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This edition focuses on rulings issued between November 15, 2016, and February 15, 2017, and begins with an article regarding the circuit split on Rule 23's implied requirement of ascertainability.

### Ninth Circuit Deepens Circuit Divide on Implied Requirement of Ascertainability

A recurring question in federal class action practice is whether there must be a threshold showing that the proposed class is ascertainable — *i.e.*, whether there is an administratively feasible mechanism for identifying class members of the proposed class. Several circuit courts, including the appellate courts in the Second, Third, Fourth and Eleventh circuits, have made clear that such a showing is a fundamental prerequisite to class certification. However, other courts, including the Sixth, Seventh and Eighth circuits, have disagreed, holding that a class is ascertainable as long as the definition is not ambiguous and does not incorporate any merits determinations. In January 2017, in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), the Ninth Circuit joined the latter camp, highlighting a deep circuit split on the parameters of the implied requirement of ascertainability, and offering the U.S. Supreme Court a prime opportunity to weigh in on this important issue.

### The Circuit Split

While courts have long recognized an implied requirement that a class be ascertainable, the Third Circuit's landmark ruling in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), represented the first major appellate dive into the issue. In *Carrera*, the Third Circuit held that a class is not ascertainable unless class membership can be easily determined using objective criteria. Applying that principle to claims against Bayer with respect to its One A Day WeightSmart multivitamins, the Third Circuit determined that membership in the class could not be identified "without extensive and individualized fact-finding or mini-trials," since there was no list of purchasers and Bayer did not sell WeightSmart directly to consumers. The Third Circuit further explained that the ascertainability requirement has fundamental due process underpinnings in light of a defendant's right to assert any available defense, including, as might commonly be argued in individual suits, that there is no proof that the plaintiff actually purchased the product.

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Just a couple years later, in *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), cert. denied, 136 S. Ct. 1161 (2016), the Seventh Circuit expressly rejected what it described as the Third Circuit’s “heightened” ascertainability requirement, which would serve as a death knell for consumer-fraud class actions involving products of so little cost that no consumer would bother to keep a receipt. According to the Seventh Circuit, nothing in Rule 23 expressly requires ascertainability, and “[t]he policy concerns motivating the heightened ascertainability requirement are better addressed by” other parts of Rule 23(a) and (b). The thrust of the decision, however, was that the Seventh Circuit found preservation of so-called “low-cost product” class actions to be outweighed by the manageability and fairness concerns noted by *Carrera* and its progeny. The Sixth and Eighth circuits subsequently adopted the Seventh Circuit’s “weak” ascertainability rule.

The Ninth Circuit deepened this already-stark divide in January in *Briseno*, expressly refusing to recognize an ascertainability requirement and emphatically rejecting the approach followed by the Third Circuit. In *Briseno*, the plaintiffs filed a putative class action alleging that consumers were misled by the defendant’s cooking oil products, which were deceptively labeled as “100% Natural.” The defendant argued that the proposed class of purchasers of the cooking oil products was not ascertainable on the ground that the plaintiffs had failed to present *any* administratively feasible way to identify members of the purported class. Most notably, the defendant explained, consumers “do not generally save grocery receipts and are unlikely to remember details about individual purchases of a low-cost product like cooking oil.”

The Ninth Circuit was unpersuaded by ConAgra’s argument, and instead relied heavily on the Seventh Circuit’s decision in *Mullins*, while lambasting the Third Circuit’s approach in *Carrera*. The court’s proffered reasons were that the plain text of Rule 23 does not expressly include any freestanding “administrative feasibility requirement” and that “there is no due process right to ‘a cost-effective procedure for challenging every individual claim to class membership’” (quoting *Mullins*). However, while the Ninth Circuit purported to hew closely to the plain text of Rule 23, its holding, like the Seventh Circuit’s in *Mullins*, seemed to rest squarely on its determination that the preservation of “low-cost product” class actions was more important than manageability concerns and defendants’ due process rights.

## The Need for Supreme Court Review

The deepening divide among the federal circuit courts makes this important issue ripe for Supreme Court review. The Supreme Court must now intervene so that class action practitioners and consumers no longer have to face a checkerboard of divergent standards with regard to a basic class action prerequisite that

should be uniform across the country. In so doing, the Supreme Court should validate the *Carrera* approach, which would guarantee a defendant’s fundamental due process right to challenge class membership at the certification stage and ensure that Rule 23 — a purely procedural device — is not converted into a private attorney general remedial scheme in violation of the Rules Enabling Act.

First, the Supreme Court should clarify once and for all the role of due process in the class-certification inquiry. As the Third Circuit recognized in *Carrera*, “[i]f this were an individual claim, a plaintiff would have to prove at trial he purchased” the product. This due process right to mount such a challenge does not disappear by dint of the class device, the Third Circuit explained, emphasizing that “a class action cannot be certified in a way that eviscerates this right or masks individual issues.” As *Carrera* and other courts have also recognized, effectuating a defendant’s due process right to challenge class membership is particularly challenging (if not impossible) in low-value consumer class actions because class members will probably not be able to present verifiable proof of purchase — making the determination of class membership individualized and administratively unfeasible.

While some courts (like *Briseno* and *Mullins*) have attempted to skirt this issue by allowing class members to submit self-serving affidavits declaring that they purchased the product in question, these courts have not provided defendants with a concomitant opportunity to challenge them before the critical decision of whether to certify the class is made. Because the right to challenge a plaintiff’s proof is essential to due process, this issue cannot be so easily bypassed and relegated to hundreds or thousands of mini-trials regarding class identification, which only would prove that class certification was improper in the first place. The Supreme Court should therefore expressly recognize a defendant’s right to challenge class membership at the certification stage and make clear that a class representative must demonstrate an administratively feasible method of identifying class members before — not after — class certification is granted.

Second, by expressly adopting an ascertainability requirement of the sort endorsed by the Third Circuit in *Carrera*, the Supreme Court would ensure that the class action device is not impermissibly transformed into a punitive and private attorney general enforcement scheme. Under the Rules Enabling Act, a rule of procedure like Rule 23 may not “abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b). As one district court put it, “Rule 23 ... is meant to provide a vehicle to compensate class members and to resolve disputes”; it does not create a “free-standing device to do justice.” *In re Thornburg Mortg., Inc. Sec. Litig.*, 885 F. Supp. 2d 1097 (D.N.M. 2012). But that is essentially what decisions like *Briseno* and *Mullins* seek to accomplish by rendering irrelevant the fundamental question of whether the

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purportedly aggrieved class members are identifiable and therefore capable of being compensated. By downplaying — indeed ignoring — this essential question, courts in the *Briseno* and *Mullins* camp are converting class actions, which are supposed to provide compensation for a broad range of class members who otherwise would have no incentive to sue on their own, into civil enforcement devices in derogation of the Rules Enabling Act.

## Class Certification Decisions

In this issue, we cover two decisions granting motions to strike/dismiss class claims, two decisions denying such motions, 15 decisions denying class certification or reversing grants of class certification, 20 decisions granting or upholding class certification, 12 decisions denying motions to remand or reversing remand orders pursuant to the Class Action Fairness Act (CAFA), and 10 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

*Cholly v. Uptain Group, Inc.*, No. 15 C 5030, 2017 WL 449176 (N.D. Ill. Feb. 1, 2017)

Judge Robert W. Gettleman of the U.S. District Court for the Northern District of Illinois granted the defendants' motion to strike the plaintiff's proposed classes. The plaintiff alleged violations of the Telephone Consumer Protection Act related to calls received on her cell phone from a debt collection service using an automatic telephone dialing system. The plaintiff sought to represent a class of persons who received calls where the defendants did not have express consent, but because it appeared as though the plaintiff had originally given consent and then later revoked that consent, the court held that her claims would not be typical of those who never gave any express consent. The plaintiff also sought to represent a subclass of persons who received calls from the debt collection service after the service was "directly informed to stop calling or cease communication." However, such a class failed the predominance requirement, because the court would be required to conduct class member-specific inquiries for each individual to determine whether each potential member did in fact revoke consent at the pertinent time. Because those individual inquiries would "inevitably predominate" over any common questions of fact, the court granted the defendants' motion to strike.

*Pumputiena v. Deutsche Lufthansa, AG*, No. 16 C 4868, 2017 WL 66823 (N.D. Ill. Jan. 6, 2017)

Judge Gary Scott Feinerman of the U.S. District Court for the Northern District of Illinois granted the defendant's motion to strike class allegations, in part, related to a putative class action alleging breach of contract and violation of the Convention for the Unification of Certain Rules for International Carriage by Air in connection with a 2015 flight from Chicago, Illinois, to Brussels, Belgium, and ensuing travel to Vilnius, Lithuania. The plaintiff alleged that the Chicago to Brussels flight was delayed, but even though the Brussels to Vilnius flight had also been delayed, the plaintiff was not allowed to board due to United's amending the travel itinerary. Following other delays, the plaintiff arrived in Vilnius ten hours later than originally scheduled, during which the plaintiff had spent approximately €200 on necessities. After dismissing class claims against Lufthansa because the airline was found to not be liable to the plaintiff, the court turned to the class allegations against United. The plaintiff sought to certify two classes against United: (1) the 8804 class relating to United flight 8804 (the delayed Chicago to Brussels flight) and (2) the general United class of passengers on any international United flight since June 8, 2015, who suffered delays under certain conditions. With regards to predominance, Article 19 requires a passenger-specific inquiry into the reasonableness of an airline's accommodations in light of each passenger's individual circumstances and needs following a delay. With regards to a single flight, the court found that such an assessment could possibly be the same as to all passengers on the flight. However, that question could not be answered across hundreds or thousands of delayed flights since June 2015. Accordingly, the court struck class allegations as to the general United class but denied the motion as to the 8804 class.

### Decisions Denying Motions to Strike/Dismiss Class Claims

*Kimber Baldwin Designs, LLC v. Silv Communications, Inc.*, No. 1:16-cv-448, 2016 U.S. Dist. LEXIS 173481 (S.D. Ohio Dec. 15, 2016)

Judge Timothy S. Black of the U.S. District Court for the Southern District of Ohio denied a motion to strike class allegations in a putative class action alleging that the defendant had fraudulently switched telephone customers to a higher-cost long-distance service without their consent. First, contrary to the defendants' arguments, the court decided that the putative class has standing if the named plaintiff has standing, which it did. Next, although the defendant argued that individualized inquiries into whether each class member consented would be necessary, the court held that allegations of defendants'

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purported uniform practice were sufficient to satisfy typicality at the pleading stage. Similarly, the plaintiff's allegations estimating the size of the class were sufficient to establish numerosity for pleading purposes, particularly where knowledge of the number of customers affected was solely in the hands of the defendant. On predominance, the court noted that individualized issues identified by the defendant generally related to damages, which would not preclude class certification; moreover, any concerns regarding state-law variations could not be addressed until the relevant states were identified through discovery and the plaintiff had alleged a basis for presuming classwide reliance for its fraud claims. Further, the court held that the mere fact that attorneys' fees could be awarded under one of the plaintiff's claims did not mean that classwide resolution was not the superior approach, particularly where potential class members might not know their rights were being violated. Finally, the court noted that the statute at issue provided a private right of action and did not prohibit class actions, notwithstanding the defendant's arguments to the contrary.

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***Murdock-Alexander, Jr. v. TempsNow Employment & Placement Services, LLC*, No. 16-cv-5182, 2016 WL 6833961 (N.D. Ill. Nov. 21, 2016)**

Judge John Robert Blakey of the U.S. District Court for the Northern District of Illinois denied the defendants' motion to strike the plaintiff's class allegations related to discriminatory hiring practices. The plaintiff alleged that the defendants refused to assign him and other African American laborers to its client companies on the basis of race. On review, the court found that the defendants' motions to strike were premature. The defendants argued that the plaintiff would be unable to meet the commonality and predominance requirements, but the court noted that the complaint did not allege discrimination on the basis of TempsNow's client companies but instead alleged discrimination on the part of TempsNow itself. The plaintiff did allege additional charges of discrimination against one of TempNow's client companies, but the plaintiff identified a separate subclass of laborers who were eligible to work at that client company but did not receive that particular assignment. Turning to predominance, the court noted that the motion to strike was premature at this stage. The court was confined to the allegations in the complaint and its exhibits, but those materials did not allow the court to conduct the "rigorous analysis" required under Rule 23. At this juncture, it was too early for the court to perform this analysis. Accordingly, the motion to strike class allegations was denied.

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## Decisions Rejecting/Denying Class Certification

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***In re Class 8 Transmission Indirect Purchaser Antitrust Litigation*, No. 15-3791, 2017 WL 532296 (3d Cir. Feb. 9, 2017)**

The U.S. Court of Appeals for the Third Circuit (Chagares, Greenway, Jr. and Restrepo, JJ.) affirmed a denial of class certification in a putative class action alleging a conspiracy among manufacturers of heavy-duty trucks and a supplier of transmissions to maintain the supplier's monopoly in the heavy-duty truck transmissions market. The Third Circuit agreed that the appellants failed to satisfy the predominance requirement of Rule 23(b) where they were unable to demonstrate that classwide evidence could prove antitrust impact — *i.e.*, that the supplier Eaton overcharged truck manufacturers for Class 8 transmissions; that the manufacturers passed on that overcharge to direct purchasers; and that direct purchasers passed on the overcharge to the appellants, indirect purchasers. Contrary to the appellants' argument, the Third Circuit held that the district court properly considered certain "real-world factors" in determining whether common evidence could show individual economic loss, including unique sales incentives in certain states, and the fact that Class 8 trucks are often "unique and highly customized." The Third Circuit also found no abuse of discretion in the district court's evaluation of the appellants' expert report. The appellant's amended expert report analyzed approximately 2 percent of the supplier's sales data in formulating its conclusion on antitrust impact, which the district court found insufficient to demonstrate classwide impact. Satisfied that the lower court had conducted a "rigorous analysis" of the appellants' theory of classwide impact and evidence, the Third Circuit affirmed the denial of class certification on predominance grounds. However, the appellate court held that the lower court erred by dismissing the appellants' individual claims, where the appellants explicitly brought their claims "on behalf of themselves" and the putative class.

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***McCamis v. Servis One, Inc.*, No. 8:16-CV-1130-T-30AEP, 2017 WL 589251 (M.D. Fla. Feb. 14, 2017)**

Judge James S. Moody, Jr. of the U.S. District Court for the Middle District of Florida denied certification of a putative class of individuals who received debt-collection communications in violation of two Florida debt-collection statutes. The court first held that the class was not ascertainable because, *inter alia*, the underlying circumstances of each putative class member's bankruptcy would need to be examined to determine if a residential mortgage had been discharged, and the defendant would have

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to conduct a loan-by-loan review to determine if it had been notified of a discharge. Next, the court held that the plaintiff could not establish commonality or predominance because, *inter alia*, the claims involved “a wide range of very different letters,” not all of which concerned debt collection, requiring individual inquiries as to whether each was actionable.

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***Meyer v. Bebe Stores, Inc.*, No. 14-cv-00267-YGR, 2017 WL 558017 (N.D. Cal. Feb. 10, 2017)**

Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California refused to decertify two nationwide classes of text-message recipients alleging that the defendant violated the Telephone Consumer Protection Act by sending telemarketing messages using an automatic telephone dialing system (ATDS) without express written consent. The court rejected the defendant’s contention that the classes were not ascertainable because the plaintiffs could not produce records of text message recipients. The court held that class proponents need not demonstrate administrative feasibility for certification, and that a class action was superior because individual plaintiffs would not incur the time and expense to bring the claims for the statutory damages at issue. The court also rejected the defendant’s argument that the plaintiffs did not present common proof to establish that it utilized an ATDS, as the plaintiffs intended to introduce expert testimony in support, and the defendant cannot “short-circuit the process by asking [it] to make a factual determination regarding the probative value of plaintiffs’ expert’s opinions,” particularly as the defendant had yet to depose the expert. The court further denied the defendant’s motion to strike allegations referencing one plaintiff, who the defendant contended was an improper representative, as a “wholly inappropriate” use of Rule 12(f).

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***Cave v. Saxon Mortgage Services, Inc.*, Nos. 11-4586, 12-5366, 2017 WL 511629 (E.D. Pa. Feb. 8, 2017)**

Judge John R. Padova of the U.S. District Court for the Eastern District of Pennsylvania denied the plaintiff’s motion to reconsider a denial of his class certification opinion. The plaintiff argued that the court erred in concluding that he could not meet the predominance element of Rule 23(b), and in finding that he was an atypical and inadequate class member under Rule 23(a). The court held that predominance was lacking because there was no way to determine from common evidence whether each class member satisfied two conditions precedent to qualify for a Temporary Payment Plan (TPP) modification — (1) whether the borrower had made each trial-period payment in full and on time,

and (2) the continued validity of the financial information the borrower orally submitted when initially applying for TPP. While the plaintiff claimed the court erred by failing to consider which party was obligated to verify the accuracy of the borrower’s financial information, Judge Padova held that this did not address the focus of the predominance holding — “that determining whether submitted information was accurate was incapable of being shown by common evidence.” The court also held that there was no manifest error in its determination that the plaintiff was an atypical and inadequate class representative because there was evidence that the plaintiff submitted inaccurate financial information and failed to submit required documentation, and was thus unable to satisfy the two conditions precedent. This evidence likely made him subject to a defense that was inapplicable to many class members and that would likely become a major focus of the litigation. Thus, the denial of class certification was not erroneous and not subject to reconsideration.

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***Del Valle v. Global Exchange Vacation Club*, No. SA CV 16-2149-DOC (JCGx), 2017 WL 433998 (C.D. Cal. Feb. 1, 2017)**

The plaintiff sought to certify a nationwide class of cellphone users alleging violations of the Telephone Consumer Protection Act (TCPA) arising from calls received from two telemarketing firms hired by the defendants to market timeshares. Judge David O. Carter of the U.S. District Court for the Central District of California held that class members were ascertainable from the telemarketers’ call records or from contact information provided by call recipients interested in attending timeshare presentations. The court rejected the defendants’ contention that individual issues of consent predominated due to purported deficiencies in the call records, because defeating class certification due to poor recordkeeping “would incentivize companies to not keep records, or not require that their vendors keep records, in an attempt to circumvent TCPA liability.” However, the court held that, based on the plaintiff’s vague testimony regarding the calls she received and timeshare presentations she attended, that neither typicality nor adequacy was satisfied and refused to certify the class, as it was “not clear or even likely” that the plaintiff was a member of the proposed class. The court also denied the plaintiff’s motion to remand the action to state court. The plaintiff asserted that the defendants’ argument against certification — that the plaintiff lacked standing to pursue the action on behalf of the class — contradicted the defendants’ basis for removing the action. The court held that the pleadings filed in state court, alleging that the plaintiff received annoying phone calls in violation of the TCPA, provided a basis for federal subject matter jurisdiction at the time of removal.

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***Stein v. Monterey Financial Services, Inc.*, No. 2:13-cv-01336-AKK, 2017 WL 412874 (N.D. Ala. Jan. 31, 2017)**

Judge Abdul K. Kallon of the U.S. District Court for the Northern District of Alabama denied certification of a putative class action involving allegations that the defendant debt collection agency made unconsented automated collection calls to consumers, violating the Telephone Consumer Protection Act. The court first held that the ascertainability and typicality requirements were not met because the plaintiff did not propose an administratively feasible method for identifying class members or propose a specific plan to filter out potential class members to whom the defendant made non-debt collection calls. Although the plaintiff argued that the class could be ascertained from the defendant's call records, this approach improperly placed the burden of proving that the class was ascertainable on the defendant, who would have had to filter out the non-debt collection calls. The court next held that certification was also inappropriate because individual inquiries would have been necessary to determine whether the defendant sought and in fact obtained consent from each putative class member prior to initiating the automated calls. Because consent would have been obtained on individual conversations between the defendant's customer service representatives and the consumers, these issues were particularly subjective and individualized. Accordingly, certification was inappropriate for multiple reasons.

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***Ung v. Universal Acceptance Corp.*, No. 15-127 (RHK/FLN), 2017 WL 354238 (D. Minn. Jan. 24, 2017)**

Judge Richard H. Kyle of the U.S. District Court for the District of Minnesota denied the plaintiff's motion for class certification of a putative class alleging violations of the Telephone Consumer Protection Act (TCPA). The plaintiff alleged that his contact information was provided by a car buyer to the defendant, listing the plaintiff as the car buyer's landlord. After the individual fell behind on his car payments, the defendant called the plaintiff, allegedly with an autodialer and without his consent. In opposing class certification, the defendant argued that some class members consented to be called on their cell phones, and thus consent must be independently assessed for each class member. The court agreed and found that the plaintiff failed to establish that predominance was met. The defendant proffered at least some evidence suggesting that a portion of the class provided consent to be called. The defendant's business records showed that some references called by the company confirmed that they could be contacted regarding the accounts in question, and three car dealership managers noted in their declarations that between 25-50 percent of the time, buyers apply for financing with their references physically present at the dealership. The court found it was reasonable to infer that some portion of the in-person references likely consented to be contacted. Thus, consent was

unique to each class member and any liability would hinge upon whether the class member orally consented to be called when contacted by the defendant. Further, consent was not an affirmative defense but instead is an element of a TCPA claim. A 23(b)(2) class was also not certified because the primary relief sought was monetary, and the plea for an injunction "appear[ed] to be something of an afterthought." Accordingly, the court denied the plaintiff's motion for class certification.

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***Peterson v. Aaron's, Inc.*, No. 1:14-CV-1919-TWT, 2017 WL 364094 (N.D. Ga. Jan. 24, 2017)**

Judge Thomas W. Thrash, Jr. of the U.S. District Court for the Northern District of Georgia denied certification in an action against electronics retailer Aaron's and its franchise, Aspen Way, in which the plaintiffs alleged that the defendants' pre-installation of certain spyware software on computers leased to consumers violated their privacy. The two named plaintiffs were partners at a law firm that had allegedly leased computers from Aspen Way containing the software. The court first held that one of the named plaintiffs did not have standing because the computer had been leased to the other partner-plaintiff, not the law firm, and one partner of a small law firm is not considered the other partner's employee. Next, the court held that the class was not ascertainable because, among other issues, the proposed class definitions included household members, employees and other potential computer users who had not been injured and were not easily identified. The court next held that the predominance requirement was not satisfied for multiple reasons, including the need to apply multiple states' laws. Of particular interest, the court held that the plaintiffs' damages model, which sought to determine damages based on a sampling of defense witnesses and documents, would not have accurately reflected who was injured and how much, running afoul of the Rules Enabling Act's rule that a class action may not "abridge, enlarge, or modify" substantive rights. The court also held that Rule 23(b)(2) certification was also inappropriate because the plaintiffs sought more than incidental monetary relief and failed to show a serious risk of future injury, since the defendants had already entered into a consent decree.

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***In re Pharmacy Benefit Managers Antitrust Litigation*, Nos. 06-1782, 03-4730, 06-4305, 06-4114, 06-4115, 2017 WL 275398 (E.D. Pa. Jan. 18, 2017)**

Judge C. Darnell Jones, II of the U.S. District Court for the Eastern District of Pennsylvania denied the plaintiffs' motions for class certification in the lead case, *Caremark* (No. 06-4305), and a similar motion in *Brady* (No. 03-4730), and decertified classes previously certified in related actions *Express Scripts* (No. 06-4114) and *Medco* (No. 06-4115), in this long-pending

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multidistrict litigation involving antitrust claims brought by several independent pharmacy plaintiffs against companies that provide pharmaceutical benefits management services. Because the plaintiffs sought to certify both a Rule 23(b)(3) class and a Rule 23(b)(2) injunctive relief class, the court considered both whether the class was ascertainable and sufficiently cohesive — *i.e.*, whether a single injunction or declaratory judgment would provide relief to each member of the class. The court found that because the market for retail pharmacy services was highly diverse and local, “[p]roof by use of averages that some members suffered antitrust injury ... does not constitute common evidence” that they all suffered from the same antitrust injury or that the same injunctive relief was appropriate. Addressing the remaining requirements of Rule 23(b), the court found, *inter alia*, that the predominance requirement was not satisfied where the plaintiffs failed to provide “actual evidence, common or otherwise, ... on the basic issue of whether a price fixing conspiracy existed.” Further, the plaintiffs’ proposed damages model failed the *Comcast* test because it did not match up with the plaintiffs’ theories of liability and thus could not serve as common evidence of predominance. Lastly, the superiority requirement was not satisfied for many of the same reasons: “The different way that the alleged anticompetitive activities may have impacted individual IPs’ reimbursement rates makes collective management of claims particularly difficult.” Because the allegations and expert evidence in *Brady* were essentially identical to the conspiracy alleged in *Caremark*, certification of that class was similarly denied.

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***Knight v. Stewart Title Guaranty Co.*, No. 07-87-DLB-CJS, 2017 U.S. Dist. LEXIS 5141 (E.D. Ky. Jan. 13, 2017)**

Judge David L. Bunning of the U.S. District Court for the Eastern District of Kentucky denied certification of two classes of title insurance purchasers who had allegedly been charged title insurance premiums and fees above the defendant’s filed rate schedule. As to the first class, title insurance purchasers who had a prior title insurance policy but did not receive a particular discount, the court held that commonality, typicality and predominance could not be satisfied because the requirements for qualifying for that discount had varied throughout the class period. In particular, the court noted that, unlike the terms provided to other class members, the discount available to the named plaintiff had not required that the insured present evidence of a prior policy or that the prior policy be issued by the defendant. Although the named plaintiff argued that such requirements were legally void, the court concluded that the fact that a significant legal question exists for some class members but not others (including the named plaintiff) demonstrated that commonality and typicality was lacking. The court also found that commonality was not met because the plaintiff’s core contention — that the defendant had not required its agents to

check its files for prior policies when issued a new policy — did not injure class members whose prior policy had not been issued by the defendant. The court also declined to certify a class of title insurance purchasers who had been charged a separate binder fee, because the theory of liability the named plaintiff was seeking to pursue on that class’s behalf had not been raised prior to the class certification motion and was so divergent from his prior claims that the defendant did not have fair notice of the new claims.

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***Payne v. Benchmark Furniture, LLC*, No. 15-176, 2017 WL 109225 (E.D. La. Jan. 10, 2017)**

Judge Eldon E. Fallon of the U.S. District Court for the Eastern District of Louisiana denied class certification in a product liability suit in which the plaintiffs, a married couple, alleged that the use of a recliner creates a “pinch point hazard” that caused the partial amputation of one of the spouse’s fingers. The court denied certification because the plaintiffs failed to introduce any evidence that other individuals were injured in a similar manner, precluding them from meeting any of Rule 23(a)’s four requirements.

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***Backus v. ConAgra Foods, Inc.*, No. C 16-00454 WHA, 2016 WL 7406505 (N.D. Cal. Dec. 22, 2016)**

Judge William Alsup of the U.S. District Court for the Northern District of California refused to certify a nationwide class or, alternatively, a California class, of purchasers of Fleischmann’s margarine products containing artificial transfat, alleging that the phrase “maintaining your healthy lifestyle” on the products’ packaging was misleading. The court held that the numerosity and commonality requirements were satisfied based on the central questions of whether the products at issue were in fact unhealthy and whether the labeling was therefore unlawful. However, the plaintiff’s claim was not typical, as it was subject to unique defenses. For example, proving reliance would be problematic, as the plaintiff bought the products at issue for years before any “healthy lifestyle” claims appeared on their labeling — and thus could not possibly have relied on such labels — and continued buying the product after he learned of the dangers of transfats supposedly in reliance on the labeling, including after he filed suit. The court also detailed the plaintiff’s relationship with his attorney, who had filed at least four other transfat lawsuits against other companies on his behalf. Adequacy was likewise not satisfied because the plaintiff would be “diverted” by his unique defenses. His litigation background also posed a serious risk of prejudice to the class, as it might lead a jury to infer that he “is not truly an aggrieved consumer but a hired plaintiff executing his attorney’s raids on the deep pockets of food manufacturers.”

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***Philips v. Ford Motor Co.*, No. 14-CV-02989-LHK, 2016 WL 7428810 (N.D. Cal. Dec. 22, 2016), appeal pending**

Judge Lucy H. Koh of the U.S. District Court for the Northern District of California denied certification of three California classes of purchasers or lessees of Ford's Fusion and Focus vehicles, pursuing claims under California's Consumer Legal Remedies Act and implied warranty statutes, and for fraudulent concealment. The plaintiffs alleged that these vehicles contained defective electro-mechanical relays in their assisted steering systems and that Ford had knowledge of the defects before selling the vehicles. The court held that numerosity, commonality, typicality and adequacy were satisfied under Rule 23(a) for two damages classes. The court rejected the defendant's argument that the named plaintiffs were atypical because their vehicles did not experience steering system failures due to the allegedly defective electro-mechanical relays. The court reasoned that because the plaintiffs' theory of harm was overpayment for vehicles with the alleged defect, they were allegedly harmed at the point of purchase regardless of the manifestation of the defect. However, the court held that common issues did not predominate under Rule 23(b)(3) because class members who read warnings of sudden steering system failures in their owner's manuals would not have damages, thus negating classwide proof of reliance. The court also held that the plaintiffs' damages model failed to conform to their legal theory that members were injured by "paying a premium price" for the alleged defect, since the model failed to calculate a premium and instead valued the allegedly defective system at zero dollars. Finally, the court refused to certify an injunctive relief class seeking repairs or replacements of the steering system because an adequate remedy at law existed — namely, the monetary damages sought by the first two classes.

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***Mix v. Asurion Insurance Services Inc.*, No. CV-14-02357-PHX-GMS, 2016 WL 7229140 (D. Ariz. Dec. 14, 2016), 23(f) pet. pending**

The plaintiff obtained an offer of employment with one of the defendants, pending the results of a background check. After another defendant, a background investigating service, accurately found and reported that the plaintiff had a pending criminal charge in another state, the defendant-employer withdrew its offer of employment from the plaintiff, but it did not immediately provide the background check to the plaintiff. The plaintiff asserted the defendants used improper procedures in violation of the Fair Credit Reporting Act (FCRA). Judge G. Murray Snow of the U.S. District Court for the District of Arizona refused to certify two proposed classes of individuals who had purportedly experienced the same alleged treatment from the background reporting service and the defendant-employer. The court held that numerosity was satisfied and the plaintiff had standing to pursue her FCRA claims, as she had asserted an informational injury in that she was denied

the opportunity or notice to contest the report, and privacy harms based on inadequate disclosures. However, the court held that commonality was not satisfied as to the background reporting service class, because FCRA liability could only be determined by examining the service's relationship with individual clients. Typicality and adequacy was not satisfied for the employer class, as the plaintiff could seek only statutory damages; she suffered no actual damages because her report was not erroneous. Thus, she could not adequately represent class members who had incurred actual damages due to inaccurate reports.

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***Davis v. Nationstar Mortgage, LLC*, No. 15-cv-02920-RS, 2016 WL 6822017 (N.D. Cal. Nov. 18, 2016), 23(f) pet. pending**

Judge Richard Seeborg of the U.S. District Court for the Northern District of California refused to certify nationwide and California classes of consumers asserting claims under the Fair Credit Reporting Act (FCRA) and the California Consumer Credit Reporting Agencies Act (CCRA) arising from the defendant's previous policies, which allegedly incorrectly flagged and reported consumers who had obtained certain loan modifications. The court noted that the FCRA only provides a private right of action in limited circumstances, and that those circumstances include elements not suited for classwide treatment. Thus, the court held that the class failed on multiple fronts: The plaintiff failed to show that individual issues regarding reasonableness of the defendant's investigation of the loan status did not predominate, the identity of class members was feasibly identifiable, and the class was sufficiently numerous. The claim for injunctive relief also failed, as the defendant had changed its policies, and the plaintiff did not sufficiently show that the conduct would resume if not enjoined. While noting that the required showing of actual damages presented "serious predominance" issues for the CCRA claims, the court declined to consider that claim involving solely a California class in the absence of a viable basis to pursue a class action under federal law.

## Decisions Permitting/Granting Class Certification

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***Just Film, Inc. v. Buono*, 847 F.3d 1108 (9th Cir. 2017)**

The U.S. Court of Appeals for the Ninth Circuit (Gould and Berzon, JJ., and Tunheim, chief district judge sitting by designation) affirmed the district court's certification of two nationwide classes of merchants who were leased credit and debit card processing equipment by the defendants. The plaintiffs sought certification of a class alleging Racketeer Influenced and Corrupt Organizations Act (RICO) violations through the defendants' alleged scheme to debit fabricated taxes and fees from the bank accounts of merchants with expired leases. The defendants argued that one of the plaintiffs was atypical because her bank



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account was not actually debited after she successfully challenged the alleged fraud before it was completed. Rejecting this contention, the court noted that although the specific predicate act causing her injury may differ from the acts injuring the other class members, her allegation of harm based on some activities comprising the RICO violation was sufficient since she could prove the nature of the fraudulent scheme for the benefit of all class members. The court also found that the commonality and predominance requirements were satisfied, even though there may be differences in calculation of individual damages, because the plaintiffs need only show that damages can be determined without excessive difficulty and attributed to their theory of liability. Further, the court affirmed the certification of a class alleging breach of contract arising from the defendants' calculation of the equipment property taxes using the higher acquisition cost instead of the equipment cost. The court held that the interpretation of the leasing contracts would predominate and that class action was superior given that individual damages were too small to make litigation cost-effective.

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***McKeage v. TMBC, LLC*, 847 F.3d 992 (8th Cir. 2017) (per curiam)**

The U.S. Court of Appeals for the Eighth Circuit (Wollman, Bright and Kelly, JJ.) affirmed the district court's certification of a class of plaintiffs challenging the defendant's nationwide practice of charging a document fee when selling boats and trailers under form contracts governed by Missouri law. The plaintiffs alleged that this document fee constituted unauthorized law business in violation of Mo. Rev. Stat. §§ 484.010 and 484.020. On appeal, the defendant argued that the class should not have been certified because individualized proof was required to determine whether each customer's contract contained a Missouri choice-of-law provision. On review, the panel discussed the district court's process used to identify class members where the court had ordered a document review of the defendant's files to identify those contracts containing a Missouri choice-of-law provision. The panel noted that class members were identified by reviewing the files according to objective criteria. Predominance was met because the file-by-file review indicated that customers entered into a contract "identical or substantially similar" to the contract entered by the named plaintiffs, and the defendant's corporate policy was to require all customers to sign the standard form contract governed by Missouri law. Thus, the case presented "a classic case for treatment as a class action." Accordingly, the panel affirmed the district court's certification of a class but remanded the case on other, unrelated issues related to a cross appeal for attorney's fees.

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***Briseno v. ConAgra Foods, Inc.*, No. 15-55727, 2017 WL 53421 (9th Cir. Jan. 3, 2017) and 844 F.3d 1121 (9th Cir. 2017)**

The U.S. Court of Appeals for the Ninth Circuit (W. Fletcher, Christen and Friedland, JJ.) affirmed certification of 11 state-wide damages classes of purchasers of Wesson-brand cooking oils labeled "100% Natural." The plaintiffs claim ConAgra was unjustly enriched and violated state consumer protection laws and express and implied warranties because Wesson oils are made from genetically modified organisms, which they contend are not "natural." The Ninth Circuit rejected ConAgra's contentions that the plaintiffs did not offer sufficient evidence that a reasonable consumer would consider the "100% Natural" label material and understand it to mean GMO-free, and its challenge to the plaintiffs' proposal to use "well-established damages models" to measure the price premium. In a concurrently filed opinion, the Ninth Circuit rejected ConAgra's contention that a class could not be certified because no administratively feasible method exists to identify class members, since consumers do not generally save grocery receipts and are unlikely to remember details about individual purchases of low-cost products like cooking oil. Noting that the Ninth Circuit had not adopted any "threshold ascertainability" test, the court joined the Sixth, Seventh and Eighth circuits in declining to adopt an administrative feasibility requirement like that favored by the Third Circuit. The court concluded that Rule 23 does imply such a prerequisite and that the Third Circuit's policy concerns are already addressed by Rule 23(b)(3)'s superiority requirement. The court also reasoned that an administrative feasibility requirement would likely mean that class actions involving inexpensive consumer goods would fail at the outset, even if there was no realistic alternative to class treatment. Finally, the court downplayed the likelihood of fraudulent claims diluting the recovery of bona fide members in class actions involving low-cost consumer goods, because "[w]hy would a consumer risk perjury charges and spend the time and effort to submit a false claim for a de minimis monetary recovery?" The court also noted that the defendant has opportunities in the claims administration process to challenge the claims of absent class members if they file claims for damages.

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***Bridging Communities Inc. v. Top Flite Financial Inc.*, 843 F.3d 1119 (6th Cir. 2016)**

A unanimous panel of the U.S. Court of Appeals for the Sixth Circuit (Gilman, White and Stranch, JJ.) reversed a district court's denial of class certification in a Telephone Consumer Protection Act "junk fax" action. The district court denied certification of a class of fax recipients on predominance grounds because the question of whether each class member consented

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to receiving such advertisements could require individualized proof. The panel concluded, however, that because the defendants had not offered any evidence that any class member had consented, mere speculation that such a defense could exist was not sufficient to defeat predominance. The panel noted that the plaintiff had offered classwide evidence suggesting an absence of consent (the testimony of the defendants' advertising vendor that it had not verified that the individuals on the list had consented) and that the defendants had not provided any evidence that some class members might have consented in other ways (e.g., through a prior business relationship). In addition, the panel reversed, under *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), the dismissal of the action based on an unaccepted offer of judgment.

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***Macy v. GC Services Limited Partnership*, No. 3:15-cv-819-DJH-CHL, 2017 WL 489420 (W.D. Ky. Feb. 6, 2017), 23(f) pet. pending**

Judge David J. Hale, Jr. of the U.S. District Court for the Western District of Kentucky certified a class in a Fair Debt Collection Practices Act (FDCPA) class action alleging that the defendant had sent debt collection letters that did not accurately describe debtor's rights under the FDCPA. The defendant argued against class certification primarily on the basis that there was no evidence that the named plaintiffs and proposed class members suffered an injury sufficient to confer standing. Because the court had already found that the named plaintiffs had adequately alleged standing, it deferred ruling on the defendant's remaining standing arguments, noting that it need not determine whether absent class members had standing at the class certification stage. The court also rejected the defendant's argument that numerosity had not been established because the plaintiffs had not identified how many of the letters mailed by the defendant had been received and read. According to the court, receipt was not required to establish a FDCPA violation — merely sending was sufficient. The court then determined that commonality, typicality and predominance were met because the claims involved the predominant and common question of whether the letter at issue violated the FDCPA. On the issues of adequacy and superiority, the court declined to follow another district court's denial of class certification in a case involving similar claims against the same defendant, *Dickens v. GC Services Limited Partnership*, No 8:16-cv-803-T-30TGW, 2016 WL 6681468 (M.D. Fla. Nov. 14, 2016). (The *Dickens* ruling was discussed in the winter 2016 *Class Action Chronicle*.) The court concluded that the prior court had placed undue emphasis on the fact that the named plaintiffs sought only nominal statutory damages, while other class members might have claims for actual damages, because class actions were designed to overcome the lack of incentive to bring individual actions created when only small recoveries are available, and Rule 23's opt-out provision addressed any concern that class members with actual damages would be precluded

from pursuing them. Finally, the court denied the defendant's request that the class definition be expanded to include the proposed class members in all pending lawsuits filed by the plaintiffs' counsel against the defendant, noting that the plaintiffs are masters of their complaint and the FDCPA does not limit the number of class actions that can be brought against a defendant.

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***In re Global Tel\*Link Corp. ICS Litigation*, No. 5:14-CV-5275, 2017 WL 471571 (W.D. Ark. Feb. 3, 2017), 23(f) pet. denied**

Judge Timothy L. Brooks of the U.S. District Court for the Western District of Arkansas granted class certification in a putative class action brought by the plaintiff inmates alleging, in part, violations of the federal Communications Act. The plaintiffs claimed that the defendant obtained exclusive contracts to provide telephone services to inmates at correctional facilities in exchange for payment of kickbacks known as "site commissions" and exploited those monopolies by charging unjust and unreasonable rates to users of inmate calling services. Commonality was met because the class members' uniquely individual circumstances are "utterly irrelevant" to common questions, including whether it was just or reasonable for GTL to recoup site commissions from inmate calling services customers. GTL argued predominance was not met because the reasonableness of interstate rates and fees raised individualized fact issues including the sizes of different facilities and their mix of call traffic. However, this factor was met because of the nature of the plaintiffs' claims — that it was unjust and unreasonable for GTL to recoup site commissions and to charge deposit fees that far exceeded the cost of processing deposits on prepaid accounts. The court also held that, despite the presence of variances between the different states' laws on unjust enrichment, those variances could be adequately addressed through the use of special verdict forms. Accordingly, the court granted class certification.

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***Spiegel v. Ashwood Financial, Inc.*, No. 1:16-cv-01998-LJM-DML, 2017 WL 443168 (S.D. Ind. Feb. 2, 2017)**

Judge Larry J. McKinney of the U.S. District Court for the Southern District of Indiana granted class certification in a putative class action brought by the plaintiff alleging violation of the Fair Debt Collection Practices Act (FDCPA) related to letters demanding payment of delinquent consumer debts that failed to state any dispute of the debt at issue or request for the name and address of the original creditor. The defendant argued that the plaintiff's claims were not typical of the proposed class because the plaintiff's debt was discharged through Chapter 7 bankruptcy and he had no interest in setting off debt like other putative class members. The court found, however, that typicality was satisfied because the named plaintiff's claims arose from the same letter and the named plaintiff could recover statutory damages like

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other putative class members. In addressing superiority, the court noted that despite the fee-shifting provision of the FDCPA, the class action was a superior method because few of the putative class members would realize they have a claim or would be willing to pursue a claim on an individual basis. The court noted that the fee-shifting provision “actually serve[d] to further class action proceedings and deter creditors from violating the FDCPA.” Even if the defendant was unlikely to pay damages to the plaintiff due to its poor financial condition, superiority was met. Accordingly, the court granted class certification.

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***National Veterans Legal Services Program v. United States*, No. 16-745 (ESH), 2017 WL 354084 (D.D.C. Jan. 24, 2017)**

Judge Ellen Segal Huvelle of the U.S. District Court for the District of Columbia granted the plaintiffs’ motion for class certification in an action brought by users of the Public Access to Court Electronic Records (PACER) system alleging that PACER’s fee schedule violated the E-Government Act because it was higher than necessary to cover operating costs. The court rejected the defendant’s argument that the named plaintiffs could not adequately represent the class because, unlike other PACER users, they had the ability to request PACER fee exemptions as nonprofits. Instead, the court found that the named plaintiffs were adequate representatives because they were not exempt from PACER fees and, thus, shared with the other class members an interest in reducing those fees. The court also held that common issues predominated over individual ones because, if the plaintiffs prevailed on their theory that the federal judiciary was required to set a lower rate, the defendant would be liable to any class member who paid the illegal higher rate and damage calculations would be “ministerial.” Thus, class certification was appropriate.

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***Miller v. Trans Union, LLC*, No. 3:12-CV-1715, 2017 WL 412641 (M.D. Pa. Jan. 18, 2017)**

Magistrate Judge Martin C. Carlson of the U.S. District Court for the Middle District of Pennsylvania recommended that the court find that the named plaintiff had standing to pursue this action alleging violation of the Fair Credit Reporting Act (FCRA) based on informational injury alone and that class certification be granted. The plaintiff sought certification of a class of over 13,000 individuals who received misleading credit reports between September and October 2011 that suggested his or her name appeared on the U.S. Treasury Department’s list of terrorists and other enemies of the United States (OFAC list). After addressing the issue of Article III standing, the magistrate judge addressed whether the requirements of Rule 23(a) and (b), only one of which was seriously in dispute, were satisfied. Trans Union argued that commonality was not satisfied because

the plaintiff’s FCRA claim required proof that each consumer actually read and was misled by the OFAC list disclosure. Based on precedent from a California District Court, the magistrate judge found that “informational injury stemm[ing] from allegedly inadequate statutorily-mandated disclosures” constituted a concrete harm. Further, Magistrate Judge Carlson held that questions regarding whether Trans Union violated the FCRA by failing to provide complete and truthful information, and acted recklessly in doing so, were common to the class because each member of the putative class was harmed by the same or substantially similar conduct.

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***Golan v. Veritas Entertainment, LLC*, No. 4:14CV00069 ERW, 2017 WL 193560 (E.D. Mo. Jan. 18, 2017), 23(f) pet. denied**

Judge E. Richard Webber of the U.S. District Court for the Eastern District of Missouri granted class certification in a putative class action brought by the plaintiffs alleging violations of the Telephone Consumer Protection Act, which prohibits persons from initiating calls to residential telephone lines using a prerecorded voice to deliver a message without the called party’s prior express consent. The plaintiffs alleged that, during telemarketing of a movie titled “Last Ounce of Courage,” they received prerecorded phone calls appearing as surveys to their residential phone number, which was registered on the federal Do Not Call list. The defendants challenged certification and argued that the plaintiffs failed to establish commonality because they could not prove lack of consent on a classwide basis. However, the plaintiffs submitted a deposition where a defendant stated that none of the 4 million numbers called had consented to receiving future calls about movies for commercial purposes. The defendants argued that some of the numbers had given prior consent to calls about “issues related to religious freedom,” but the court concluded that whether consent to call about religious freedom is also consent to receive calls about a movie is a legal question capable of being resolved on a classwide basis. Further, the plaintiffs had standing because the unwanted calls caused a “risk of injury due to interruption, distraction, and invasion of privacy,” which are concrete and not just bare procedural violations. Accordingly, the court granted class certification.

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***Tabiti v. LVNV Funding, LLC*, No. 13 C 7198, 2017 WL 168176 (N.D. Ill. Jan. 17, 2017)**

Judge Joan B. Gottschall of the U.S. District Court for the Northern District of Illinois granted class certification in a putative class action brought by the plaintiff alleging violation of the Fair Debt Collection Practices Act (FDCPA). The plaintiff alleged that, after the defendants bought his debt from Chase Bank USA, N.A., they filed a collection lawsuit in Illinois and attached an

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affidavit that sought the alleged unpaid balance as well as interest and continuing interest on the outstanding principal balance. The plaintiff alleged that this affidavit violated the FDCPA because Chase's assignment of the debt pursuant to a credit card account purchase agreement "specifically excluded all post charge-off interest from the assignment." In opposing class certification, the defendant argued that adequacy was not met because (1) the plaintiff did not possess the same interests as potential class members, insofar as his debt was incurred for business purposes while the FDCPA addresses only non-business debt, and (2) his claims were not brought within the appropriate statute of limitations and thus were time-barred. The court indicated, however, that the defendants had confused the plaintiff's Chase checking account with the credit card account at issue in the case. Further, the court noted that even if the statute of limitations began to run when the plaintiff was sent collection letters to his home address, the continuing violations doctrine rendered his action timely. Thus, adequacy was satisfied. Accordingly, the court granted class certification.

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***Naylor Farms, Inc. v. Chaparral Energy, LLC*, No. CIV-11-0634-HE, 2017 WL 187542 (W.D. Okla. Jan. 17, 2017)**

Chief Judge Joe Heaton of the U.S. District Court for the Western District of Oklahoma certified a putative class action seeking to recover for breach of contract, breach of fiduciary duty, unjust enrichment, and actual and constructive fraud for alleged underpayment of royalties due under natural gas leases. The plaintiffs argued that lessees have an implied duty of marketability (IDM) under Oklahoma state law, requiring the lessee to pay for the services necessary to make the natural gas marketable. More than 5,000 leases contained IDM provisions, which the defendant allegedly ignored in deducting marketability costs from the royalties it paid to class members. Considering the argument that variations in the royalty payment provisions in the leases precluded a finding of commonality, the court observed that, because 90 percent of the leases in the proposed class contained identical provisions that the Oklahoma Supreme Court already determined did not negate the IDM, commonality was satisfied if the class was limited to leases with those specific clauses. The court rejected the defendant's argument that differences in marketability of the gas at each well precluded commonality, because the class definition excluded wells producing gas that did not require treatment to be marketable. Typicality and adequacy were met because the plaintiffs and the proposed class were challenging the same practice of underpaying royalties based on an improper deduction of marketing costs. However, in analyzing predominance, the court excluded the plaintiffs' claims for fraud because of individualized issues of reliance. Thus, the court certified a Rule 23(b)(3) class of leases with the specific IDM provisions and no fraud claims.

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***Seeligson v. Devon Energy Production Co., L.P.*, No. 3:16-CV-00082-K, 2017 WL 68013 (N.D. Tex. Jan. 6, 2017), 23(f) pet. granted**

Reversing its earlier decision denying class certification, the U.S. District Court for the Northern District of Texas granted certification under Rule 23(b)(3) to a class of royalty owners suing the defendant for allegedly underpaying royalties owed to them from natural gas production. The court granted the plaintiffs' motion to reconsider its previous certification decision, made almost a year prior, finding that circumstances outside the plaintiffs' control prevented them from fully developing the factual record. On the merits of the case, the court determined that there were two overarching issues: (1) whether the defendant breached its state law duty to market the gas by allegedly selling it to an affiliate at a 17.5 percent discount, and (2) whether the defendant breached the same duty by allegedly not following its own policy to recoup the profits that the affiliate made on subsequent sales of the gas.

The court ruled that the proposed class was adequately defined and clearly ascertainable. The plaintiffs defined the class to include all royalty owners who had entered into one of nine leases with the defendant and had gas subject to those leases processed at a specific plant. Based on this definition, the court determined the class would be ascertainable because the defendant possessed the necessary records to eventually identify all members of the class.

The court also held that the proposed class met the four requirements of Rule 23(a). The court found ample evidence supporting the numerosity, typicality and adequacy requirements. Although the court acknowledged that the proposed class members were subject to nine different leases and would allege different amounts in damages, it found that they still met the commonality requirement. According to the court, commonality required the plaintiffs to show only that there was "at least one contention that is central to the validity of each class member's claims." Either of the two central issues in the case satisfied this showing. And because neither the multiple leases nor the varying damages were material to those central issues, they could not defeat a finding of commonality.

Lastly, the court held that the purported class met the predominance and superiority requirements of Rule 23(b)(3). Common questions of law or fact predominated because the central issues were common to the class, and the defendant's liability or lack thereof could be established through common evidence about the defendant's business practices. The court also found that the class met the superiority requirement because class certification would reduce inefficiencies from the court separately adjudicating the 186 individual, related actions that were then on the docket.

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Since the district court's ruling, the U.S. Court of Appeals for the Fifth Circuit has granted the defendant leave to appeal under Rule 23(f), and the district court has stayed the matter pending Fifth Circuit resolution of the appeal.

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***Wilson v. Anthem Health Plans of Kentucky, Inc.*, No. 3:14-CV-743-TBR, 2017 WL 56064 (W.D. Ky. Jan. 3, 2017)**

Judge Thomas B. Russell of the U.S. District Court for the Western District of Kentucky certified a class of health insurance beneficiaries who had been denied coverage for autism treatment on the ground that the policy's dollar limits for that treatment had been exceeded. The plaintiffs alleged that the policy's dollar limits violated federal and state mental health parity laws because the defendant did not place similar dollar limits on medical benefits. Although the plaintiffs had identified only 27 putative class members, the court found that numerosity had been satisfied because joinder was impractical where judicial economy favored proceeding as a class action, the action's protective order could limit the named plaintiff's ability to contact other class members, some class members might have incurred only a small amount of denied claims, and some class members were likely unaware of the legal basis for these claims. The court held that superiority was met for similar reasons, but noted that it could revisit the superiority issue if discovery showed that a large number of class members had large individual claims for damages. The defendant also argued that (1) no class member could satisfy typicality and adequacy because each treatment plan was unique to that class member, and (2) the named plaintiff in particular had a limited interest in litigating, because her denied claims had been paid for by a relative. The court rejected those arguments: To the court, typicality was met because the claims all arose from a single course of conduct (the cap on benefits for mental health treatments), the named plaintiff did not have interests antagonistic to the class, and her diligent prosecution of the litigation to date demonstrated that she was an adequate class representative. The court declined to rule on the merits of the parties' argument on whether autism was always a mental health condition as a matter of law, but held that commonality and predominance were met because that issue was a central and common question to the plaintiffs' claim. The court therefore certified a class under Rule 23(b)(3). However, the court denied certification under Rule 23(b)(2), because the primary purpose of the litigation was repayment of the cost of benefits that had allegedly been improperly denied, although the named plaintiff also sought an injunction to enforce the class's rights to future benefits.

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***Raffin v. Medcredit, Inc.*, No. CV 15-4912-GHK (PJWx), 2017 WL 131745 (C.D. Cal. Jan. 3, 2017)**

Judge George H. King of the U.S. District Court for the Central District of California certified a class of California plaintiffs whose telephone calls were recorded by the defendant debt collector without warning or consent in violation of Cal. Penal Code § 632.7. The court found the class was ascertainable because internal records would show whether a recording advisory was provided and whether the class member was in California when the call was sent or received, but limited the class to individuals with California area codes. Numerosity, typicality and adequacy were satisfied, despite the plaintiff's sensitivity to telephone calls due to a prior identity theft, because typicality focuses only on the representative's claim or defense. The court held that the defendant's merit-based argument that § 632.7 applies to only recordings by third parties was a common question that need not be resolved on a certification motion. Interpreting § 632.7 to prohibit any recording without first informing the parties that the conversation is being recorded, the court concluded that common issues arising from the defendant's uniform policy of recording conversations at the start of each call and providing the recording advisory only once an agent confirmed they were speaking to the correct individual predominated over individual inquiries. However, the court limited the class to first-time recorded calls, to eliminate individualized issues as to prior consent in later calls. The court also rejected the defendant's argument that a class action was not superior because the \$5,000 statutory penalty sought for thousands of class members would dwarf any actual harm suffered by the class, given that "the potential for enormous liability is not an appropriate reason to deny class certification." The court also certified a Rule 23(b)(2) injunctive relief class, rejecting the defendant's contention that the relief was moot because its warning policy had changed, as the defendant had not demonstrated that it would not engage in the allegedly unlawful recording practice again.

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***Compressor Engineering Corp. v. Thomas*, No. 10-10059, 2016 WL 7473448 (E.D. Mich. Dec. 29, 2016)**

Judge Paul D. Borman of the U.S. District Court for the Eastern District of Michigan certified a class of recipients of a fax advertisement in a Telephone Consumer Protection Act (TCPA) action. First, the court found the class definition was ascertainable and not over-broad for several reasons: (1) the record of faxes sent was objective criteria for determining class membership; (2) owning a fax machine or proof that a fax was

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printed was not required for standing to sue under the TCPA, because transmission of the fax occupied the recipient's fax line during the message transmission, which constituted a sufficient concrete and particularized injury; (3) the fax at issue did not include opt-out language necessary for any defense on the basis that recipients had consented, making it irrelevant whether any class members had a pre-existing business relationship with the defendant; and (4) the defendant's argument that some faxes had not been sent on his behalf because the marketing company had ignored his directions regarding the scope of the fax blast was a merits issue not relevant to class certification. The court also held that the named plaintiff's claims were not atypical, even though those claims were subject to the defense that the fax it received was not sent on the defendant's behalf, because the defendant contended that the vast majority of the faxes had been sent not on his behalf (*i.e.*, outside of the area he had directed the marketing company to target). The court then noted that concerns about the adequacy of certain class counsel based on their conduct in other TCPA actions was mooted by the presence of other firms unrelated to the earlier misconduct.

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***Long v. Fenton & McGarvey Law Firm P.S.C., No. 1:15-cv-01924-LJM-DML, 2016 WL 7235509 (S.D. Ind. Dec. 14, 2016)***

Judge Larry J. McKinney of the U.S. District Court for the Southern District of Indiana granted class certification in a putative 23(b)(3) class action brought by the plaintiff alleging violations of the Federal Debt Collections Protection Act (FDCPA). The plaintiff alleged that the defendants sent form debt collection letters that were confusing to a consumer and “would cause a consumer to not know to whom the debts were currently owed” because, in part, the letters failed to explain the defendants’ relationship to the debts. The plaintiff sought to represent a class of all persons similarly situated in Indiana from whom defendants attempted to collect a debt allegedly owed for a Comenity Bank credit card account via the same form collection letter that the defendants sent to the plaintiff. Numerosity was satisfied as the parties agreed that the proposed class would consist of approximately 760 people. With regard to commonality and predominance, the court found that the key issue in the case — whether or not the form letter violates the FDCPA — was identical for each putative plaintiff. The defendants argued that liability under the FDCPA should be based on each putative class member’s understanding of the form collection letter and that the court could not employ such a subjective standard. Rather, the unsophisticated consumer standard is used to determine whether a debt collector’s communication violates the FDCPA. Accordingly, the court certified the 23(b)(3) class.

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***Dear v. Q Club Hotel, LLC, No. 15-60474-CIV-COHN/SELTZER, 2016 WL 7477734 (S.D. Fla. Dec. 8, 2016)***

Judge James I. Cohn of the U.S. District Court for the Southern District of Florida granted certification in a putative class action in which the plaintiffs alleged that the defendant condominium owner inflated the amount it charged unit owners to maintain common areas. After finding that the class was easily ascertainable and that the Rule 23(a) factors (which were not challenged) were satisfied, the court held that common issues predominated, rejecting the defendant’s arguments that individual proof needed for its affirmative defenses and individual damages defeated this requirement. As to the affirmative defenses, the defendant did not provide evidence that its waiver and consent defense was applicable only to certain class members. Moreover, calculating damages would not be complicated and cumbersome because the fees charged were calculated using a fixed formula under a form contract. The court next held that the superiority requirement was met for several reasons. First, there was minimal interest in the class members controlling individual litigation because the damages sought were purely economic and largely based on a fixed formula. Second, although many unit owners were foreign, judgment enforcement and notice issues would not make the case difficult to manage. Finally, there were no due process concerns because the class members’ damages were not “completely out of proportion” to their actual losses.

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***Claridge v. North American Power & Gas, LLC, No. 15-cv-1261 (PKC), 2016 WL 7009062 (S.D.N.Y. Nov. 30, 2016)***

Judge P. Kevin Castel of the U.S. District Court for the Southern District of New York granted certification of a class alleging that the defendant misleadingly described its “variable market based rate” to its electricity consumers in violation of the New York General Business Law. The plaintiffs asserted that the variable monthly rates charged by the defendant were substantially higher than the market rate. The court held that the plaintiffs satisfied the requirements of Rule 23(a), including that the commonality requirement was met because the “common contention” that the defendant misleadingly described its method for calculating variable month rates was “capable of classwide resolution.” The court further held that the plaintiffs satisfied the requirements of Rule 23(b), noting that common issues susceptible to generalized proof “substantially predominate[d]” over any individualized issues. The plaintiffs’ motion for class certification was therefore granted.

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*In re Myford Touch Consumer Litigation*, No. 13-cv-03072-EMC, 2016 WL 6873453 (N.D. Cal. Nov. 22, 2016), 23(f) pet. pending

The plaintiffs and the defendant each sought reconsideration of an order by Judge Edward M. Chen of the U.S. District Court for the Northern District of California certifying certain classes of purchasers and/or lessees of Ford and Lincoln vehicles equipped with purportedly defective MyFord Touch or MyLincoln Touch in-car communication and entertainment systems. The plaintiffs moved for reconsideration of the court's refusal to certify four classes under California, New York and Washington consumer protection statutes, arguing that the court neglected to consider their theory of liability based on alleged omissions. The court noted that, although class certification in an omissions case may be possible, in this case information regarding the problems with the system was widely available to the public almost as soon as the system was released, making a classwide determination of reliance impossible. Further, because the software was updated a number of times, the court held that there was too much variability in the material facts throughout the class period to permit a classwide inference with respect to Ford's knowledge of and state of mind about the alleged defects, threatening predominance and manageability. Thus, the court denied the plaintiffs' motion. With regard to Ford's motion for reconsideration, the court agreed that it erred in certifying four classes for fraud-based claims arising under California, Ohio, Texas and Virginia law. The court held that those four claims required reliance as an element, and as reliance was not susceptible to classwide determination, it should not have certified the four claims at issue while denying certification of other fraud-based claims requiring reliance. Thus, the court granted the motion for reconsideration and decertified the four classes.

## Class Action Fairness Act Decisions

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

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*Williams v. Employers Mutual Casualty Co.*, 845 F.3d 891 (8th Cir. 2017)

The U.S. Court of Appeals for the Eighth Circuit (Wollman, Arnold and Kelly, JJ.) affirmed the district court's denial of remand because the state law equitable garnishment action constituted a class action subject to federal jurisdiction under CAFA. Previously, the plaintiff served as class representative to a class awarded over \$80 million for medical monitoring and loss in the value of residences as a result of defendants' supplying the residents with contaminated drinking water. The plaintiff then filed an equitable garnishment action in state court to enforce the class judgment "as class representative, by and through class

counsel." Following removal to federal court under CAFA, the plaintiff moved to remand, arguing that the action was not a "class action" as defined by CAFA, because the complaint in the garnishment action did not specifically invoke Missouri Rule 52.08, the analog to the federal rule governing class actions. The district court disagreed, concluding that although labeled otherwise, "the present action [was] a class action because it [was] a class action in substance." The Eighth Circuit agreed, reasoning that although the complaint in the equitable garnishment action did not specifically reference Rule 52.08, "it [was] clear from the face of the complaint" that the plaintiff was suing under that rule in order to enforce the judgment obtained for the benefit of the class. The court further explained that allowing the plaintiff to evade federal jurisdiction simply by omitting reference to a state class action rule would promote the kind of gamesmanship CAFA was designed to eliminate. Accordingly, the panel affirmed the district court's denial of remand under CAFA.

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*Wright Transportation, Inc. v. Pilot Corp.*, 841 F.3d 1266 (11th Cir. 2016)

In this decision, the U.S. Court of Appeals for the Eleventh Circuit (Martin and Jordan, JJ., and Vinson, district judge sitting by designation) held that the district court retained original jurisdiction under CAFA after all class claims in the action had been dismissed. The plaintiff sued the defendant truck stop operator in the Southern District of Alabama, alleging that it withheld contracted-for discounts on fuel from its customers, asserting federal racketeering and a number of state-law claims both individually and on behalf of a class. After the district court dismissed the federal and class claims, new citizenship information rendered the action not diverse. The district court then granted the plaintiff's request to dismiss the case for lack of jurisdiction without prejudice so that it could refile in state court, rejecting the defendant's argument that it retained original jurisdiction under CAFA. In reversing and remanding, the panel explained that "jurisdictional facts are assessed at the time of removal; and post-removal events ... do not deprive federal courts of subject matter jurisdiction." The court explained that, while dismissal for lack of jurisdiction after CAFA removal may be appropriate when "the federal court never had CAFA jurisdiction in the first place," such as when the claims "contain frivolous attempts to invoke CAFA jurisdiction or lack the expectation that a class may be eventually certified," it would be incorrect to say that jurisdiction "existed and then was lost." The court further explained that a different result was not necessary even though the case was filed in federal court rather than removed, because the "post-filing action that did away with the class claims" was not an action by the plaintiff (such as an amended complaint) aimed at belatedly defeating federal jurisdiction.

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## ***Hammond v. Stamps.com, Inc.*, 844 F.3d 909 (10th Cir. 2016)**

A unanimous panel of the U.S. Court of Appeals for the Tenth Circuit (Kelly, Gorsuch and McHugh, JJ.) vacated the district court's order granting the plaintiff's motion for remand. The plaintiff sought relief in New Mexico state court on behalf of a nationwide class of former Stamps.com subscribers who canceled their subscriptions after they were charged for months when they did not use its services. The defendant removed the action, establishing that 312,680 customers canceled their subscriptions during the class period, and that the plaintiff sought \$300 in statutory damages or at least \$31.98 in monthly subscription charges per class member, meaning potential damages of up to \$93 million. The district court refused jurisdiction, holding that Stamps.com failed to show which customer cancellations reflected customers who were actually deceived, and thus did not demonstrate that \$5 million or more was "in controversy." Analyzing the meaning of "in controversy," the panel concluded the defendant established jurisdiction under CAFA. The court put to the side the district court's observation that the plaintiff was unlikely to show all the cancellations were due to the alleged misrepresentations, because "the question at this stage in the proceedings isn't what damages the plaintiff will *likely* prove but what a factfinder *might* conceivably lawfully award." The district court's approach "would invite delays and costs more appropriately reserved for adjudicating the merits than choosing the forum" and "task[] [the defendant] with the job of proving his own likely liability ... simply to get a foot in the door of the federal courthouse." The panel further rejected the plaintiff's argument that removal could be delayed until after a class is certified in state court as contrary to Congress's intent to resolve the forum question early and quickly in the litigation.

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## ***Middendorf v. West Chester Hospital, LLC*, No. 1:15-CV-00439-TSB, 2017 WL 510267 (S.D. Ohio Feb. 8, 2017)**

Judge Timothy S. Black of the U.S. District Court for the Southern District of Ohio denied a motion to remand a putative class action alleging that the defendant hospital systems had allowed a particular medical device to be used in an off-label manner without patients' informed consent. The plaintiff conceded that the main requirements for CAFA jurisdiction were met, but argued that the district court should decline jurisdiction under a CAFA exception because most class members were residents of the forum state (Ohio), an argument the court rejected. First, the court held that neither the local controversy nor home-state exceptions applied, because both exceptions require that more than two-thirds of the putative class be citizens of the forum state and the plaintiff's own sampling of known potential class members showed that only 58 percent were Ohio residents. Second, as to the discretionary exception for cases involving classes with less than two-thirds but more than one-third of local

citizens, the court noted that several factors favored retaining jurisdiction, most significantly that several product liability cases related to the medical device were already pending in federal court and any decisions in this action could have an impact on cases across the country. The court further noted that the need to interpret the federal Food, Drug and Cosmetic Act labeling regulations also weighed in favor of federal jurisdiction.

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## ***Sharpe v. Puritan's Pride, Inc.*, No. 3:16-cv-06717-JD, 2017 WL 475662 (N.D. Cal. Feb. 6, 2017)**

The plaintiffs sought remand of an action, brought on behalf of a nationwide class, asserting that the defendants violated 40 states' consumer protection statutes when they induced the purchase of their vitamin products through the use of "free" promotions. Judge James Donato of the U.S. District Court for the Northern District of California denied the motion, rejecting the plaintiffs' contention that the \$5 million amount-in-controversy was not satisfied. The defendants introduced evidence that total nationwide sales of the products at issue under "free" promotions during the class period exceeded \$5 million. More specifically, the defendants showed that more than 100,000 New York residents alone were potential class members, and the relevant New York statute provided for at least \$50 in statutory damages per claimant. The court noted that the plaintiffs did not offer any contrary counter-evidence and rejected the plaintiffs' suggestion that they would seek only "actual" damages as contradicted by the relief sought in the complaint. The court also held that the plaintiffs' counsel did not have authority to legally bind a putative class with a damages limitation. Because of the damages sought under New York law alone — without considering the plaintiffs' nationwide restitutionary claims or claims for damages under dozens of other allegedly violated state consumer protection laws — CAFA jurisdiction was appropriate.

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## ***A&M Gerber Chiropractic LLC v. Geico General Insurance Co.*, No. 16-cv-62610-BLOOM/Valle, 2017 WL 35519 (S.D. Fla. Dec. 30, 2016), 1453(c) pet. pending**

Judge Beth Bloom of the U.S. District Court for the Southern District of Florida denied the plaintiff's motion to remand this action seeking declaratory relief for the defendant insurance company's "wide-spread practice of improperly paying claims at a reduced amount." The court first held that CAFA's amount-in-controversy requirement was satisfied based on the defendant's officer's affidavit and deposition testimony calculating potential damages well in excess of the \$5 million threshold. Although the plaintiff argued that the officer's estimate was inflated and not reflective of the amount the defendant actually paid for claims, the court explained that amount in controversy is an estimate of the amount that will be put at issue in the litigation, not how



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much a plaintiff is ultimately likely to recover. The court also found that the fact that the plaintiff sought declaratory relief did not make the amount in controversy “overly speculative,” explaining that the Eleventh Circuit has rejected the notion that “class members armed with a declaratory judgment would not later seek out the additional payment they are owed.” Finally, the court rejected the plaintiff’s “interesting” argument that it did not have standing to sue in federal court, finding that the complaint adequately alleged a threat of future injury, because the plaintiff represented an open-ended class and the defendant did not intend to change its interpretation of the insurance policy at issue.

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***Seasons Homeowners Association v. Richmond Homes of Nevada, Inc.*, No. 2:16-CV-1816 JCM (CWH), 2016 WL 7155746 (D. Nev. Dec. 7, 2016)**

The plaintiff sought remand of a class action construction defect suit brought by 380 homeowners arising from allegedly defective air conditioning cooling coils. Judge James C. Mahan of the U.S. District Court for the District of Nevada denied remand. Initially, the plaintiff had successfully resisted remand when its action was consolidated with another state court action involving the same alleged construction defect, because the amount-in-controversy was less than \$5 million and the consolidation did not merge the two cases. After the consolidated cases were consolidated with another state court case for discovery purposes only, the defendants removed again. The plaintiff did not contest that the amount-in-controversy exceeded \$5 million, but asserted that the removal was untimely. The court rejected the plaintiff’s contention that discovery revealed the amount-in-controversy, because the documents cited by the plaintiff did not provide notice of the potentially recoverable attorney’s fees. The plaintiff also cited a demand letter demanding \$90 million as proof of the amount-in-controversy, but the court noted that that letter pertained to a separate case consolidated with the instant case. Because the other case involved approximately 60,000 homes throughout Nevada, the letter did not put the defendants on notice of removability under CAFA for the instant action involving a single neighborhood. Instead, the court held that the first paper from which the defendants could ascertain removability was a settlement letter demanding \$6.7 million to settle the instant case alone. Because the defendants removed the action the following day, the removal was timely and the motion to remand was denied.

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***Heather v. Air Methods Corp.*, No. CIV-16-843-R, 2016 WL 7109675 (W.D. Okla. Dec. 6, 2016)**

Judge David L. Russell of the U.S. District Court for the Western District of Oklahoma denied the plaintiffs’ motion for remand of a putative class action asserting the defendants charged unreasonable rates for air ambulance services. The court concluded

that the defendants appropriately based their estimate of the amount-in-controversy on figures offered by the plaintiffs in the complaint. Specifically, the plaintiffs sought damages on behalf of all patients or parents of minor patients transported by the defendants from a location in Oklahoma for a period of three years, at an average rate of more than \$25,000 per plaintiff. The court held that, based on the rates that the plaintiffs argued would have been reasonable for such services (such as certain Medicare reimbursement rates), the alleged overcharge per plaintiff would be between \$17,184.67 and \$21,503.25. Since the plaintiffs alleged the proposed class would include thousands of class members, CAFA’s amount-in-controversy requirement was met. The court rejected the plaintiffs’ contention that the defendants did not demonstrate the amount-in-controversy with “particularity,” as the notice of removal need include “only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold.” The court further noted that the defendants had also submitted an affidavit demonstrating that over 7,200 patients were billed during the proposed three-year class period with charges exceeding \$5 million, and denied the plaintiffs’ motion.

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***Brown v. Saint-Gobain Performance Plastics Corp.*, No. 16-cv-242-JL, 2016 WL 6996136 (D.N.H. Nov. 30, 2016), 1453(c) pet. denied**

Judge Joseph N. Laplante of the U.S. District Court for the District of New Hampshire denied a motion to remand two putative class actions alleging damages from chemical contamination from the defendants’ manufacturing plant in New Hampshire. The actions asserted claims related to the alleged decrease in value of the surrounding properties and for the costs of medical monitoring of the current and former residents of the area surrounding the plant. The plaintiffs argued that CAFA’s local controversy exception required remand. However, the court concluded that the two actions did not meet the exception’s requirement that no other class actions asserting similar factual allegations had been filed against the defendants in the last three years, because putative class actions had been filed against the defendants alleging similar chemical contamination from the defendants’ plants in New York and Vermont. Although the earlier actions did not relate to the New Hampshire plant, the court held that CAFA required only that the actions were similar, not identical, to bar the exception.

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***Lopez v. U.S. Home Corp.*, No. 2:16-cv-01754-GMN-CWH, 2016 WL 6988486 (D. Nev. Nov. 27, 2016), pet. for writ of mandamus denied**

Chief Judge Gloria M. Navarro of the U.S. District Court for the District of Nevada refused to remand a class action suit asserting claims arising out of alleged construction defects. The plaintiffs

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complained that it was not evident from the face of the complaint that the amount-in-controversy exceeded CAFA's \$5 million threshold. However, the court accepted the defendants' evidence of potential costs of repairs based on an expert report submitted in a separate construction defect action pending against U.S. Home in state court, alleging substantially similar defects. The court held that the fact the expert report was prepared in the course of separate litigation did not undermine its validity in light of the similar underlying defects, and the expert report provided a reasonable approximation of damages. As none of the homes in the report had an estimated repair cost below \$41,034, the court held that the \$5 million threshold was easily met and federal jurisdiction under CAFA was proper.

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*Walsh v. Defenders, Inc.*, No. 16-0753 (ES) (SCM), 2016 WL 6775634 (D.N.J. Nov. 15, 2016)

Judge Esther Salas of the U.S. District Court for the District of New Jersey adopted in relevant part Magistrate Judge Steven C. Mannion's Report and Recommendation (R&R) and denied the plaintiff's motion to remand. The gravamen of the putative class action was that the defendants "buried" unlawful provisions in their consumer contracts. The plaintiff objected to the R&R on the asserted ground that the local controversy exception to diversity jurisdiction under CAFA applied, prompting a *de novo* review by the district court. Primarily at issue was whether the local defendant's alleged conduct was a significant basis for the claims — a core requirement of the exception. The court found that the plaintiff failed to demonstrate this element of the exception where he did not address the Third Circuit's nine areas of inquiry announced in *Kaufman v. Allstate New Jersey Insurance Co.*, 561 F.3d 144 (3d Cir. 2009). In addition, the court emphasized that the local defendant only operated for approximately two-and-a-half years of the six-year putative class period, strongly suggesting that the local defendant's alleged conduct was a significant basis for the asserted claims. Because the plaintiff failed to sustain his burden of showing that the local controversy exception applied, the plaintiff's motion to remand was denied.

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*Labrado v. Method Products, PBC*, No. 16-cv-05905-LB, 2016 WL 6947337 (N.D. Cal. Nov. 28, 2016)

Judge Laurel Beeler of the U.S. District Court for the Northern District of California granted the plaintiff leave to amend his putative class action complaint to clarify the scope of the class definition. The lawsuit alleged that the defendant falsely promoted its household products as being natural, plant-based and hypoallergenic. The plaintiff alleged violations of three California consumer protection statutes and defined the class to include "[a]ll persons in the State of California who, within four

years prior to the filing of this Complaint, purchased Defendant's Products." Method removed the case, asserting "minimal diversity" under CAFA because the class definition was not limited to California citizens and so could include non-California citizens who purchased the products while in the state. Method also sought a stay pending approval of the settlement of a nationwide class action in the Southern District of New York. The court denied the stay, noting that it would be more efficient to address the remand motion and would not risk inconsistent results. The court concluded that, as pled, the class definition did not expressly exclude non-California citizens. However, the court granted the plaintiff leave to amend the complaint to impose this requirement. Under the court's ruling, if the plaintiff files an amended complaint that limits the class to California citizens within three days of the order, the case will be remanded.

## Decisions Granting Motions to Remand/Finding No CAFA Jurisdiction

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*Tri-State Water Treatment, Inc. v. Home Depot U.S.A., Inc.*, 845 F.3d 350 (7th Cir. 2017)

The U.S. Court of Appeals for the Seventh Circuit (Wood, C.J., Flaum and Rovner, JJ.) affirmed the district court's remand of a putative class action to state court in finding that an additional counterclaim-defendant is not entitled to remove a class action from state court to a federal district court under CAFA. The case began as a collection action in small claims court where Tri-State alleged that the Bauers failed to pay for a water treatment system Tri-State had installed at their home following a free, in-home assessment of their water. The Bauers answered the complaint and filed a counterclaim asserting a multistate class action for fraud in connection with the sale of the water treatment system. The Bauers then filed an amended class action counterclaim, adding Home Depot and another entity as counterclaim-defendants. The Bauers claimed that the in-home water tests misled consumers into buying their water treatment systems, because the in-home tests did nothing but identify mineral content rather than contaminants. Following removal by Home Depot as an additional counterclaim-defendant, the district court remanded the case to state court, relying on the longstanding rule that only original defendants can remove cases to federal court. The panel of the Seventh Circuit agreed, relying on construction of CAFA's text and in line with the Seventh Circuit's holding in *First Bank v. DJL Properties, LLC*, 598 F.3d 915 (7th Cir. 2010), that counterclaim-defendants are not entitled to remove such a case under CAFA. The panel noted that Congress was free to fine-tune the removal rules for CAFA actions, but the panel was to apply the law as it stands, and the panel noted that its decision adhered to *First Bank* and maintained consistency with its sister circuits. Accordingly, the panel affirmed the district court's order remanding the case to state court.

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***Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383 (6th Cir. 2016)**

In a 2-1 decision, the U.S. Court of Appeals for the Sixth Circuit (Griffin and Donald JJ., Kethledge, J. (dissenting)), upheld an order remanding a putative negligence class action to state court. The action was against engineering firms hired by the city of Flint, Michigan, to develop plans for Flint's water treatment facilities, which allegedly did not include measures that would have prevented lead contamination, and sought relief on behalf of a class of residents and property owners in Flint. After the defendants removed, the plaintiffs requested remand under CAFA's local controversy exception. The majority held that the plaintiffs could rely on the rebuttable presumption that a person's residence is his or her domicile in order to establish class members' citizenship. Because the defendants did not offer any contrary evidence to rebut that presumption and there were no circumstances — like a large student population — that suggested that a significant number of Flint residents were not Michigan citizens, the majority concluded that the district court had not erred in finding that at least two-thirds of the proposed class were citizens of the forum state. Further, although Flint had formally contracted with one of the out-of-state defendants, the majority agreed that the plaintiffs had established that the Michigan-based defendant's conduct was an important part of their claims by alleging that the Michigan entity had been formed to conduct one of the out-of-state defendant's work in Michigan. The majority also noted that the role of a third out-of-state defendant was minimal at best, since the plaintiffs only alleged that it was vicariously liable for the other defendants' conduct as their corporate alter ego. Judge Kethledge dissented, concluding that the plaintiffs had not met the citizenship or conduct elements of the local controversy exception. First, he agreed with the five other circuits that had held that allegations of residency were not sufficient to establish class-member citizenship and noted that the proposed class included both residents and an unknown number of property owners who might not be residents. Second, he reasoned that whether the local defendant's conduct was significant compared to the conduct of other defendants could not be determined from the plaintiffs' complaint because, other than alleging that one of the out-of-state defendants formed and conducted business through the local defendant, the complaint referred to those two defendants collectively and what actions each was alleged to have taken were thus unclear. In a subsequent case filed in federal court, *Gilcreast v. Lockwood, Andrews & Newnam, P.C.*, No. 16-11173, 2017 U.S. Dist. LEXIS 16867 (E.D. Mich. Feb. 7, 2017), Judge John Corbett O'Meara of the U.S. District Court for the Eastern District of Michigan applied the local controversy exception to dismiss the action because it was "indistinguishable" from *Mason*.

***Whitlock v. Bayer Corp.*, No. 4:16-CV-1913-SPM, 2017 WL 564489 (E.D. Mo. Feb. 13, 2017), *Hall v. Bayer Corp.*, No. 4:16-CV-1523 (CEJ), 2017 WL 86011 (E.D. Mo. Jan. 10, 2017), 1453(c) pet. denied**

Magistrate Judge Shirley Padmore Mensah and Judge Carol E. Jackson of the U.S. District Court for the Eastern District of Missouri granted the plaintiffs' motions to remand, rejecting the defendants' bid to sustain subject matter jurisdiction under CAFA's "mass action" provision. The plaintiffs in both cases alleged injuries resulting from the use of Essure, a permanent birth control system manufactured by the defendants. Even though each individual case involved fewer than 100 plaintiffs, the defendants argued that the plaintiffs in the cases and other similar ones should be aggregated. The courts noted, however, that CAFA's mass action provision expressly excludes "claims joined upon motion of a defendant" from the definition of a "mass action" removable under CAFA. Because the plaintiffs had made no attempt to consolidate the cases, the courts concluded that CAFA could not form a proper ground for removal.

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***Rhodes v. Kroger Co.*, No. 4:16CV00640 JLH, 2017 WL 528484 (E.D. Ark. Feb. 9, 2017)**

Judge J. Leon Holmes of the U.S. District Court for the Eastern District of Arkansas granted the plaintiffs' motion to remand the case to state court because the case was not timely removed. The plaintiffs challenged the legality of portions of Kroger's discount program, because the program offered customers over the age of 55 an additional discount once a week in violation of Arkansas Code § 4-75-501(a)(2). The Arkansas provision makes it unlawful to fail to grant a purchaser of a manufactured product a discount that is granted to other purchasers of like quantities. Kroger first removed the case in June 2015, but the case was remanded to state court because CAFA's local controversy exception applied. After dismissing two defendants, Kroger removed the action in September 2016, arguing that the dismissal of the two defendants rendered the local controversy exception inapplicable. The primary question was whether this second removal was timely. Kroger argued the action was not initially removable because the court was required under the local controversy exception to remand the case to state court. However, even though this exception mandated remand, the court had original jurisdiction under CAFA when the case was initially removed. The court noted a distinction between (1) a lack of jurisdiction and (2) a directive from Congress to abstain from exercising jurisdiction. The court found that an action in which the local controversy exception applies is removable "because the local controversy exception is not an element of subject-matter jurisdiction and because it is not expressly provided by Act of Congress that an action in which the local controversy exception

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applies may not be removed.” Kroger was thus required to file its notice of removal within 30 days of receipt of the original complaint, and its second notice of removal was untimely.

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***Hargett v. RevClaims, LLC*, No. 3:16cv200-JM-BD, 2017 WL 61914 (E.D. Ark. Jan. 5, 2017), 1453(c) pet. granted**

Judge James M. Moody Jr. of the U.S. District Court for the Eastern District of Arkansas granted the plaintiff’s motion to remand the putative class action to the Circuit Court of Craighead County. The plaintiff alleged that defendant health care providers contracted with RevClaims to illegally collect accounts from patients who were Arkansas Medicaid-eligible for services provided to those patients that were Medicaid-covered services. Following removal, the court found that the local controversy exception to CAFA applied. First, the court found that at least two-thirds of the class members are citizens of Arkansas because, in part, the plaintiff defined the class as all persons who were Arkansas residents at the time the relevant medical services were provided. Second, the court found it reasonable to conclude that significant relief was sought from at least one of the four local health care providers. Third, the court found the principal injuries requirement to be satisfied as the proposed class sought to recover for conduct made illegal by Arkansas laws for liens filed in Arkansas on behalf of Arkansas health care providers against Arkansas residents. Accordingly, the court found the local controversy exception of CAFA to be satisfied and granted the motion to remand.

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***Hughes v. AutoZone Parts, Inc.*, No. CV 16-08009 SJO (KSx), 2017 WL 61917 (C.D. Cal. Jan. 4, 2017)**

Judge S. James Otero of the U.S. District Court for the Central District of California granted the plaintiffs’ motion to remand their class action brought on behalf of participants in AutoZone’s rewards program in California. The plaintiffs asserted claims for breach of contract, fraud and violations of various California consumer protection statutes arising from a change in AutoZone policy that resulted in the retroactive expiration of class members’ rewards credits. Declarations submitted by AutoZone asserted that there were approximately 8.5 million AutoZone rewards program members in California, and that 748,258 of those members had “all or a portion of” a \$20 rewards credit expire since January 2012, totaling more than \$15 million and satisfying CAFA’s \$5 million amount-in-controversy requirement. The court noted that the declarant failed to attach the records reviewed or establish that those records were authentic. Moreover, AutoZone did not indicate the average value of the relevant members’ rewards that expired or explain why all putative class members were entitled to the full \$20 for each

expired award. Thus, the court held that AutoZone had not met its burden of establishing that the amount-in-controversy should equal \$20 times the number of individuals with expired credits, and remanded the case to state court.

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***Rosbacka v. John Johnson’s Cars*, No. 3:16-cv-1086-GPC-WVG, 2016 WL 7046502 (S.D. Cal. Dec. 5, 2016)**

Judge Gonzalo P. Curiel of the U.S. District Court for the Southern District of California remanded an action brought by a consumer who brought a putative class action against the Navy Federal Credit Union (NFCU) for alleged violations of California’s Unfair Competition Law (UCL) and the Rosenthal Debt Collection Practices Act (Rosenthal Act). Judge Curiel issued an order to show cause *sua sponte* why the action should not be remanded to state court, questioning whether CAFA’s minimal jurisdictional amount of \$5 million was met. The court rejected the defendant’s argument that the amount-in-controversy included the value of all class loans subject to rescission (over \$1 billion) because, although the plaintiff had referenced classwide rescission in its commonality allegations, it was not a specific allegation of damages and the plaintiff clarified in his briefing that he was not seeking classwide rescission. Regarding the amount-in-controversy under the UCL, the court held that the appropriate value was the additional interest that NFCU collected, or stood to collect, under the higher APR, but the defendant’s evidence confirmed that such value was no more than \$2.7 million and would be reduced depending on how many of those loans were used to buy cars from California dealerships. The court declined to include the cost of complying with prospective injunctive relief and concluded that the maximum damages established by the defendant under the Rosenthal Act were \$500,000 in statutory damages. Thus, even including reasonable attorneys’ fees, the defendant did not meet the jurisdictional minimum and subject matter jurisdiction was lacking.

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***Bohnenstiehl v. McBride, Lock, & Associates, LLC*, No. 16-CV-306-NJR-DGW, 2016 WL 6872955 (S.D. Ill. Nov. 22, 2016)**

Judge Nancy J. Rosenstengel of the U.S. District Court for the Southern District of Illinois granted the plaintiffs’ motion to remand a case to state court because the defendant failed to demonstrate that the amount in controversy under CAFA was satisfied. The plaintiffs filed a putative class action alleging that the defendant failed to exercise reasonable care in safeguarding and protecting social security number information. The plaintiffs’ complaint indicated that the class consisted of at least 100 members “with individual monetary claims not in excess of \$75,000.” Relying on such language, the defendant argued that the amount in controversy was at least \$7.5 million, since there

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were at least 100 putative class members. The court found that these figures were not sufficient to satisfy CAFA's jurisdictional threshold. As the court explained, just because the class definition excludes those with damages over \$75,000, it "does not automatically follow that \$75,000 is the amount of damages each class member is claiming." The court noted that the defendant "relied solely on a bald assertion and completely ignored its obligation to support its assertion with facts."

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***In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices & Products Liability Litigation*, No. 2:14-mn-02502-RMG, 2016 WL 7338594 (D.S.C. Nov. 21, 2016)**

Judge Richard Mark Gergel of the U.S. District Court for the District of South Carolina granted in part plaintiffs' motion to remand. The defendants removed eight actions to federal courts in California, asserting diversity jurisdiction and federal jurisdiction under CAFA. These actions were then transferred to a multidistrict litigation (MDL) court in South Carolina. The plaintiffs in these eight actions generally alleged that they had developed Type II diabetes as a result of taking the defendants' prescription drug Lipitor. Judge Gergel held that removal on the basis of diversity jurisdiction was barred by the forum defendant rule, notwithstanding that the forum defendant had not been served prior to removal. Judge Gergel also "suggest[ed] to the JPML" that the actions be remanded to their respective transferor

courts because "mass actions" removed solely on the basis of CAFA jurisdiction cannot be transferred to an MDL proceeding, even if non-CAFA jurisdiction is asserted at the time of removal and later found improper.

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***Arrington v. Ana P. Hall Construction, L.L.C.*, No. 2:15-CV-00711-PCH-TFM, 2016 WL 8201650 (M.D. Ala. Nov. 15, 2016)**

Judge Paul C. Huck of the U.S. District Court for the Middle District of Alabama granted the plaintiffs' motion to remand this action because it did not satisfy CAFA's \$5 million amount-in-controversy requirement. The plaintiffs lived in an apartment complex owned by the defendants and sued for largely emotional harms allegedly suffered because of the defendants' failure to maintain the premises. In support of their motion to remand, the plaintiffs stipulated that they would "neither seek, nor will they accept, in excess of \$5 million in the aggregate concerning their claims." Explaining that as "masters of their complaints," plaintiffs may "stipulat[e] to amounts at issue that fall below the federal jurisdiction requirement," the court found that the stipulation strongly supported remand. The court also refused to speculate or otherwise extrapolate the aggregate amount in controversy from two larger claims the court viewed as "unrealistic representations" of the amount at issue, as evidenced by numerous offers to settle for considerably less and the individualized nature of emotional distress damages.

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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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