national classes of consumers bringing claims under the Fair Credit Reporting Act (FCRA) in light of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). (The class certification order was discussed in the fall 2015 *Class Action Chronicle*.) The plaintiff brought two claims: an "accuracy" claim based on the defendants' dissemination of a consumer information report that wrongly described him as a terrorist with a criminal record that he did not have, and a "disclosure" claim for the defendants' failure to send him the background check performed on him or the alert that had flagged him as a potential terrorist. The court rejected the defendants' argument that neither claim alleged a sufficiently concrete injury to give the plaintiff standing, noting that it had "little difficulty in concluding that the alleged inaccuracies — being wrongly branded a potential terrorist, or wrongly ascribed a criminal record — are themselves concrete harms." The fact that this mistaken information was distributed only to users of the subscription services did not defeat standing, as "there is harm in the first passing on of such derogatory untruths," regardless of how widely distributed. Regarding the disclosure claim, the court held that the failure to provide information that Congress mandates be disclosed can constitute a concrete injury for purposes of standing. The alleged nondisclosure here fell within that family of claims, as the main purpose of the FCRA is to ensure fair and accurate credit reporting. The court dismissed the defendants' other challenges, declining to revisit Rule 23 arguments that the court had previously rejected.

***Ramirez v. Trans Union, LLC*, No. 12-cv-00632-JSC, 2016 WL 6070490 (N.D. Cal. Oct. 17, 2016)**

Magistrate Judge Jacqueline Scott Corley of the U.S. District Court for the Northern District of California declined to decertify a nationwide class of consumers alleging the defendant violated the Fair Credit Reporting Act (FCRA) for failure to disclose information in class members' files and follow reasonable procedures to assure the accuracy of information in its consumer reports. Judge Corley had previously certified a class under the FCRA and its California counterpart, as discussed in the fall 2014 *Class Action Chronicle*. The defendant argued for decertification in light of the U.S. Supreme Court's ruling in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), asserting that the plaintiff and class members could not establish a concrete injury to demonstrate Article III standing. The court held that the defendant, among other things, did not notify the plaintiff that his name appeared on the U.S. government's list of terrorists and drug traffickers or how to dispute inaccurate information on his credit report, which created a material risk of real harm to the plaintiff sufficient to establish standing. The court rejected the defendant's argument that individual questions as to each class member's standing precluded certification, holding that U.S. Court of Appeals for the 9th Circuit precedent was clear that in a class action, standing is satisfied if at least one named plaintiff meets the requirements. The defendant failed to show that intervening authority changed this precedent. The court further noted that even if class members were each required to show standing, each class member was incorrectly identified and received inaccurate disclosures, and it denied the defendant's motion to decertify the class.

***Goldemberg v. Johnson & Johnson Consumer Cos.*, No. 13 Civ. 3073 (NSR), 2016 WL 5817012 (S.D.N.Y. Oct. 4, 2016)**

Judge Nelson S. Román of the U.S. District Court for the Southern District of New York granted the plaintiffs' motion for class certification as modified. The plaintiffs sought certification of New York, California and Florida classes of consumers who purchased any of 90 body care products bearing the words "Active Naturals" on their labels. The consumers alleged that this labeling was deceptive because the products contained synthetic ingredients. The court certified New York, California and Florida damages classes, each with subclasses based on the products purchased in each state. The court excluded claims based on certain online advertising, reasoning that questions of individual members' exposure to that advertising would predominate if it could not be demonstrated that all class members had seen the same advertisements or if the content of the advertising varied widely. The court also excluded from the class products with packaging or labeling that had changed during the proposed class period, finding that predominance was not satisfied with respect to those products. The court further concluded that the named plaintiffs only had standing to bring claims on behalf of proposed class members for products that the named plaintiffs themselves had purchased. Finally, the court certified a Rule 23(b)(2) class seeking injunctive relief in the form of a prohibition on the defendant marketing products as "Active Naturals." Certification was warranted because an injunction would provide a single solution to all class members and because an injunction, unlike damages, would "protect the rights of all consumers."

***McCurdy v. Professional Credit Service*, No. 6:15-cv-01498-AA, 2016 WL 5853721 (D. Or. Oct. 3, 2016)**

After holding that language in a debt collection letter the plaintiff received from the defendant violated two provisions of the Fair Debt Collection Practices Act (FDCPA), Judge Ann Aiken of the U.S. District Court for the District of Oregon certified a nationwide class of recipients of letters from the defendant containing the offending language. The court rejected the

defendant's challenge that the plaintiff was not an adequate representative because she never disputed the debt and brought the suit in bad faith to avoid paying the debt, noting that validity of an underlying debt did not affect liability under the FDCPA and the defendant did not introduce evidence of bad faith. The court also rejected the defendant's contention that Rule 23(b)'s superiority requirement was not satisfied because the narrow class period proposed by the plaintiff excluded claims still within the FDCPA's one-year statute of limitations, permitting "serial class actions" that would exceed the statutory cap on damages. The court held that the plain text of the FDCPA did not preclude multiple class actions and refused to deny certification on the "mere possibility another class action will be filed." Analyzing the remaining class certification factors, the court held that the numerosity, typicality, commonality and predominance requirements were satisfied because, among other things, the two main questions of the action — whether the language in the letter violated the FDCPA and the appropriate amount of statutory damages — were common to the class.

***In re Syngenta AG MIR 162 Corn Litigation*, No. 14-md-2591-JWL, 2016 WL 5371856 (D. Kan. Sept. 26, 2016), 23(f) pet. denied**

In this multidistrict litigation, Judge John W. Lungstrum of the U.S. District Court for the District of Kansas granted a motion to certify one nationwide class and eight statewide classes of corn producers to pursue Lanham Act, negligence, tortious interference and state law consumer protection claims. The plaintiffs alleged that the defendants' commercialization of their products caused corn containing a genetic trait called MIR 162 to be commingled throughout the U.S. corn supply, which led to the rejection of corn imports in China and caused corn prices to drop in the United States. The court first held that the class was ascertainable, as it was defined by objective criteria — namely, corn producers listed on the Department of Agriculture's Farm Service Agency Form 578 — and rejected application of a stricter standard also requiring class members to be determined in an economical and "administratively feasible manner." The court further rejected the defendants' contention that the class was overbroad because it included producers who were not harmed by the drop in prices, such as sellers of specialty corn. These merits-based defenses did not provide a basis to conclude a great number of members could not have been harmed, the court found. The defendants did not dispute that the Rule 23(a) requirements were met, and the court held there were many common questions of fact and law relating to, among other things, Syngenta's intent and knowledge, duty of care, representations and role in China's rejection of the corn, that would be addressed and answered by common proof. These common questions and the plaintiffs' proposed method of demonstrating classwide damages through common proof of market price decreases satisfied the Rule 23(b) requirements of predominance and superiority.

***Jordan v. Freedom National Insurance Services Inc.*, No. CV-16-00362-PHX-DLR, 2016 WL 5363752 (D. Ariz. Sept. 26, 2016)**

The plaintiff alleged the "Authorization Agreement for Auto-Debit Payment Method" she was required to sign, providing that the defendant insurance company would not be responsible for claims relating to the debit or credit of the plaintiff's account, violated the Electronic Fund Transfer Act (EFTA). Judge Douglas L. Rayes of the U.S. District Court for the District of Arizona certified a class of all individuals in the United States who had signed such an agreement with the defendant. The defendant conceded that Rule 23(a)'s numerosity and adequacy requirements were satisfied. The court held that both commonality and typicality were met because it would be required to analyze the same questions of law and fact for the entire class: namely, whether the class member signed the authorization agreement and whether that agreement violated the EFTA. Common questions likewise predominated over individual issues under Rule 23(b), as the same evidence would be used to establish whether each class member signed the agreement, and the court would be left with a "purely legal question" of whether the provision violated the EFTA. The court also held that the class action method was superior because the $1,000 maximum damages award was hardly enough incentive for individual plaintiffs to prosecute their claims.

***Meta v. Target Corp.*, No. 4:14 CV 832, 2016 WL 5076089 (N.D. Ohio Sept. 19, 2016)**

In an action alleging that the defendants had produced and sold flushable wipes while misrepresenting their potential to harm plumbing systems, Judge Donald C. Nugent of the U.S. District Court for the Northern District of Ohio declined to certify injunctive relief and fraud claims yet certified a class of warranty claims. As the court explained in denying certification of the injunctive relief and fraud claims, there was no need for injunctive relief because the product formulation at issue was no longer on the market, and individualized issues of reliance would predominate over common issues for the fraud claims because there were other conceivable benefits to the product that could have affected customers' purchase decision. That meant reliance had to be established on an individual basis. Yet, the court also held that the plaintiffs had satisfied the Rule 23 requirements for their warranty claims: The contention that the product was labeled as flushable but did not perform as described was a question of fact common to all product members that predominated over individual issues, and the plaintiffs had submitted a plausible theory of classwide recovery of the value of the characteristics allegedly misrepresented. However, the court narrowed the proposed class period to end on the day the product's formulation changed because the named plaintiffs had no standing to bring claims related to the new formulation.

***Jones v. Advanced Bureau of Collections LLP*, No. 5:15-CV-16(MTT), 2016 WL 4499456 (M.D. Ga. Aug. 26, 2016)**

Judge Marc T. Treadwell of the U.S. District Court for the Middle District of Georgia certified a class of individuals who received a letter from the defendant debt collection agency that allegedly violated the Fair Debt Collection Practices Act (FDCPA) by failing to say that a request to obtain verification of the alleged debt or the identity of the original creditor must be "in writing." The defendant argued that a class could not be certified because there was no evidence of the content of each individual letter. The court rejected this argument, citing the defendant manager's testimony that the letter was a "form notice" and noting that evidence of content was exclusively in the defendant's control. The court held that ascertainability, numerosity, commonality, typicality and predominance were all satisfied because 11,500 putative class members received the same allegedly defective letter. Next, the court held that the plaintiff was an adequate class representative, finding that he was familiar with the substance of his claims, had reviewed the FDCPA and the complaint and remained in frequent contact with counsel. Moreover, the court held the plaintiff's counsel's history of 16 prior class actions involving the FDCPA revealed that counsel had adequate expertise and resources to manage the suit. The court accordingly certified the class.

***Prindle v. Carrington Mortgage Services, LLC*, No. 3:13-cv-1349-J-34PDB, 2016 WL 4466838 (M.D. Fla. Aug. 24, 2016)**

Judge Marcia Morales Howard of the U.S. District Court for the Middle District of Florida certified a class of individuals who received a mortgage statement that allegedly violated the Fair Debt Collection Practices Act (FDCPA) in seeking to collect on discharged debts. The defendant argued that commonality was not satisfied because there were questions as to whether: (1) each class member's account was in default; (2) the communications with each class member were made in connection with the collection of the debt; and (3) such communications were false, deceptive or misleading. The court held that at least the second and third of these issues presented common questions. Specifically, although there was evidence that the statements were sent for informational purposes, there was also evidence that the defendant sent the statements to debtors automatically. Accordingly, a jury could conclude that the defendant's purpose in sending all the statements was to collect debts. Moreover, because alleged violations of the FDCPA are evaluated under an objective "least-sophisticated-consumer" standard, whether the statements were deceptive could be decided "in one stroke." The court next found that the named plaintiff's claims were typical of the class because she "received a mortgage statement in substantially the same form after receiving a discharge." Next, the court found that whether a particular account was in default at the time the defendant obtained it could be determined based on a report generated by the defendant's system and therefore "would not require a significant individualized inquiry and so would not overwhelm the common questions at the core of this case." Turning to superiority, the court held that although the plaintiff did not provide evidence of the defendant's net worth, it was unlikely that the defendant's net worth was low enough to implicate the FDCPA's statutory damages cap and result in lower recovery for the class members than if they brought individual actions. Finally, despite certifying the class, the court revised the class definition to "include only those individuals who personally received the allegedly offending mortgage statement within the applicable statute of limitations," finding that individuals who were sent but did not receive a statement would not have standing pursuant to the U.S. Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

***In re Suntrust Banks, Inc. ERISA Litigation*, No. 1:08-CV-03384-RWS, 2016 WL 4377131 (N.D. Ga. Aug. 17, 2016)**

In this decision, Judge Richard W. Story of the U.S. District Court for the Northern District of Georgia certified a class of retirement plan participants alleging breach of fiduciary duty against their plan administrator under Rule 23(b)(1). The plaintiffs brought suit under the Employee Retirement Income Security Act (ERISA) and pleaded alternative actions the defendants could have taken to abide by securities laws and avoid breaching their fiduciary duties. The court held that commonality was satisfied because although the alternatives pleaded could have affected different plan participants differently, it did "not change the fact that the determination of whether a breach of fiduciary duty occurred will provide classwide resolution." For similar reasons, the court held that typicality and adequacy were satisfied; because the participants shared an interest in determining whether a fiduciary duty was breached, any intraclass conflicts were of secondary concern. Turning to Rule 23(b)(1), the court agreed with "numerous courts" that have recognized that ERISA breach of fiduciary claims are "paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class" due to their derivative nature. Although the defendants argued that certification was improper under this rule because the alleged misconduct harmed some participants yet helped others, the court deemed certification appropriate after amending the class definition to exclude participants who were not injured. Because certification was appropriate under Rule 23(b)(1)(B), the court declined to pass on whether the fact that the plaintiffs sought both injunctive relief and compensatory damages defeated the possibility of certifying the class under Rule 23(b)(1)(A).

Class Action Fairness Act Decisions

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

***Dutcher v. Matheson*, 840 F.3d 1183 (10th Cir. 2016)**

The U.S. Court of Appeals for the 10th Circuit (Lucero, Hartz and Holmes, JJ.) affirmed the district court's denial of remand of a class of former Utah property owners alleging illegal nonjudicial foreclosure. (The lower court decision was discussed in the summer 2014 *Class Action Chronicle*.) The plaintiffs did not dispute that the CAFA elements were met but instead argued that three CAFA exceptions applied. In finding the "local controversy" exception inapplicable, the court noted that another class action raising similar factual allegations and the same basis for wrongdoing was filed in Utah district court eight months before the instant action. Although the first suit involved claims under different statutes, the court held that the exception under CAFA focuses only on similarities in the factual allegations rather than causes of action, stating that "differences in the causes of action pleaded are not enough to distinguish cases under the demands of CAFA." Rejecting the plaintiffs' contention that the first suit was not a "class action" because class certification there was denied, the court held that the relevant time to determine whether a case is a class action is when the complaint seeking classwide relief is filed, not when certification is decided. The court further found that the "home state" exception did not apply. That exception only applies where: (1) more than two-thirds of the class members are citizens of the forum state; and (2) the primary defendants are citizens of the forum state. The parties only disputed whether the second requirement was satisfied. According to the Court of Appeals, the second requirement was not satisfied because while some of the defendants were Utah citizens, CAFA requires that all primary defendants be citizens of the state where the action was filed in order for the case to qualify for remand, and the plaintiffs could not make that showing. For the same reason, CAFA's discretionary exception did not apply, because it also requires all the primary defendants to be citizens of the relevant state.

***Gibson v. Clean Harbors Environmental Services, Inc.*, 840 F.3d 515 (8th Cir. 2016)**

The U.S. Court of Appeals for the 8th Circuit (Wollman, Loken and Murphy, JJ.) reversed and remanded this case alleging state tort claims related to a chemical release from a hazardous waste facility after the district court granted the plaintiffs' motion to remand. After an amended complaint was filed in February 2016, the defendant received a letter from the plaintiffs' counsel that "recommend[ed] a total payment of $6,500,000 to resolve" the case on March 11, 2016. The letter indicated that counsel had been contacted by 2,100 affected individuals and noted there were approximately 5,600 residents in the area at issue. On April 21, 2016, the defendant received the plaintiffs' expert report that set forth the scientific methodology on which the plaintiffs determined the area allegedly affected by the chemical release. On May 9, 2016, the defendant removed the case to the U.S. District Court for the Western District of Arkansas under CAFA, arguing that neither the complaint nor the March 11 letter set forth a basis for removal because the number of class members and amount in controversy were "based on unscientific and subjective information." The district court granted the plaintiffs' motion to remand, however, because removal was untimely insofar as it occurred more than 30 days after the March 11 letter. On review, the 8th Circuit adopted the "bright-line approach" adopted by other circuit courts, under which the CAFA removal period begins to run only when the defendant receives a document "from which the defendant can unambiguously ascertain" that the CAFA jurisdictional requirements have been satisfied, and the defendant has no duty to investigate a plaintiff's indeterminate allegations on its own. Consistent with that approach, the panel found that the March 11 letter did not offer factual support for either the class-size allegations or the recommended resolution amounts. The removal period began to run, though, upon receipt of the objective, scientifically based expert report. Accordingly, removal was timely, and the district court's order to remand was reversed.

***Slocum v. International Paper Co.*, No. 16-12563, 2016 WL 6569357 (E.D. La. Nov. 4, 2016)**

The plaintiffs filed a proposed class action in Louisiana state court for injuries allegedly caused by the discharge of "black liquor" from a paper mill. Some of the defendants, including International Paper (IP), removed the suit to federal court under CAFA. The plaintiffs sought remand for three reasons. First, they argued that the suit was unlikely to remain a class action in federal court because the U.S. Court of Appeals for the 5th Circuit standard for certification was more stringent than the Louisiana standard. Second, they contended that CAFA provided the district court with discretion to remand their suit. Third, they argued that removal violated the 11th Amendment because one of the defendants was a Louisiana state agency. Judge Eldon E. Fallon of the U.S. District Court for the Eastern District of Louisiana rejected all three arguments. The court determined that the plaintiffs' first argument was unavailing because federal jurisdiction under CAFA does not depend on certification. It also held that it lacked discretion under CAFA to remand because CAFA provides this discretion only where, *inter alia*, the primary defendants are citizens of the state in which the action was filed, and IP is not a citizen of Louisiana. Finally, the court held that the presence of a state agency would not violate state sovereign immunity. Because 11th Amendment immunity

is a waivable right, the presence of the Louisiana state agency in federal court would not automatically destroy subject-matter jurisdiction. Further, CAFA does not require all defendants to consent to removal; thus, even if the Louisiana state agency did later assert sovereign immunity, it would not deprive the district court of subject-matter jurisdiction over the claims against the remaining defendants.

***Stone v. Government Employees Insurance Co.*, No. C16-5383 BHS, 2016 WL 5929228 (W.D. Wash. Oct. 12, 2016) and 2016 WL 5938819 (W.D. Wash. Oct. 12, 2016), 1453 pet. pending**

Judge Benjamin H. Settle of the U.S. District Court for the Western District of Washington granted the defendant's motion to reconsider and vacated his previous order granting 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 (discussed in the fall 2016 *Class Action Chronicle*.) The plaintiffs disputed the defendant's projected class size of 19,811 as overinclusive but failed to support the arguments with actual evidence. Because "simple discovery can affirmatively resolve this issue" and the plaintiffs could move to remand for lack of subject-matter jurisdiction after discovery closed, the court refused to "engage in advisory speculation pending fact discovery" and concluded that the amount in controversy was at least $6.4 million. Accordingly, it denied remand. The court also held that GEICO's removal after the plaintiffs moved for class certification was not untimely because the expert declaration submitted with the plaintiffs' motion provided new information about the size of the proposed class and average damages. Thus, the court rejected the plaintiffs' contention that the information was available in an earlier deposition transcript. While noting that deposition testimony may constitute "other paper" that triggers the second 30-day removal period, the court held that the deponent testified only that it was possible to determine the average loss-of-use time period using GEICO's computer system but did not provide the relevant numbers, so GEICO could not have known from the deposition alone that the amount in controversy exceeded the jurisdictional limit.

***Boelter v. Advance Magazine Publishers Inc.*, No. 15 Civ. 5671 (NRB), 2016 WL 5478468 (S.D.N.Y. Sept. 28, 2016)**

Judge Naomi Reice Buchwald of the U.S. District Court for the Southern District of New York denied the defendant's motion to dismiss for lack of subject-matter jurisdiction under CAFA. The defendant argued that the court did not have federal jurisdiction under CAFA because Michigan law precluded the plaintiffs from bringing their class action in state court. As it explained, given CAFA's purpose of providing an expanded basis for defendants to remove state class actions to federal court, Congress did not expect to provide plaintiffs with a federal forum for state-law-based class actions they could not pursue in state court. The *Boelter* court disagreed, holding that the plain language of CAFA does not exclude class actions that could not have been brought in state court. Moreover, Judge Buchwald rejected the defendant's request to "read such an exception into CAFA" to avoid forum shopping, holding that the U.S. Supreme Court had already considered a similar concern but nevertheless determined that, under *Erie*, Rule 23 would displace similar state rules barring parties from maintaining class actions.

***Whisenant v. Sheridan Production Co.*, No. CIV-15-81-M, 2016 WL 5338557 (W.D. Okla. Sept. 23, 2016), 1453 pet. denied**

Judge Vicki Miles-LaGrange of the U.S. District Court for the Western District of Oklahoma denied the plaintiff's renewed motion for remand of his class action alleging underpayment or nonpayment of royalties owed on natural gas leases. The U.S. Court of Appeals for the 10th Circuit had reversed a prior denial of remand for including certain statutory interest in the CAFA amount-in-controversy determination and remanded to the district court to consider whether "any amounts other than" that statutory interest should be added to satisfy the amount-in-controversy requirement (discussed in the winter 2015 *Class Action Chronicle*). The court first concluded that attorney and expert witness fees provided by statute should not be considered in the amount-in-controversy calculation because the plaintiff was asserting only a common law breach-of-lease claim, not statutory claims. However, the court held that, in addition to the $3.7 million in damages arising from the royalties at issue, the plaintiff was also claiming just under $1 million in damages for underpayment or nonpayment for on-lease fuel and gas stream constituents (like nitrogen and helium), and the defendant had properly preserved that argument by raising it in the first remand motion. The court further held that the plaintiff was seeking to recoup under/nonpaid royalties beyond the date he filed his complaint. Because those future accruing damages were almost $40,000 per month, the court held it was reasonable for the defendant, at the time of removal, to determine that the amount in controversy would include damages up until the time the class was given notification, and thus damages would exceed the $5 million CAFA jurisdictional requirement, precluding remand.

***Municipal Water Authority of Westmoreland County v. CNX Gas Co.*, No. 16-422, 2016 WL 5025752 (W.D. Pa. Sept. 20, 2016)**

Chief Judge Joy Flowers Conti of the U.S. District Court for the Western District of Pennsylvania denied the plaintiff's motion to remand based on an application of the local-controversy exception to CAFA, holding that the plaintiff failed to satisfy its burden to show that more than two-thirds of the putative class were citizens of Pennsylvania, a necessary element of the exception. The plaintiff argued that the court should consider the entirety of the complaint in determining the applicable putative class rather than limiting its reading to the single paragraph of the complaint setting forth the class definition, which was broader than the plaintiff's understanding of the class. Finding ambiguities as to whether the class definition was limited to owners of royalties under Pennsylvania leases or (as the plaintiff advocated, based on a reading of the entire complaint) a broader class not limited to Pennsylvania leases (as the defendants argued, based on a reading of the class definition), the court held that construing the ambiguities in favor of the defendants required it to adopt a broader reading of the class definition that did not satisfy the local-controversy exception.

***Nop v. American Water Resources, Inc.*, No. 15-1691 (RBK/AMD), 2016 WL 4890412 (D.N.J. Sept. 14, 2016)**

Judge Robert B. Kugler of the U.S. District Court for the District of New Jersey denied the plaintiff's renewed motion for remand, holding that following a grant of leave to take limited jurisdictional discovery, the plaintiff failed to produce sufficient evidence that at least one-third of the putative class were citizens of New Jersey. Such evidence would have meant the court could have exercised its discretion under the home-state exception to CAFA to decline jurisdiction. While the plaintiff argued that the defendant's customer list revealed that 36.7 percent of its customers were registered to vote in New Jersey, the court held that proof of residency was insufficient to establish citizenship; rather, because citizenship is synonymous with domicile in the U.S. Court of Appeals for the 3rd Circuit, the plaintiff was required to demonstrate an "intent to remain indefinitely" in addition to in-state residency on behalf of putative class members. Further, the plaintiff failed to demonstrate that the voter registration data from 2016 that it used to determine class membership was accurate as of 2015, the year the class claims were filed. Thus, the plaintiff failed to meet its burden of proof to establish the home-state exception should apply, and remand was denied.

***Coleman-Anacleto v. Samsung Electronics America, Inc.*, No. 16-CV-02941-LHK, 2016 WL 4729302 (N.D. Cal. Sept. 12, 2016)**

The plaintiff sought remand of a proposed class action of California consumers alleging design defects in Samsung television wall mounts, asserting that CAFA's $5 million amount in controversy was not met. Judge Lucy H. Koh of the U.S. District Court for the Northern District of California accepted the defendant's evidence of the cost of reimbursing or refunding the price of the allegedly defective wall mounts based on sales of seven models sold in California during the class period and the weighted average retail price of the units. The court rejected the plaintiff's challenge to the defendant's retail price estimates that relied on the website "CamelCamelCamel," which purports to track the prices of goods offered for sale on Amazon.com, because the plaintiff offered no explanation of CamelCamelCamel's methodology or its reliability; in any event, the plaintiff only introduced price data for one model. The court also accepted the defendant's calculations of the estimated costs of repairing or replacing any Samsung televisions damaged by a failed wall mount based on (1) the number of wall mounts sold; (2) the average price per television compatible with the wall mounts; and (3) an assumed failure rate of 3 percent, which the court independently determined was reasonable in light of the allegations in the complaint. Together, the costs of replacing or reimbursing the class for the wall mounts and damaged televisions met CAFA's amount-in-controversy requirement, and Judge Koh accordingly denied remand.

Decisions Granting Motions to Remand/Finding No CAFA Jurisdiction

***Polo v. Innoventions International, LLC*, 833 F.3d 1193 (9th Cir. 2016)**

A unanimous panel of the U.S. Court of Appeals for the 9th Circuit (M. Smith, Fisher and Nguyen, JJ.) reversed a ruling granting summary judgment for the defendant and instructed the district court to remand the case to the state court pursuant to 28 U.S.C. § 1447(c). The plaintiff brought claims based on product liability and California consumer protection laws concerning a product that was claimed to treat diabetes and sought class treatment with respect to the consumer protection claims. After the defendant removed under CAFA, the district court granted summary judgment on the personal injury claims on the ground that the plaintiff lacked Article III standing because the plaintiff did not have diabetes and therefore could not have suffered an injury. It also dismissed the consumer

protection claims for lack of Article III standing because the defendant had refunded her entire purchase price for the product. On appeal, the plaintiff argued that on finding no Article III standing, the action should have been automatically remanded to the state court. The panel agreed, holding that remand is appropriate under Section 1447(c) "at any time before final judgment" when subject-matter jurisdiction is lacking and that Section 1447(c) applies to actions removed under CAFA. Although the panel acknowledged that post-filing developments ordinarily do not require remand of a case removed under CAFA, the panel found that the plaintiff's lack of standing existed at the time of filing and thus was not a post-filing development, and in any event, remand did not implicate concerns that the case would pingpong between the state and federal courts. The panel also rejected the defendant's argument that summary judgment was proper where, as here, the lack of injury would make prosecuting the case in state court futile. The panel acknowledged that the futility doctrine might apply in some circumstances (although it questioned the doctrine's continuing vitality), but not in this case because the plaintiff likely did have standing under California law. Thus, the panel reversed with instructions to remand to the state court.

***Alexander v. Bayer Corp.*, No. CV-16-6822-MWF (MRW), 2016 WL 667891 (C.D. Cal. Nov. 14, 2016)**

The plaintiffs sought remand of seven related actions alleging injury from birth control manufactured and distributed by the defendants. After the plaintiffs submitted a petition for coordination "solely for pretrial purposes," the state court *sua sponte* consolidated the cases, and the defendants removed under CAFA's mass action provision permitting removal of cases to be tried jointly. Judge Michael W. Fitzgerald of the U.S. District Court for the Central District of California granted the motion to remand, holding that a *sua sponte* consolidation is not a "proposal" to try the cases jointly. The court rejected the defendants' argument that CAFA does not limit "proposals" to those by plaintiffs in mass actions, and that Congress could, but did not, exclude *sua sponte* consolidations by state courts from CAFA's jurisdictional grant. The court noted that courts do not typically "propose" this; rather, they issue orders the parties must follow. The plaintiffs did not "propose" that the cases be consolidated in state court, and the state court did not "propose" consolidation before consolidating the cases and assigning them to a single judge. The court also observed that U.S. Court of Appeals for the 9th Circuit case law dictates the mass action provision be read narrowly and permits the strategic filing of separate complaints in state court. Because the case was not a mass action removable under CAFA, the court remanded the action to state court.

***Cato v. OK Foods, Inc.*, No. 2:16-CV-02202, 2016 WL 6652458 (W.D. Ark. Nov. 10, 2016), 1453 pet. denied**

Chief Judge P. K. Holmes, III of the U.S. District Court for the Western District of Arkansas granted the plaintiffs' motion to remand the putative class action to the Circuit Court of Sebastian County, Arkansas, because minimal diversity of citizenship was lacking. When the state court complaint was filed and at the time of removal, the defendant was an Arkansas corporation with its principal place of business in Arkansas. Thus, the defendant is a citizen of Arkansas. Further, the plaintiffs' proposed class was defined as being limited to those "who are citizens of the state of Arkansas." Accordingly, the court held that "[b]y definition, there can be no minimal diversity between any class member and OK Foods."

***Bartels v. Saber Healthcare Group, LLC*, No. 5:16-CV-283-BO, 2016 WL 6237811 (E.D.N.C. Oct. 25, 2016), appeal filed**

Judge Terrence W. Boyle of the U.S. District Court for the Eastern District of North Carolina granted the plaintiffs' motion to remand their class action against the defendants, finding that CAFA did not trump the forum-selection clause. The plaintiffs filed the action alleging claims arising from the defendants' failure to comply with their contractual and statutory obligations to provide assisted-living services that meet the needs of the residents of the defendants' care centers. The court held that a forum-selection clause limited jurisdiction to state courts in North Carolina. The court disagreed with the defendants' argument that CAFA trumped the forum-selection clause because CAFA, like other federal statutes subject to civil venue statues, does not pre-empt a valid forum-selection clause. As a result, the court granted the plaintiffs' motion to remand.

***Gyorke-Takatri v. Nestle USA, Inc.*, No. 16-cv-03893-WHO, 2016 WL 5514756 (N.D. Cal. Sept. 30, 2016)**

After the plaintiffs successfully moved to remand their class action asserting Gerber Puffs Cereal products were mislabeled in November 2015 (discussed in the winter 2015 *Class Action Chronicle*), the defendant Gerber removed again, asserting CAFA jurisdiction was satisfied based on the plaintiffs' motion to certify the class in state court. Judge William H. Orrick of the U.S. District Court for the Northern District of California rejected Gerber's contention that CAFA cases are not subject to the rule that successive removal petitions are permitted only upon a "relevant change of circumstances — that is, when subsequent pleadings or events reveal a new and different ground for removal" because it would allow indefinite appeals of unfavorable CAFA removal rulings. Judge Orrick also rejected Gerber's

contention that the plaintiffs' claim for disgorgement of Gerber's wholesale price, as opposed to their claim for restitution of the retail price paid, offered new grounds for removal. The court found the proposed measure of damages was not new evidence exceeding the amount in controversy because it was equal to or less than the damages that Gerber failed to show satisfied CAFA's amount in controversy in removing the first time. Moreover, the plaintiffs merely proposed a specific method of calculating damages based on the same allegations and facts included in their original complaint. Because Gerber could have proposed this same method for calculating damages in its first removal, the court held that Gerber failed to show a relevant change in circumstances justifying a successive removal and granted the motion to remand.

***Broadway Grill, Inc. v. Visa Inc.*, No. 16-cv-04040-PJH, 2016 WL 4498822 (N.D. Cal. Aug. 29, 2016) and 2016 WL 5390415 (N.D. Cal. Sept. 27, 2016), 1453 pet. pending**

The plaintiff sought remand of its putative class action based on the defendants' alleged California state law antitrust violations in imposing "interchange fees" on merchants who accept Visa-branded credit cards. Judge Phyllis J. Hamilton of the U.S. District Court for the Northern District of California initially denied the plaintiff's motion to remand because CAFA's amount-in-controversy and class size requirements were met. In particular, because the original complaint defined the class as "[a]ll California individuals" and entities who accepted Visa cards — as opposed to California citizens — the class included merchants and other companies headquartered and incorporated out of state, thereby satisfying the minimal diversity requirement. The court also found that the "home state" exception did not apply because the plaintiff failed to show that two-thirds of the putative class members were California citizens. The plaintiff subsequently sought leave to amend the complaint to limit the class to California citizens, which the district court granted because U.S. Court of Appeals for the 9th Circuit authority permitted amendment after removal to clarify issues pertaining to federal jurisdiction. The court then remanded the case to state court because the amended class definition defeated minimal diversity.

***Dunson v. Cordis Corp.*, Nos. 16-cv-03076-EMC, 16-cv-03080-EMC, 16-cv-03082-EMC, 16-cv-03083-EMC, 16-cv-03085-EMC, 16-cv-03086-EMC, 16-cv-03087-EMC, 16-cv-03088-EMC, 16-cv-04012-EMC, 16-cv-04409-EMC, 16-cv-04608-EMC, 16-cv-04819-EMC, 16-cv-05055-EMC, 16-cv-05199-EMC, 2016 WL 5335551 (N.D. Cal. Sept. 23, 2016), 1453 pet. pending**

Judge Edward M. Chen of the U.S. District Court for the Northern District of California remanded to state court 14 related actions seeking damages for injuries allegedly caused by defective medical devices produced by the defendant. Before removal, the plaintiffs had moved to consolidate the actions for pretrial purposes, including discovery, and implementation of a bellwether trial process. The defendant removed the action, arguing that the motion to consolidate proposed a "joint trial," thus triggering CAFA's mass action removal provision. The court noted first that the plaintiffs had clearly and emphatically disclaimed any effort to seek a joint trial in the motion to consolidate. Moreover, the plaintiffs' request for a bellwether trial did not constitute a request for a joint trial. While a bellwether trial might facilitate resolution of related cases consolidated for pretrial purposes, any resulting verdict would not be binding on the related cases. Put another way, the request for a bellwether trial process evinced an intent to try cases one by one rather than through joint trials. Finally, the court rejected the defendant's argument that any evidentiary hearing with potentially preclusive effect, including pretrial proceedings, constituted a trial within the meaning of CAFA. Such a definition "not only flies in the face of common usage, but also reads a key exception out of CAFA's jurisdictional provision," which specifically distinguishes between trial and pretrial proceedings.

***Cavalry SPV I, LLC v. Hughes*, No. 2:16-cv-05976, 2016 WL 5338516 (S.D. W. Va. Sept. 21, 2016)**

Judge Thomas E. Johnston of the U.S. District Court for the Southern District of West Virginia granted the defendant's motion to remand a debt collection action. The plaintiff removed the action to federal court and moved to dismiss its own claims under Rule 41(a) and to realign the parties. The plaintiff argued that the defendant's counterclaim under CAFA gave rise to federal jurisdiction. The court disagreed. It held that a plaintiff is not entitled to remove an action because the removal statute expressly authorizes removal "*by the defendant or the defendants*." Further, even if he were so entitled, the court reasoned that a plaintiff cannot remove an action based upon a federal question presented in a counterclaim. This is so, the court explained, because the well-pleaded-complaint rule requires federal jurisdiction to be present "on the face" of the complaint — not in a defendant's answer.

***Aaron v. West Chester Hospital, LLC*, No. 1:16cv292, 2016 WL 4480337 (S.D. Ohio Aug. 25, 2016)**

Judge Michael R. Barrett of the U.S. District Court for the Southern District of Ohio upheld jurisdiction over a declaratory judgment action in which hundreds of patients who had sued a hospital for medical malpractice related to services provided by a particular doctor sought a declaration that $110 million of insurance coverage was available for their claims. After the plaintiffs requested that the individually filed medical malpractice actions be tried in a single or several group trials, the

defendants in those actions removed the malpractice actions and the declaratory judgment action under CAFA's mass torts provision. The provision permits removal of nonclass actions where the claims of at least 100 plaintiffs are proposed to be tried together. (After removal, the malpractice actions were consolidated, but this declaratory judgment action remained a separate action.) The court determined that removal under CAFA's mass torts provision was not warranted because that provision applied to single actions with more than 100 plaintiffs and the claims of individual plaintiffs alleging medical malpractice in separate lawsuits could not be combined to meet that requirement. (The court noted that the related medical malpractice claims had been remanded to state court for the same reason, as discussed in the spring 2016 *Class Action Chronicle*.) However, the court held that traditional diversity jurisdiction presented a separate basis for removal. It denied the motion for remand because there was complete diversity between the plaintiffs, who were from Ohio and Kentucky, and the defendant insurers, who were not; the defendant Ohio hospital could be disregarded for diversity purposes because the plaintiffs had no colorable claim against it. Under the applicable state law, a plaintiff can only seek a declaratory judgment regarding insurance coverage against an insured like the defendant hospital after a final judgment for damages had been entered against it.

***Scott v. Cricket Communications, LLC*, Nos. GLR-15-3330, GLR-15-3759, 2016 WL 4415047 (D. Md. Aug. 19, 2016)**

Judge George L. Russell, III of the U.S. District Court for the District of Maryland granted the plaintiff's motion to remand because the defendant failed to demonstrate that federal jurisdiction existed under CAFA. The plaintiff alleged that the defendant "locked" the plaintiff's cellphone for use exclusively on the defendant's network, even though the defendant knew the network would be shut down, thus rendering the cellphone "useless and worthless." In deciding whether to remand the case, the court held that the defendant failed to demonstrate that the amount in controversy was in excess of $5 million. The defendant confirmed that it did not possess any information relevant to the domiciles of customers who purchased and activated cellphones in Maryland during the relevant period. Although the defendant had information detailing customers who listed Maryland addresses on their accounts, the court found this to be overinclusive evidence and insufficient to prove federal jurisdiction. As a result, the court granted the plaintiff's motion to remand.

***Vigna v. Allstate Insurance Co.*, No. C16-5474 BHS, 2016 WL 4361810 (W.D. Wash. Aug. 16, 2016), 1453 pet. denied**

Judge Benjamin H. Settle of the U.S. District Court for the Western District of Washington remanded a putative class action of Washington insureds, who claimed that Allstate did not adequately compensate the diminished value of their vehicles, for failure to meet CAFA's $5 million amount-in-controversy threshold. Although the complaint only alleged $2.7 million in damages, Allstate argued that the $5 million threshold could be met by (1) extrapolating the named plaintiff's $5,025 diminished value appraisal across the class; (2) including attorneys' fees; and (3) aggregating the amount in controversy with a similar case pending against Allstate in the same district. The court rejected each of these approaches. First, there was no evidence "from which the Court may reasonably infer Vigna's diminished value appraisal reflects the average damages of other class members." The mere fact that the plaintiff alleged that his claims were typical of the class did not warrant extrapolating the amount of his expected damages because Rule 23's typicality requirement "concerns whether each class member's claim arises from the same course of events and involves similar legal arguments," not similar amounts of damages. Second, even if attorneys' fees were included at 30 percent of compensatory damages, they would not push the amount in controversy over CAFA's threshold. Finally, the court rejected aggregating the amount in controversy in this suit with that of a separate action, citing its rejection of this approach in *Zarelli v. Encompass Insurance Co.*, C15-5607 BHS, 2015 WL 7272260, at *3 (W.D. Wash. Nov. 17, 2015), which Allstate had failed to distinguish.

The Class Action Chronicle

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

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