Skadden

The Class Action Chronicle

This edition focuses on rulings issued between February 15, 2017, and May 15, 2017, and begins with an article regarding third-party litigation funding.

Developments in Third-Party Litigation Funding

A burgeoning trend in federal class action practice is the financing of lawsuits by means of third-party litigation funding (TPLF), in which companies "invest" in a lawsuit by providing funding in return for a share of any proceeds. For example, EJF Capital (based in Arlington, Virginia) has raised hundreds of millions of dollars to invest in mass tort lawsuits, including transvaginal mesh and Risperdal litigation.[1] The hedge fund reportedly is targeting "class-action injury lawsuits" at "hefty interest rates," with the loans to be repaid by law firms "as they earn fees from settlements and judgments."[2] "[C]lass actions [also] make up a significant portion of the cases that [Bay Area-based Law Finance Group] invests in."[3] "Other firms, like New York-based Counsel Financial, also market themselves as offering various kinds of financing to class-action plaintiffs[']attorneys."[4]

Notably, funders often enter into an agreement with plaintiffs' lawyers that is not disclosed to class members or to the court, even though some agreements require that portions of any recovery by the class be paid to the funder. This fact, and the increasing prevalence of TPLF arrangements in class actions, raise serious ethical questions as well as concerns about the named plaintiffs' adequacy of representation, as funders seek to maximize their own pecuniary interest in the litigation through their control of key litigation decisions.

These ethics and adequacy issues were well-illustrated in *Gbarabe v. Chevron Corp.*, a putative class action arising out of an explosion on a drilling rig off the coast of Nigeria. In that case, a two-attorney legal team representing the plaintiffs acknowledged to the court that they had to seek third-party funding to advance their case and obtained a number of time extensions as a result. When funding was apparently obtained but the plaintiffs refused to disclose its terms, Chevron moved to compel production. It argued,

[1] *See* Rob Copeland, "Hedge-Fund Manager's Next Frontier: Lawsuits," *Wall St. J.*, Mar. 9, 2015.

[2] *Id.*

[3] Ben Hancock, "New Litigation Funding Rule Seen as 'Harbinger' for Shadowy Industry," *The Recorder*, Jan. 25, 2017.

[4] *Id.*

among other things, that the information about funding was relevant to adequacy of the class representatives under Rule 23(a)(4) due to the possibility that the funding agreement created a conflict of interest with absent class members. Chevron also argued that the agreement could be relevant to the suitability of the attorneys as representatives of the class under Rule 23(g), which requires a court appointing class counsel to consider "the resources that counsel will commit to representing the class" and further permits the court to consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."

The court agreed and ordered production of the funding agreement, which contained several significant provisions. Specifically, the agreement referred to a "Project Plan" for the litigation developed by counsel and the funder with restrictions on counsel deviation, particularly with respect to hiring only identified experts.[5] The agreement expressly prohibited the lawyers from engaging any co-counsel or experts "without [the funder's] prior written consent."[6] Further, the agreement required that counsel "give reasonable notice of and permit [the funder] where reasonably practicable, to attend as an observer at internal meetings, which include meetings with experts, and send an observer to any mediation or hearing relating to the Claim."[7] The funding agreement also provided that the lawyers would endeavor to "recover the maximum possible Contingency Fee"[8] and that the funder would be repaid its $1.7 million investment in the case by way of a "success fee" of six times that amount ($10.2 million), to be paid from attorneys' fees plus 2 percent of the total amount recovered by the putative class members. Thus, apparently without their knowledge or approval, putative class members would have had to hand over part of their recovery to the litigation funder.

Provisions like these raise significant ethical concerns and provided fodder for Chevron's later arguments against class certification. Ethics rules generally bar attorneys from representing a client where the representation creates a conflict of interest (*e.g.*, ABA Model R. Prof'l Conduct 1.7). But all of these provisions create potentially serious conflicts between the attorneys and their clients, and the class they sought to represent. Perhaps most starkly, the attorneys were bound by the agreement to seek the maximum possible contingency fee, even though such a requirement could easily become a barrier to resolving the suit by way of settlement with the defendant.[9] Citing the same provision, Chevron argued that the limitations imposed on fees showed that the plaintiffs' counsel could not adequately represent the class because it was plausible that the class' interest would be better served by a different fee arrangement.[10]

Ethical rules also generally require an attorney to "abide by a client's decision whether to settle a matter" (*e.g.*, ABA Model R. Prof'l Conduct 1.2(a)). But as Chevron argued in opposing class certification, client control was potentially compromised by the requirement that the attorneys adhere to the Project Plan.[11] And it is easy to imagine that internal conflicts over whether to settle could emerge in light of the provisions requiring substantial payment back to the funder, which would naturally motivate the attorneys to hold out for settlements that are high enough to ensure that they could recover something after the funder's $10.2 million "success fee" was paid out of their fees.

Finally, although Chevron did not address this issue in its opposition to class certification, ethical rules also generally impose restrictions that operate as limitations on the sourcing of funds for third-party funders. The rules generally do not permit attorneys to share legal fees with nonlawyers, subject to exceptions that do not apply to third-party funders (*e.g.*, ABA Model R. Prof'l Conduct 5.4(a)). But in *Gbarabe*, the agreement expressly required payment of the funder's "success fee" out of attorneys' fees. And while a plaintiff can agree to give part of his or her personal recovery to a funder, an uncertified class of individuals has no means of granting such consent in advance; and yet the plaintiffs' attorneys in *Gbarabe* did just that on the putative class's behalf by agreeing to pay 2 percent of any recovery to the funder.

The problem posed by the rights of absent class members is particularly thorny in this context, as *Gbarabe* highlights. Class representatives tend to be among the least sophisticated and zealous — plaintiffs' attorneys are often the driving force in such cases. In *Gbarabe*, for example, the representative knew nothing about the details of the funding agreement. Under these circumstances, it is difficult to see how the plaintiff could be expected to protect the putative class' interests regarding an agreement between the attorneys and a third-party funder. And of course, the class' problems are the defendant's problems because an unfair funding agreement poses a significant risk that any final resolution could be overturned by a court or an objector who learns only at the end of the case that class payments are to be

[5] Litigation Funding Agreement §§ 1.1, 10.1, *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, Ex. 13 to ECF No. 186 (N.D. Cal. filed Sept. 16, 2016).

[6] *Id.* § 10.1.

[7] *Id.* § 10.2.4.

[8] *Id.* § 3.1.3.

[9] *Id.*

[10] Chevron Corp.'s Mem. in Opp'n to Mot. for Class Certification, *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 WL 5596113 (N.D. Cal. filed Sept. 16, 2016).

[11] *Id.*

shaved off to pay exorbitant fees to a funder that has remained hidden during the course of the litigation.

Ultimately, the district court denied certification in *Gbarabe* on several grounds, including adequacy of representation.[12] But it did not address any of these important issues presented by the agreement in the case, leaving them for further development by future cases.[13]

That said, the federal judiciary is beginning to take notice of these issues and to test new rules designed to shine a light on this shadowy practice. Indeed, while *Gbarabe* was being litigated, the U.S. District Court for the Northern District of California issued a rule mandating the disclosure of TPLF in all class and representative actions,[14] providing an important precedent for making the practice more transparent. The Northern District's action was taken in the immediate aftermath of a panel discussion at the court's judicial conference during which TPLF industry representatives took the position that their investments in class actions and other litigation should not be disclosed. As one attorney who studies the litigation funding industry explained, the Northern District of California rule is "really a harbinger and a signal that courts ... need to consider the presence of third-party financiers in a lawsuit and consider their role."[15] Indeed, published reports indicate that the U.S. District Court for the Eastern District of Texas may also be considering a disclosure rule.[16] Congress may also weigh in on this growing phenomenon through the Fairness in Class Action Litigation Act of 2017, which passed the House of Representatives in March 2017. That legislation contains a similar disclosure provision that would apply to all class actions filed in federal courts nationwide. And a group of 27 prominent trade associations, state chambers of commerce and other groups — led by the U.S. Chamber Institute for Legal Reform — has just submitted a petition to the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts advocating the adoption of a rule that would require the disclosure of TPLF arrangement in all civil cases in federal court.

In short, the days of undisclosed TPLF arrangements might soon be numbered, at least in the class context, giving class members and defendants alike some hope that the kinds of ethical abuses illustrated in *Gbarabe* will never come to fruition.

Class Certification Decisions

In this issue, we cover five decisions granting motions to strike/dismiss class claims, two decisions denying such motions, 18 decisions denying class certification or reversing grants of class certification, 28 decisions granting or upholding class certification, 11 decisions denying motions to remand or reversing remand orders pursuant to the Class Action Fairness Act (CAFA), and 17 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

***Bates v. Bankers Life & Cas. Co.*, 848 F.3d 1236 (9th Cir. 2017) (*per curiam*)**

The U.S. Court of Appeals for the Ninth Circuit (Clifton, Murguia and Nguyen, JJ.) dismissed the plaintiffs' appeal of the district court's order striking their class allegations for lack of jurisdiction. The plaintiffs represented three putative classes of elderly Oregonians and their successors asserting claims for breach of contract, fraud and violations of Oregon's financial abuse statute, arising from the alleged mishandling of their long-term health care insurance claims. The district court granted the defendant's motion to strike the class allegations because they required case-by-case analysis of each claim — and even with class discovery, the plaintiffs would not be able to satisfy either the typicality requirement or any of the Rule 23(b) requirements — and held that the decision was final and appealable under Rule 54(b). The Ninth Circuit disagreed, holding that a decision to grant a motion to strike class allegations, like the denial of a motion to certify a case as a class action, is not a final judgment because it does not terminate the entire litigation — the plaintiff can proceed on his individual claim. Because the plaintiffs did not ask the district court to certify an order for interlocutory review pursuant to 28 U.S.C. § 1292(b) or file a petition for permission to appeal pursuant to Rule 23(f), the panel lacked jurisdiction to review the order striking their class allegations.

[12] *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2017 WL 956628, at *35-37 (N.D. Cal. Mar. 13, 2017).

[13] *Gbarabe* is just one recent example of TPLF in the class action context and is not even the first one involving Chevron. For example, litigation against Chevron arising out of alleged environmental contamination in Lago Agrio, Ecuador, was financed in part by Burford, one of the largest TPLF companies in the world. The funding agreement at issue in that case "provide[d] control to the Funders" through "installment of 'Nominated Lawyers'" — lawyers "selected by the Claimants with the Funder's approval." Maya Steinitz, "The Litigation Finance Contract," 54 Wm. & Mary L. Rev. 455, 472 (2012) (citation omitted).

[14] Ben Hancock, "Northern District, First in Nation, Mandates Disclosure of Third-Party Funding in Class Actions," *The Recorder*, Jan. 23, 2017.

[15] Hancock, "New Litigation Funding Rule Seen as 'Harbinger' for Shadowy Industry."

[16] *See* Ben Hancock, "Bentham Hires Yetter Coleman Partner as It Expands to Texas," *Texas Lawyer*, Feb. 21, 2017. ("After the [Northern District of California] disclosure rule was announced, Ron Clark, chief judge of the Eastern District of Texas, told Texas Lawyer that jurists in his division may follow the Northern District of California's lead and consider similar measures.")

***Monteferrante v. Williams-Sonoma, Inc.*, No. 16-10578-MLW, 2017 WL 1064005 (D. Mass. Mar. 20, 2017)**

Judge Mark L. Wolf of the U.S. District Court for the District of Massachusetts granted a motion to strike class allegations in a putative consumer protection class action where the class definition included individuals whose claims were barred by the statute of limitations. The plaintiff alleged that the defendant retailer violated state law by using zip codes collected at points of sale to send consumers marketing materials and sought to represent a class of consumers who received any marketing materials during the statute of limitations period. The court concluded that the class definition was overbroad because the claims accrued when a consumer first received marketing materials, not every time materials were sent. Accordingly, the court struck the class allegations but permitted the plaintiff to file an amended complaint with the class limited to consumers who received the initial mailing within the limitations period.

***Coleman v. Sears Home Improvement Prods. Inc.*, No. 16-2537, 2017 WL 1064965 (E.D. La. Mar. 20, 2017)**

Judge Nannette Jolivette Brown of the U.S. District Court for the Eastern District of Louisiana granted the defendant's unopposed motion to strike class allegations in a putative nationwide class action alleging that the defendant hired "substandard subcontractor[s]" to install customers' roofs. The plaintiffs initially opposed the defendant's motion to strike. However, the plaintiffs later filed a motion to withdraw both their opposition and their motion to certify the class. The court, in addressing the defendant's motion to strike, found multiple issues with the plaintiffs' class claims. First, the court held that the plaintiffs improperly moved for class certification under a Louisiana state statute rather than under Federal Rule 23 — a violation of the court's local rules. Second, the court held that the plaintiffs could not satisfy the predominance or commonality requirements because the overbroad class definition included every customer who purchased a roof installation from the defendant throughout the United States regardless of the type of roof installation deficiencies they suffered, if any. Third, the court found that the plaintiffs could not satisfy the typicality requirement because they alleged that the class sustained certain damages — *i.e.*, leaky roofs — that the plaintiffs did not themselves claim to have suffered. Finally, the court held that Rule 23's adequacy requirement was not satisfied because the plaintiffs' attorneys had displayed a lack of competency by failing to pursue the class claims and because the plaintiffs themselves would have significantly different interests than the broad range of class members. Thus, the court granted the defendant's motion to strike the class allegations.

***Hernandez v. State Farm Fire & Cas. Co.*, No. 16cv200-LAB (JLB), 2017 WL 932198 (S.D. Cal. Mar. 9, 2017)**

Judge Larry Alan Burns of the U.S. District Court for the Southern District of California granted the defendants' motion to strike the plaintiffs' class allegations asserting fraud, unfair competition and contractual claims in connection with allegedly insufficient mitigation services provided under their insurance policies. The court noted at the outset that the class was unlikely to obtain injunctive relief because the likelihood of most of the class members experiencing water damage in their homes and suffering the same kind of injury was "infinitesimal." In considering whether a damages class could proceed, the court noted that "many, perhaps most, class members were provided with satisfactory mitigation services," which raised concerns about common causation issues, and that some class members' five-year warranties had already expired, depriving them of standing to sue.

The court also held that not all the class members used the mitigation service providers named in the complaint, and thus the plaintiffs would be required to "name a multitude of new class representatives" to pursue the claims of class members against other providers, or abandon those claims, which "undercuts the rationale for allowing class actions in the first place, and bespeaks inadequate representation." Further, the court held, extensive fact-finding would be required to determine whether: each class member had a valid claim under their policy, the defendants made misleading representations to them, the class members relied on those representations, and the mitigation services they received were inadequate. Finally, the court noted that superiority would likely not be satisfied, because damages would require individual adjudication, and the high value of a lawsuit meant insureds could and would bring claims on their own behalf. The court therefore struck the class allegations and dismissed the action with leave to amend.

***Ramirez v. Baxter Credit Union*, No. 16-cv-03765-SI, 2017 WL 1064991 (N.D. Cal. Mar. 21, 2017)**

Judge Susan Illston of the U.S. District Court for the Northern District of California granted in part and denied in part the defendant's motion to strike certain class allegations. The plaintiff alleged that the defendant misled its members about its overdraft charge policy and asserted nationwide class claims for, *inter alia*, breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment/restitution and violation of the Electronic Fund Transfer Act (EFTA). The court agreed that because EFTA claims are subject to a one-year statute of limitations, the plaintiff's proposed six-year class period was facially invalid, and it struck the EFTA class allegations encompassing a

time period in excess of one year prior to the filing of the action. However, the court refused to strike class allegations that the defendant did not properly segregate the opt-in overdraft form in its enrollment agreement because "[i]n this controverted situation, a finding in the defendant's favor" as to whether the opt-in form complied with the law "is inappropriate on the pleadings alone."

Decisions Denying Motions to Strike/ Dismiss Class Claims

***Beck v. Stony Hollow Landfill, Inc.*, No. 3:16-cv-455, 2017 WL 1551216 (S.D. Ohio May 1, 2017)**

Judge Thomas M. Rose of the U.S. District Court for the Southern District of Ohio denied as premature a motion to strike class allegations in a mass tort air pollution action in which the named plaintiffs sought to represent a class of property owners within 3 miles of a landfill. Although the defendant principally argued that individualized issues would preclude certification of the class, the court concluded that it would be premature to rule on the viability of the proposed class without further factual development.

***O.P. Schuman & Sons, Inc. v. DJM Advisory Grp., LLC*, No. 16-3563, 2017 WL 634069 (E.D. Pa. Feb. 16, 2017)**

Judge Juan R. Sánchez of the U.S. District Court for the Eastern District of Pennsylvania denied the defendants' motions to dismiss for lack of standing and to strike the plaintiff's proposed class definition. The plaintiff brought this putative class action alleging violations of the Telephone Consumer Protection Act based on receipt of an unsolicited facsimile. While the defendants argued that the plaintiff lacked Article III standing because the plaintiff failed to plead a concrete and particularized injury, the court found that allegations that the defendants' fax caused loss of paper and toner, utilized the putative class members' fax machines, cost the plaintiff time and unlawfully interrupted the putative class members' privacy interests sufficiently alleged concrete and particularized harm. The court denied the defendants' motion to strike the plaintiff's proposed class definition on the ground that it alleged an impermissible fail-safe class, holding that it was not "readily apparent" whether the plaintiff's class was fail-safe, and that regardless, the U.S. Court of Appeals for the Third Circuit had not yet ruled on the permissibility of fail-safe classes. The defendants also argued that the matter should be dismissed or stayed pursuant to the first-filed doctrine, as a substantively similar putative class complaint was filed against the same defendants in a Florida district court seven months prior to the plaintiff's case. Judge Sánchez held that the first-filed rule applied and determined that transfer, rather than dismissal or stay, was appropriate under 28 U.S.C. § 1404(a), as it would be in the interests of justice and convenience for the case to proceed in Florida.

Decisions Rejecting/Denying Class Certification

***Ward v. EZCorp, Inc.*, No. 16-14280, 2017 WL 908194 (11th Cir. Mar. 8, 2017) (*per curiam*)**

The U.S. Court of Appeals for the Eleventh Circuit (Marcus, Julie Carnes and Black, JJ.) affirmed the district court's order denying the plaintiff's motion for class certification in this suit alleging that the defendant pawnbroker and its parent company violated the Florida Pawnbroking Act by unfairly charging the plaintiff and others $2 fees when they retrieved pledged property without their pawn tickets. The plaintiff alleged that the defendants collected this fee without first obtaining a jointly signed statement of the loss, destruction or theft of the pledgor's copy of the pawn ticket, as required by the statute. The panel agreed with the district court that the plaintiff's proposed method of identifying class members — reviewing transactions in the defendants' customer database — could not distinguish between pledgors who were charged the $2 fee in connection with a missing pawn ticket and pledgors who were charged regardless of presenting a pawn ticket. The panel also agreed that typicality was not satisfied because the class definition was broad enough to include class members who suffered harms different from the plaintiff's alleged harm.

***Webb v. Exxon Mobil Corp.*, 856 F.3d 1150 (8th Cir. 2017)**

The U.S. Court of Appeals for the Eighth Circuit (Riley, C.J., Wollman and Benton, JJ.) affirmed the district court's decertification of a putative class on the basis that the putative class could not satisfy commonality and predominance. The putative class, successors in interest to easement contracts, brought suit alleging that a pipeline's current owners and operators breached their easement contracts by failing to reasonably operate, maintain and repair the pipeline. The suit sought rescission of the easements and the pipeline's removal or replacement or, in the alternative, damages. After initially granting class certification, the district court determined that class certification was improper because, in part, the pipeline was comprised of individual segments and "[the defendant's] actions, or inactions, on one individual's land would not necessarily implicate the interests of other landowners." On review, the panel of the Eighth Circuit agreed. The plaintiffs argued that Exxon operates the pipeline uniformly as "one continuous unit," but claims for breach of contract would require examination of how operation of the pipeline affected the plaintiffs. This examination would vary depending on where the individuals' property is located, among other factors. In addition, the plaintiffs could not meet predominance because of each property's unique features and conditions. Moreover, the proposed class would join contract, property and tort-based claims based on the law of four states, potentially "invit[ing] the application of

multiple conflicting state laws." Accordingly, the Eighth Circuit affirmed the district court's decertification of the putative class.

***Leyse v. Lifetime Entm't Servs., LLC*, Nos. 16-1133-cv, 16-1425-cv, 2017 WL 659894 (2d Cir. Feb. 15, 2017)**

The U.S. Court of Appeals for the Second Circuit (Raggi, Lohier, Jr. and Droney, JJ.) affirmed the district court's decision denying certification of a class of individuals who received prerecorded voicemail messages on their residential telephone lines from the defendant, allegedly in violation of the Telephone Consumer Protection Act. The court held that the district court did not abuse its discretion in finding that the plaintiff could not establish that the proposed class was ascertainable because members of the proposed class could not be easily identified. The plaintiff had proposed to identify class members by soliciting individual affidavits certifying receipt of the prerecorded calls accompanied by telephone bills showing subscription to the New York City residential telephone service. The court explained, however, that the plaintiff failed to proffer any evidence that this method was administratively feasible because no list of the numbers that had received the messages existed, and the proposed class members could not realistically be expected to recall a message received several years ago or to have retained any documentation of receipt.

***Slade v. Progressive Sec. Ins. Co.*, 856 F.3d 408 (5th Cir. 2017)**

The U.S. Court of Appeals for the Fifth Circuit (Owen, Graves and Higginson, JJ.) reversed in part and remanded in part a class action alleging that the defendant insurance company paid the putative class members less for their total loss vehicles than they were entitled to collect under Louisiana law, which requires that a valuation methodology be "generally accepted" in the industry. The defendant argued that the plaintiffs' liability and damages theories did not share the requisite "fit" under *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). The court disagreed, noting that the plaintiffs' liability theory, *i.e.*, that the defendant used an improper source to calculate each insured's vehicle value, aligned with their damages theory, *i.e.*, that a proper source could be used to prove the plaintiffs' losses. Next, the defendant argued that by offering to accept the defendant's vehicle condition score calculation, the plaintiffs had impermissibly waived unnamed class members' ability to dispute this computation. Although the court noted that this waiver could create adequacy of representation issues, it held that remand for consideration was appropriate because the parties did not argue this point until the appeal. Finally, the court agreed that it was improper for the district court to certify a fraud class action because the Fifth Circuit "has held consistently that ... fraud class action[s] cannot be certified when individual reliance will be an issue." Thus, the court reversed the district court's fraud-class decision and remanded the other claims for further consideration.

***Jarzyna v. Home Props., L.P.*, No. 10-4191, 2017 WL 2061688 (E.D. Pa. May 15, 2017)**

Judge Eduardo C. Robreno of the U.S. District Court for the Eastern District of Pennsylvania denied the plaintiff's motion to certify a class of tenants against a residential management company and debt collection agency, alleging violations of the Fair Debt Collection Practices Act and other state consumer protection laws. The court held that the class could not be certified because it failed to meet the U.S. Court of Appeals for the Third Circuit's ascertainability requirement. While the plaintiff claimed the putative class members who were charged the same illegal fees as the plaintiff and were subjected to the same uniform collection policies could be identified by the defendants' software systems, the defendants contended that their computer systems could not distinguish between tenants subject to various fees. Finding that the plaintiff failed to present a "reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition," Judge Robreno did not address the other requirements for class certification under Rule 23.

***Cates v. Whirlpool Corp.*, No. 15-CV-5980, 2017 WL 1862640 (N.D. Ill. May 9, 2017)**

Judge Amy J. St. Eve of the U.S. District Court for the Northern District of Illinois, after excluding the testimony of the plaintiffs' expert, denied the plaintiffs' motion for class certification alleging breach of warranty, consumer fraud and unjust enrichment related to alleged defects in the defendant's ovens. The plaintiffs alleged that the ovens suffered from an inherent defect that caused them to become unusable when the self-cleaning function was run. However, the plaintiffs' expert admitted that he did not know what caused an oven to fail during self-cleaning and admitted that two ovens may fail for different reasons. Because the plaintiffs failed to tie all of the ovens together with sufficient evidence of a common defect, the plaintiffs could not show that their claims arose out of the same event or course of conduct as all class members. Certification under Rule 23(b)(2) was also not appropriate because, due to the lack of classwide proof of a common defect, the class was insufficiently cohesive. Injunctive relief was not warranted because the plaintiffs had not shown that monetary damages would be inadequate. Finally, certification under Rule 23(c)(4) was not warranted because all of the alleged common questions were predicated on the existence of a common defect. Accordingly, the court denied the motion for class certification.

Dolmage v. Combined Ins. Co. of Am.*, No. 14 C 3809, 2017 WL 1754772 (N.D. Ill. May 3, 2017), *23(f) pet. denied

Chief Judge Rubén Castillo of the U.S. District Court for the Northern District of Illinois denied the plaintiff's motion for class certification in a putative class action alleging breach of contract for failing to keep her personally identifiable information private. After collecting the information as part of issuing an insurance policy, the defendant shared the information with a third party it had hired to provide support services. The personally identifiable information, however, was not adequately secured on the third party's website. On review, the court found that commonality was not satisfied in part because the proposed class involved individuals living in more than 25 states, and the court would have to apply multiple states' laws to determine if the "Privacy Pledge" was enforceable. Typicality was also not satisfied because different states' laws would govern the various claims, including the laws of states other than the named plaintiff's home state of Iowa. Predominance was likewise not satisfied because both the enforceability of the contract and damages would need to be determined on an individual basis. Accordingly, the court denied class certification.

***Butler v. Porsche Cars N. Am., Inc.*, No. 16-CV-2042-LHK, 2017 WL 1398316 (N.D. Cal. Apr. 19, 2017)**

Judge Lucy H. Koh of the U.S. District Court for the Northern District of California refused to certify a class and subclass of California purchasers of 2005-08 Porsche 911 vehicles, asserting claims under California consumer protection statutes arising from Porsche's failure to disclose alleged design defects in the vehicles' wiring harnesses. The court focused solely on Rule 23(b)(3)'s predominance requirement. The court observed that the plaintiff did not show a classwide defect existed, as the defendant's unrebutted expert evidence isolated the cause as not a design defect but a unique manufacturing abnormality involving the crimping of a copper wire, which was indisputably corrected in vehicles manufactured after January 1, 2008 (meaning that not all class members were affected). Even if a classwide defect existed, individualized inquiries were required to determine whether class members purchased a used vehicle where the faulty harness had been replaced with the post-2008 harness. Such individuals would technically be members of a proposed class but suffered no legally cognizable injury. Finally, the court concluded that the required elements of exposure to and reliance on Porsche's alleged omission of the defect was unsuitable for class treatment because the plaintiff did not explain where Porsche should have disclosed the defect or what information should have been disclosed. Further, the plaintiff did not state what Porsche material class members viewed prior to purchase, or whether class members interacted with a Porsche representative prior to purchase. Given the range of purchasing situations across the class, the court had "no basis to find that all class members were exposed to a Porsche representation with omissions, or that class members would have been aware of a disclosure about the defect from Porsche in a common way had a disclosure been made."

Valenzuela v. Union Pac. R.R. Co.*, No. CV-15-01092-PHX-DGC, 2017 WL 679095 (D. Ariz. Feb. 21, 2017), *vacated in part* (Mar. 3, 2017), *opinion reinstated*, 2017 WL 1398593 (D. Ariz. Apr. 19, 2017), *23(f) pet. pending

The plaintiffs sought certification of a class of past and present owners of real property adjacent to a railroad right-of-way in Arizona, operated by defendant Union Pacific Railroad Company and under which defendant Kinder Morgan operates a pipeline carrying fuel products. The plaintiffs alleged they are the rightful owners of the subsurface beneath the right-of-way and brought claims for trespass, quiet title, ejectment, inverse condemnation, unjust enrichment, recovery of rents and an accounting. Judge David G. Campbell of the U.S. District Court for the District of Arizona denied the plaintiffs' motions for class certification. The plaintiffs were sufficiently numerous and identified common questions for adjudication, such as whether the railroad lacked sufficient property interests in the subsurface to convey property rights for the pipeline and whether the defendants knew or had reason to know the railroad did not possess a sufficient ownership interest in the subsurface to grant rights for the pipeline.

Nevertheless, the court held that typicality, adequacy and predominance could not be satisfied because liability would only attach if each class member owned the subsurface of the right-of-way, and there were never any easements granted for the pipeline, requiring examination of myriad individual property situations encompassed in the class. Establishing ownership, the court concluded, was too fact-intensive in many cases and Kinder Morgan provided evidence that it sought pipeline easements from adjoining landowners in the 1950s and 1980s. Moreover, numerous affirmative defenses such as statute of limitations and adverse possession gave rise to further individualized issues, precluding certification of a Rule 23(b)(2) or Rule 23(b)(3) class. In a later opinion, the court refused to certify an issues class under Rule 23(c)(4) because the relatively modest amount of trial time and effort required to litigate the common issues would be greatly outweighed by the time and evidence required to litigate the property-specific issues of individual class members. Doing so would also not resolve liability as to each plaintiff, meaning that an issues class would not "materially advance the litigation."

***Gazzara v. Pulte Home Corp.*, No. 6:16-cv-657-Orl-31TBS, 2017 WL 1331364 (M.D. Fla. Apr. 11, 2017)**

The plaintiffs in this case alleged that the defendant violated the Florida Building Code by improperly applying stucco siding when building their homes, causing the siding to crack. In denying class certification, Judge Gregory A. Presnell of the U.S. District Court for the Middle District of Florida first concluded that the proposed class of homeowners was not clearly ascertainable because the plaintiffs provided no evidence that the defendant kept records of which stucco-sided homes from the relevant time period were built with one of the alleged code violations. The court also rejected the plaintiffs' self-identification proposal, reasoning that self-identification would lead to thousands of administratively unfeasible mini-trials. The court additionally concluded that the plaintiffs failed to establish commonality because a finding of improper stucco application for one home would not establish the same for other homes, and a finding that improper application of the stucco caused cracking at one home would likewise not prove the same for others. Finally, the court held that individualized issues predominated, including how much damage occurred at a particular class member's home, what caused the stucco to crack and whether the home passed inspection (a consideration for the defendant's affirmative defense).

***Brooks v. Darling Int'l, Inc.*, No. 1:14-cv-01128-DAD-EPG, 2017 WL 1198542 (E.D. Cal. Mar. 30, 2017)**

Judge Dale A. Drozd of the U.S. District Court for the Eastern District of California denied the plaintiffs' motion to certify a class of owner/occupiers and renters of residential property living within 1.5 miles of the defendant's rendering plant who alleged that the plant was infusing their neighborhood with noxious odors. The court held that the class definition was not ascertainable because the plaintiffs failed to identify any logical reason for drawing the physical boundaries at 1.5 miles from the defendant's rendering plant, but it noted this deficiency could be cured with scientific testing. The court concluded that if the class definition deficiency was addressed, the Rule 23(a) factors would be satisfied. Specifically, the class was sufficiently numerous and shared common issues, in that their claims focused on the defendant's behavior and not the behavior of the potential class members. Further, the named plaintiffs were typical and adequate because, even if the extent of the alleged injury varied depending on where each class member lives, the basic nature of the injury is likely to be the same and attributable to the same conduct. Finally, the court concluded that the superiority and predominance requirements of Rule 23(b)(3) could be met if the class definition was revised, as factual inquiries about the source and extent of the odors were potentially capable of classwide proof through the use of air modeling.

***In re Fluidmaster, Inc., Water Connector Components Prods. Liab. Litig.*, No. 14-cv-5696, 2017 WL 1196990 (N.D. Ill. Mar. 31, 2017)**

Judge Robert M. Dow, Jr. of the U.S. District Court for the Northern District of Illinois denied the plaintiffs' motion for class certification of a national class alleging violations of the California Consumers Legal Remedies Act (CLRA), subclasses alleging a breach of warranty under six states' laws, and subclasses alleging negligence and strict liability under 11 states' laws. The plaintiffs alleged that the defendant's plumbing products, flexible inner tubing and coupling nuts used to connect the supply lines to plumbing fixtures, had two design defects that ultimately lead to their failure. The court undertook a choice-of-law analysis and determined that California law could not be applied nationwide under choice-of-law principles, defeating the proposed nationwide class. The court also noted that individualized factual issues predominated with respect to the plaintiffs' consumer fraud claims, including issues related to who was exposed to statements about the defendant's product and what they knew about the product at the time of purchase. Further, the plaintiffs' price premium damages model was insufficiently linked to their theory of liability. For these and other reasons, the plaintiffs' motion for class certification was denied.

***Briggs v. Freeport-McMoran Copper & Gold, Inc.*, No. CIV-13-1157-M, 2017 WL 1162208 (W.D. Okla. Mar. 28, 2017)**

Judge Vicki Miles-LaGrange of the U.S. District Court for the Western District of Oklahoma denied the plaintiffs' motion to certify a class of individuals seeking actual and punitive damages, and injunctive relief in the form of remediation, for claims arising out of continuous and ongoing pollution and contamination allegedly caused by the defendants. The court found that the plaintiffs failed to satisfy the requirements of Rule 23(a) because they did not establish that the class was so numerous as to make joinder impracticable. The potential class consisted of the owners of 479 parcels of land who opted out of a settlement class in related litigation. More than 100 potential class members had already joined the action, and the plaintiffs presented no evidence to show geographic dispersion among the class members. To the contrary, the plaintiffs' expert testified that the land parcels and ownership were easily ascertained. Because joinder of the remaining landowners would not be impracticable, the court refused to certify a class. Separately, the court noted that even if numerosity had been established, class certification under Rules 23(b)(2) and 23(b)(3) would have been inappropriate as the Environmental Protection Agency and an Oklahoma state agency had continuing jurisdiction over the remediation efforts, and the claims of nuisance, negligence and trespass were highly individualized and would have required individual evidence and proof barring a class action.

***Davis v. AT&T Corp.*, No. 15cv2342-DMS (DHB), 2017 WL 1155350 (S.D. Cal. Mar. 28, 2017)**

The plaintiff sought to certify a nationwide class alleging willful and negligent violations of the Telephone Consumer Protection Act on behalf of persons who received a call from the defendant when they were not customers and where the recipient indicated that the defendant had reached a "wrong number." Although the amended complaint had not been accepted for filing, the plaintiff argued that the class fell within the "narrowing" exception whereby courts may consider certification of an amended class if it is narrower than the class alleged in the complaint. Judge Dana M. Sabraw of the U.S. District Court for the Southern District of California rejected this contention, holding that the modification proposed a different class altogether, that additional discovery would be required and that the defendant would be prejudiced by addressing the amended class. Judge Sabraw also held that the amended class failed to satisfy the requirements of Rules 23(b)(3) and 23(b)(2). Among other things, the court held that "wrong number" indicators would not resolve the consent issue, and a complete analysis of the customer status issue would require an inquiry into each call recipient's individual circumstances. Furthermore, the plaintiff did not properly specify the injunctive relief sought. Thus, the court denied the motion for certification.

***Corcoran v. CVS Health*, No. 15-cv-03504-YGR, 2017 WL 1065135 (N.D. Cal. Mar. 21, 2017)**

Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California refused to certify 11 state classes seeking damages and injunctive relief for claims under each state's statutory laws against unlawful and deceptive acts, common law fraud, negligent misrepresentation, and unjust enrichment. The plaintiffs alleged that the defendants overcharged insured patients by submitting falsely inflated drug prices to pharmacy benefit managers and third-party payer insurance providers, which resulted in higher copayment obligations for the plaintiffs. The court held that the predominance and commonality requirements were not met. A determination of whether the defendants submitted false prices to the pharmacy benefit managers would necessarily involve an individualized analysis of each contract between the defendants and those managers, and those agreements varied significantly. Further, the defendants submitted declarations from pharmacy benefit managers demonstrating their understanding of the pricing at issue in the action, and the plaintiffs could not address, in a common manner, how these managers were in some way deceived given their knowledge and understanding of the program. In *dicta*, the court provided guidance on the remaining factors, noting that certain named plaintiffs were not typical of the classes they sought to represent due to their purchase history and that the certification of 11 statewide classes with potentially disparate statutory and common law claims could undermine the superiority of a class action.

***Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI (N.D. Cal. Mar. 13, 2017)**

Judge Susan Illston of the U.S. District Court for the Northern District of California refused to certify a class of Nigerian residents seeking compensation and punitive damages arising out of environmental damage that occurred in connection with oil drilling off the coast of Nigeria. The plaintiff brought claims alleging, *inter alia*, gross negligence for damage incurred to the environment in connection with the defendant's activities in the area. The court noted that the class definition was inadequate because the plaintiff did not show that the actual harm occurred in the proposed geographic area. The court also noted that the named plaintiff's claims were likely not typical of the proposed class but did not hold that the plaintiff was atypical in light of its finding that the adequacy requirement was not met. The named plaintiff's testimony and discovery responses were evasive and contradictory, raising "significant, unanswered questions" about his credibility that rendered him an inadequate named plaintiff. The court also concluded that the plaintiff's counsel did not demonstrate that they could adequately represent the proposed class in the class action given their complete disregard for scheduling orders, lack of familiarity with procedural rules, deficient evidence and expert reports, and failure to diligently prosecute the case. Finally, the court held that the plaintiff failed to meet Rule 23(b)(3)'s superiority requirement, as many lawsuits were already filed and pending in Nigeria, and all of the evidence and witnesses were located in Nigeria. Thus, Judge Illston denied the motion to certify the proposed class.

***Wilmington Sav. Fund Soc'y, FSB v. Bus. Law Grp., P.A.*, No 8:15-cv-2831-T-36TGW, 2017 WL 1034198 (M.D. Fla. Feb. 22, 2017)**

Upon request, condominium and homeowners associations in Florida must provide their members with estoppel certificates identifying how much they owe in assessments. Florida law limits a first mortgagee's liability for the unpaid assessments of his or her predecessor to an amount known as the "safe harbor." In this case, the plaintiff filed a class action lawsuit against the defendant debt collectors for issuing deceptive estoppel certificates and otherwise demanding payment in excess of the safe harbor. The plaintiff sought to certify claims for injunctive and declaratory relief under Rule 23(b)(2) and claims for damages under Rule 23(b)(3). In denying the plaintiff's motion for class certification, Judge Charlene Edwards Honeywell of the U.S. District Court for the Middle District of Florida concluded that

the proposed class was not ascertainable because it required individualized determinations of whether each member was a first mortgagee. The court further concluded that commonality was not satisfied because determining whether the certificates were deceptive would require individualized inquiries into the requests made and certificates received. Similarly, the plaintiff could not establish that the defendants acted or refused to act on grounds that applied generally to the class, as required to certify a class under Rule 23(b)(2), because each claim would turn at least in part on whether the class member provided the defendants with sufficient information to establish entitlement to the safe harbor. Finally, the court held that Florida's comprehensive statutory scheme for resolving these disputes was superior to a class action, precluding certification under Rule 23(b)(3).

***Miller v. Wells Fargo Bank, N.A.*, No. 1:16-cv-21145-UU, 2017 WL 698520 (S.D. Fla. Feb. 22, 2017), *Smith v. U.S. Bank, N.A.*, No. 1:16-cv-21146-UU, 2017 WL 698530 (S.D. Fla. Feb. 22, 2017)**

The plaintiffs in these cases sued the defendant banks alleging that they charged and collected post-payment interest without providing adequate disclosures as required by Department of Housing and Urban Development (HUD) and Federal Housing Administration regulations. In denying class certification in both cases, Judge Ursula Ungaro of the U.S. District Court for the Southern District of Florida first observed that the proposed classes were adequately defined and clearly ascertainable because the parties could readily determine: (1) which borrowers were entitled to the relevant disclosures; (2) whether the defendants provided any disclosures; and (3) whether the borrowers actually paid post-payment interest. Moreover, notwithstanding provisions in the plaintiffs' fee arrangements with counsel limiting their ability to settle claims individually, the court held that the plaintiffs were adequate class representatives because the fee arrangements did not render their interests antagonistic to those of the class. Nevertheless, the court refused to certify the proposed nationwide class because the substantive contract law applicable to the plaintiffs' claims varied materially from state to state. The court explained that the inquiry was not whether the elements of a breach-of-contract claim were uniform across states, but whether states uniformly allowed borrowers to bring affirmative breach-of-contract claims for damages based on violations of HUD regulations incorporated into promissory notes. Thus, the plaintiffs' chart addressing the former issue was unhelpful, while the defendants' showing that states approach the latter issue in three distinct ways demonstrated that common questions of law and fact did not predominate.

Decisions Permitting/Granting Class Certification

***Blow v. Bijora, Inc.*, 855 F.3d 793 (7th Cir. 2017)**

The U.S. Court of Appeals for the Seventh Circuit (Ripple, Kanne and Rovner, JJ.) affirmed the district court's grant of class certification and summary judgment in favor of the defendant retailer. The named plaintiff brought suit alleging that the retailer violated the Telephone Consumer Protection Act and the Illinois Consumer Fraud and Deceptive Business Practices Act by sending advertisements by text message to the class members' cell phones. The district court certified a class of individuals with particular Illinois telephone area codes who had received automated texts from the defendant in the preceding four years. The district court later granted summary judgment in favor of the defendant because the plaintiff had failed to show that the defendant used an automatic telephone dialing system. On appeal, the defendant argued, among other things, that the class was improperly certified because determining whether each plaintiff had consented to the text messages would require a series of mini-trials, and, thus, commonality was not satisfied. The district court found, however, that commonality was satisfied because the claims arose from the same factual circumstances and are evaluated under the same statute. Further, the defendant produced more than 20,000 pages of customer loyalty cards during discovery. This created a common issue of "whether the customer loyalty cards operated to provide consent" to the texts. The Seventh Circuit was thus "hard-pressed" to find an abuse of discretion in finding commonality to be satisfied and affirmed the district court's grant of summary judgment.

***Stathakos v. Columbia Sportswear Co.*, No. 15-cv-04543-YGR, 2017 WL 1957063 (N.D. Cal. May 11, 2017)**

Plaintiffs sought certification of a class action for violations of California consumer protection statutes, asserting that the defendant retailers engaged in deceptive and misleading labeling and marketing of merchandise in company-owned outlet stores. Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California granted summary judgment in favor of the defendants on the plaintiffs' claims for restitution and disgorgement of profits, and thus denied certification of a Rule 23(b)(3) damages class. However, the court certified a Rule 23(b)(2) class for injunctive relief. The court held that the proposed class satisfied the Rule 23(a) requirements of numerosity, typicality and adequacy. It also found common issues as to the defendants' uniform pricing methods and reliance demonstrated in the price tags offered by the plaintiffs as common evidence that such misrepresentations are likely to mislead reasonable consumers. Further, the injunctive relief sought —

the discontinued use of reference prices — would apply to the entire class. Finally, because damages were only sought under Rule 23(b)(3) — which had already been rejected — the court concluded that there was no concern that the injunctive relief sought would be incidental to any damages. Accordingly, it conditionally certified the proposed class for injunctive relief.

***Abante Rooter & Plumbing, Inc. v. Alarm.com Inc.*, No. 15-CV-6314-YGR, 2017 WL 1806583 (N.D. Cal. May 5, 2017)**

The plaintiffs sought certification of three nationwide classes of cellphone and residential telephone users for violations of the Telephone Consumer Protection Act, alleging that the defendants failed to follow telemarketing procedures or respect the National Do Not Call Registry. Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California certified the three proposed classes. The court analyzed the commonality and predominance requirements together, holding that several common questions existed as to liability, the use of prerecorded messages and whether calls were placed to numbers on the registry. The defendants argued that individualized issues arose as to consent, whether the calls "promoted" Alarm.com and apportioning liability. The court concluded that apportionment of liability issues would not differ from plaintiff to plaintiff, and whether the calls "promoted" Alarm.com was not an individualized issue, based on scripts and other evidence establishing "a consistent approach to making telephone calls" that did not vary significantly from call to call. To eliminate individualized consent issues, the court modified the classes to exclude consumers who provided their telephone numbers to the defendants before the telemarketing call. The court further held that numerosity, typicality and adequacy were satisfied, and rejected the defendants' contention that a class action was not superior in light of a parallel proceeding that might result in double recovery for class members, because "any risk of double recovery could easily be addressed by affording Alarm.com an offset against any recovery" by the plaintiffs in the parallel action.

Meidl v. Aetna, Inc.*, No. 15-cv-1319 (JCH), 2017 WL 1831916 (D. Conn. May 4, 2017), *23(f) pet. pending

The plaintiff in this case alleged that the defendant Aetna insurance companies improperly adopted and implemented policies to deny coverage for transcranial magnetic stimulation (TMS) therapy used to treat depression — policies codified in Aetna's Clinical Policy Bulletin 469 (CPB 469). In certifying the class, Judge Janet C. Hall of the U.S. District Court for the District of Connecticut first found that 301 claim denial letters containing references to CPB 469 demonstrated that Aetna had a "uniform policy" of denying TMS claims under CPB 469 and "strongly support[ed] the conclusion that a common question exist[ed] as to whether the creation and enactment of CPB 469 constituted a violation of ERISA fiduciary duties." The court rejected the defendants' argument that commonality was not satisfied because the class members had different levels of depression and treatment histories and were denied coverage on different dates, explaining that each putative class member "suffered the same injury, as required for commonality," because each putative class member was denied coverage for TMS based on the same policy. Additionally, the court rejected the defendants' argument that the named plaintiff was atypical because his plan's experimental and investigational provision uniquely asked whether a treatment was approved by the Food and Drug Administration (FDA). The court found that although the plans contained varying language, they "almost uniformly" defined "experimental" and "investigational" as services not approved by the FDA. Finally, the court held that certification was appropriate under either Rule 23(b)(1)(A) or Rule 23(b)(2) because the plaintiff sought injunctive relief and the defendants had categorically denied coverage for a type of treatment. Having certified the class under those rules, the court declined to decide whether certification under Rule 23(b)(3) would also have been appropriate.

Bond v. Liberty Ins. Corp.*, No. 2:15-cv-04236-NKL, 2017 WL 1628956 (W.D. Mo. May 1, 2017), *23(f) pet. denied

Judge Nanette K. Laughrey of the U.S. District Court for the Western District of Missouri granted class certification in a suit alleging that the defendant insurance company violated its insurance policy by assessing a deductible on certain actual cash value (ACV) claims that the plaintiffs contended should not have been assessed under the terms of the policies. The court initially granted an unopposed motion to bifurcate the class action into an initial Rule 23(b)(2) phase followed by a Rule 23(b)(3) phase. The plaintiffs argued that a 23(b)(2) class could allow the court to determine the defendant's liability under its insurance policies. The declaratory/injunctive class sought, in part, an order interpreting the policy language and declaring that the defendant's application of a deductible to ACV payments was improper; the court could later consider certifying a 23(b)(3) monetary damages class based on its earlier liability determination.

The court held that commonality was satisfied because all claims revolved around the same question of whether the defendant's admitted practice of applying deductibles to ACV claims is permissible under the policy. Typicality was met because all members of the class were subject to the same base policy language, and the class was limited to Missouri policyholders whose claims involved the same legal standards and methods of contract interpretation. In addition, the class was cohesive

because all class members were subject to the same base policy, and the defendant undertook a systematic practice regarding the deductibles and ACV claims. Finally, the court held that this hybrid approach of certifying a 23(b)(2) class where the relief may serve as a predicate for later monetary relief under 23(b)(3) was permissible because the declaratory relief sought was a "separable and distinct type of relief that w[ould] resolve an issue common to all class members." Accordingly, the court granted class certification.

***Backer Law Firm v. Costco Wholesale Corp.*, No. 15-0327-CV-W-SRB, 2017 WL 1907764 (W.D. Mo. Apr. 27, 2017)**

Judge Stephen R. Bough of the U.S. District Court for the Western District of Missouri granted class certification in a suit alleging that the defendant violated the Telephone Consumer Protection Act (TCPA) by sending an unsolicited facsimile advertisement to the plaintiff's business. The plaintiff brought state claims of conversion, violation of the Missouri Computer Tampering Act, negligence, and negligence per se. As an initial matter, the court found the plaintiff had standing because the TCPA required only the sending of a facsimile, not the receipt of the facsimile. Ascertainability was also satisfied because the plaintiff provided a list of class members of 1,552 persons whose names were derived from a report generated to capture all entries referencing "faxes and faxing" associated with particular Costco locations in a four-year period. Commonality was satisfied because the plaintiff had established that liability can arise from the transmission of unsolicited fax advertisements. Typicality was satisfied because Costco had not provided sufficient evidence that any of the proposed class members had consented to receiving the faxes, and the complaint was premised on the same kinds of conduct implicating the same legal theories and factual assessments. Predominance was also satisfied because the question whether the defendant violated the TCPA by transmitting unsolicited fax advertisements to the class predominated over inquiries affecting individuals members, including the times the faxes were sent, by which employee and by which fax machine. Accordingly, the court granted class certification.

***Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, No. 12-CV-2066 (PJS/HB), 2017 WL 1483330 (D. Minn. Apr. 25, 2017)**

Judge Patrick J. Schiltz of the U.S. District Court for the District of Minnesota granted class certification in a case alleging violations of the Telephone Consumer Protection Act (TCPA) arising from the plaintiff's receipt of an unsolicited facsimile advertisement from the defendant laboratory about lead testing services that lacked a proper opt-out notice. The plaintiff alleged that the violation of the TCPA tied up the plaintiff's fax line, wasted paper and ink, forced the plaintiff's employees to waste time processing the unwanted fax and invaded the plaintiff's privacy interests. After finding that standing was satisfied, the court analyzed the requirements for class certification, keeping in mind that the U.S. Court of Appeals for the Eighth Circuit had already found commonality and predominance to be satisfied. Numerosity was met because the fax was sent to 3,256 individuals. Typicality was met because, contrary to the defendant's argument, the plaintiff was not a "professional plaintiff." Even if he were, his claims would still be typical of the class because he received the same fax under the same circumstances and brought the same claims under the same statute.

Adequacy was a closer call, in part, because the named plaintiff appeared to show little interest in or commitment to the litigation. The plaintiff failed to personally appear at the last settlement conference and appeared to be unprepared for his deposition. However, the main focus of the adequacy inquiry was to uncover conflicts of interest between the named parties and the class they seek to represent, and the court did not identify any kind of conflict with members of the class. Superiority was also satisfied because the main question in a TCPA case — whether a given fax is an advertisement — is usually resolved in one stroke. Accordingly, the court granted class certification.

***Chapman v. Tristar Prods., Inc.*, No. 1:16-CV-1114, 2017 WL 1433259 (N.D. Ohio Apr. 24, 2017)**

Judge James S. Gwin of the U.S. District Court for the Northern District of Ohio granted in part a class certification motion in an action alleging that the defendant's pressure cookers contained a design defect that allowed users to open the product while still pressurized, rendering the product worthless. The plaintiffs sought to certify a nationwide class asserting express warranty claims and state subclasses on state-specific tort and products liability claims. Noting that the parties agreed that the laws of class members' home states controlled their claims, the court declined to certify the nationwide class because variations among the states' express warranty laws would cause individual issues to predominate. However, the court found that common questions of state law predominated when that class was narrowed to three states that agreed on the elements of an express warranty claim and certified the class as to those three states.

In certifying this narrower class, the court also found that the named class representatives satisfied typicality and adequacy. As for typicality, the court held that the fundamental claim asserted — the pressure cookers could be opened while still pressurized — was typical of all class members, even though the defendants' expert was unable to replicate the plaintiffs' alle-

gations that the device could be opened without any resistance. As to adequacy, the defendants argued that the named plaintiffs' decision to seek only economic damages and waive any personal injury or property damages could lead to waiver of other class members' personal injury or property damages claims. To address this concern, the court added an opt-out provision to allow class members with such claims to preserve their right to pursue them. The court then narrowed the proposed multistate implied warranty subclass to include only purchasers in a single state, finding that variations in state law would otherwise defeat predominance and that the plaintiffs had not alleged the manifestation of the defect, which was a required element in another state that the plaintiffs sought to certify. The court also declined to certify some of the remaining states' subclasses on the basis that the relevant state law required alleged injuries other than economic damages, and the plaintiffs had waived any claim for personal injury or property damage.

***Pierre v. Midland Credit Mgmt., Inc.*, No. 16 C 2895, 2017 WL 1427070 (N.D. Ill. Apr. 21, 2017)**

Judge Harry D. Leinenweber of the U.S. District Court for the Northern District of Illinois granted class certification in a suit brought by a plaintiff alleging that the defendant's debt collection letters failed to provide necessary disclosures, in violation of the Fair Debt Collection Practices Act (FDCPA). The plaintiff alleged that the following statement was misleading: "The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it, we will not report it to any credit reporting agency, and payment or non-payment will not affect your credit score." After finding that the class had standing and was objectively identifiable, the court addressed the Rule 23(a) requirements. Commonality was satisfied, as the case involved a standard form letter where only personal and account information varied across the 68,000 letters sent to Illinois residents. The defendant argued that predominance was not satisfied because the mandatory arbitration provisions and class action waivers in many of the class members' original credit agreements required individualized inquiries to determine whether each class member had an actionable claim. However, the plaintiff sued Midland for violations of the FDCPA arising out of its conduct as a debt servicer, not a related entity that was the assignee and owner of the class members' underlying debt obligations. Predominance was met because the central issue in the case involved the defendant's standardized course of conduct directed to each class member. Accordingly, the court granted class certification.

Dover v. British Airways, PLC (UK)*, No. 12 CV 5567 (RJD) (CLP), 2017 WL 1251083 (E.D.N.Y. Mar. 31, 2017), *23(f) pet. denied

The plaintiffs in this case alleged that the defendant airline breached its frequent flyer contract by imposing fuel surcharges on frequent flyer reward flights that were calculated to recoup previous fuel costs that were only arbitrarily related to their flights. According to the plaintiffs, "fuel surcharges" contemplated under the contract instead needed to be "substantively or temporally relevant to" the present cost of fuel. In certifying the class, Judge Raymond J. Dearie of the U.S. District Court for the Eastern District of New York first rejected the airline's argument that commonality and predominance were not satisfied because the surcharges varied in structure and amount over the class period. The court explained that the proper interpretation of the term "fuel surcharges" was a common question and that whether the surcharges were in fact arbitrarily assessed was a central issue that could be decided "in one stroke." The court additionally held that although several of the proposed class representatives had failed to initially comply with their discovery obligations and had credibility issues — for example, one putative representative had "gamed the system" to obtain frequent flyer miles without actually spending money — they were adequate representatives because these issues were not "significant." Finally, the court held that the proposed class was easily ascertainable via the airline's database.

In re Morning Song Bird Food Litig.*, No. 12cv01592 JAH-AGS, 2017 WL 1191485 (S.D. Cal. Mar. 30, 2017), *23(f) pet. denied

Judge John A. Houston of the U.S. District Court for the Southern District of California certified a class of consumers asserting a Racketeer Influenced and Corrupt Organizations Act (RICO) claim arising out of purchases of a wild bird food product that contained certain chemicals alleged to be harmful to the birds, and three subclasses for California, Missouri and Minnesota state law claims. The requirements of Rule 23(a) were satisfied, including ascertainability, because the plaintiffs provided an objective way of ascertaining the purchasers through retail records during a specified time frame. The court also found the requirements of Rule 23(b)(3) were satisfied, rejecting the defendants' claims that the allegations were subject to multiple, plaintiff-specific defenses and fact-intensive inquiries, including scientific analysis of the allegations and statute of limitations grounds. Instead, the plaintiffs demonstrated common questions of fact and law because the RICO claims focused on a scheme that affected all class members alike, and the class' injuries derived from a unitary course of conduct. Similarly, the state claims involved common questions of law and fact regarding the deceptiveness and materiality of the defendants' alleged concealment of their illegal conduct and the illegality of their product.

Thus, the claims involved the same alleged injury, alleged the same conduct by the defendants and would involve common proof. Finally, a class action would be superior, given the costs of an individual action compared to the recovery and the efficiency of addressing common issues on a classwide basis.

***Zeidel v. A&M (2015) LLC*, No. 13-cv-6989, 2017 WL 1178150 (N.D. Ill. Mar. 30, 2017)**

Judge Robert M. Dow, Jr. of the U.S. District Court for the Northern District of Illinois granted the plaintiff's motion for class certification in a putative class action alleging violation of the Telephone Consumer Protection Act (TCPA). The plaintiff alleged that the defendant retailer maintained a policy and practice of gathering telephone numbers and sending customers text messages without their prior written consent. The plaintiff's proposed class included those who received one of three particular text messages on their cellphones from the defendant without providing prior express written consent to receive such messages. The defendant was not "fundamentally opposed" to certification of a class and only disputed the ascertainability requirement of Rule 23. Numerosity was satisfied, as the defendant sent out the messages to at least 79,000 unique numbers, and commonality was satisfied because putative class members were sent substantially the same message. Additionally, whether the messages were "advertisements" or "telemarketing" under the TCPA were common questions. Predominance was met because of the defendant's alleged uniform practice of sending substantially similar text messages, policy of collecting phone numbers orally and the alleged lack of written consent. Ascertainability was also satisfied because the putative class members could be identified by whether they received one of the text messages during the relevant date range and could be excluded from the class if they provided their phone number through the defendant's website, by texting the defendant or by filling out a written consent form. The class definition, however, was modified to reflect these methods of providing express written consent. Accordingly, the court granted the plaintiff's motion for class certification.

***Erickson v. Elliot Bay Adjustment Co.*, No. C16-0391JLR, 2017 WL 1179435 (W.D. Wash. Mar. 30, 2017)**

Judge James L. Robart of the U.S. District Court for the Western District of Washington granted certification of a class of consumers alleging violations of the Fair Debt Collection Practices Act and two Washington consumer protection statutes based on the defendant's debt collection attempts. The requirements of Rule 23(a) were met, as the class consisted of more than 40 consumers who received collection letters with nearly identical language, and whether that language was misleading could be resolved as a matter of law, common to the class. The defendant's defenses, relating to agreements between the representative plaintiff and a service provider and his refusal to accept service in a separate collection lawsuit, were too speculative to rebut the presumption of typicality. Predominance and superiority under Rule 23(b)(3) were satisfied, as the court's determination of whether the form collection letters contained impermissible statements would generate a dispositive common answer and predominate over individual questions, and individual class members would have little incentive to pursue individual claims given the limited financial recovery available. The court *sua sponte* exercised its discretion to modify the class definition, limiting the proposed class to those who actually read the allegedly offending letters — including the allegedly offending language, so that potential members need not refer to the complaint to determine membership — and imposing a one-year class period to limit member claims to those within the applicable statute of limitations.

Adair v. EQT Prod. Co.*, No. 1:10CV00037, 2017 WL 1174024 (W.D. Va. Mar. 29, 2017), *1292(b) pet. denied

Judge James P. Jones of the U.S. District Court for the Western District of Virginia certified in part three of five putative class actions brought against two coalbed methane gas (CBM) producers, alleging that the producers deprived holders of royalty payments. The court had previously certified all five classes; however, the U.S. Court of Appeals for the Fourth Circuit remanded, holding that complications in resolving gas estate ownership — such as heirship, intestacy and title-defect issues — "pose[d] a significant administrative barrier to ascertaining the ownership classes." *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 359, 371 (4th Cir. 2014). Notably, the Fourth Circuit's decision aligned it with the Third and Eleventh circuits in requiring a heightened showing of ascertainability in putative class actions; the Sixth, Seventh, Eighth and Ninth circuits have refused to require such a showing.

On remand, the district court explained that events had since taken place that simplified the ascertainability inquiry, including the passing of a new Virginia law that required gas-well operators to identify CBM gas owners by the end of 2015. The court held that — even "giv[ing] greater consideration to the administrative challenges" of identifying class members, as the Fourth Circuit directed — all of the proposed classes were now ascertainable because the Virginia law essentially mandated that the defendants identify the putative class members. The court's determinations regarding commonality and predominance, however, varied with the different putative classes and claims. For example, the court found that common issues predominated

for the class of "deemed lessors" because they were subject to the same pooling order, enabling a classwide determination of whether the defendants' deduction practices were improper. Conversely, the court found that the class of "individual lessors" could not be certified because the lessors were bound by individual leases, necessitating individualized inquiries into whether the defendants took excessive deductions from each lessor's royalty payments. In the end, the court certified in part two classes: plaintiffs who had never received CBM royalties and whose CBM interest were force-pooled and plaintiffs who had received royalties but claimed to have been underpaid.

***In re Dial Complete Mktg. & Sales Practices Litig.*, MDL No. 11-md-2263-SM, 2017 WL 1155736 (D.N.H. Mar. 27, 2017)**

Judge Steven J. McAuliffe of the U.S. District Court for the District of New Hampshire certified a class of purchasers in an action alleging that the defendant's product packaging misrepresented the antibacterial properties of its soap. The court had previously denied the plaintiffs' class certification motion on the basis that the plaintiffs had not demonstrated that damages could be calculated on a classwide basis. As part of their renewed motion for class certification, the plaintiffs submitted testimony from a new expert regarding his methodology for quantifying the portion of the product's price attributable to the allegedly false claims. Although the defendant identified potential flaws in the expert's methods and calculations, the court found that the damages model was sufficient to demonstrate that damages could be calculated on a classwide basis in a manner consistent with the plaintiffs' theory of liability. Specifically, the defendant argued that this damages model was unreliable because it only measured the change in consumer "willingness to pay" and did not incorporate any analysis of market supply factors. Therefore, it only measured the change in consumer demand, not the change in market price. The court disagreed: In an efficient market, the court said, the marginal consumer's willingness to pay could be an appropriate measure for determining price premium.

***Navelski v. Int'l Paper Co.*, No. 3:14cv445/MCR/CJK, 2017 WL 1132569 (N.D. Fla. Mar. 25, 2017)**

During a storm described by the court as "extraordinary," a creek running through the defendant's property overflowed and flooded some of the plaintiffs' homes. The plaintiffs asserted various tort claims against the defendant, claiming that the flooding was caused or exacerbated by a dam that collapsed during the storm because the defendant failed either to maintain or remove it. Chief Judge M. Casey Rodgers of the U.S. District Court for the Northern District of Florida certified a liability -only class of current and former property owners in subdivisions near the creek under Rule 23(b)(3). The court observed that the plaintiffs had alleged common factual questions for which there were common answers regarding the defendant's maintenance or abandonment of the dam and whether the flooding was caused or exacerbated by the dam's collapse. The court also noted that all homes within the proposed class area experienced stigma damages and/or flooding, and that individual variations in when class members' homes flooded or the extent of their damages did not defeat typicality or adequacy. Finally, notwithstanding the need for property-specific damages calculations, the court concluded that common issues predominated because every aspect of liability could be resolved on a classwide basis. Thus, the court bifurcated the case and certified a class on the issue of liability only, reserving damages for separate, individualized proceedings.

***Martin v. Monsanto Co.*, No. ED CV 16-2168-JFW (SPx), 2017 WL 1115167 (C.D. Cal. Mar. 24, 2017)**

Judge John F. Walter of the U.S. District Court for the Central District of California certified a class action of consumers seeking damages for violations of both federal and California consumer protections and warranty statutes. The plaintiff asserted that representations on the label of the defendant's herbicide products like "Makes Up to [x] Gallons," were deceptive because mixing the products according to the directions resulted in fewer gallons than represented. The court held that class certification was appropriate. Numerosity was easily satisfied, as the defendant sold hundreds of thousands of products to tens of thousands of consumers. Moreover, commonality and typicality were met because the transactions involved the same facts and claims: namely, the class was exposed to the same statement on similar products. Finally, the court rejected the defendant's argument that the plaintiff was inadequate because she was seeking less in damages than she could obtain pursuant to the consumer guarantee — which allows a consumer to obtain a full refund of the product — given that members who preferred to obtain a refund could opt out of the class. The proposed class satisfied Rule 23(b)(3) because a reasonable consumer could find the statement material, and the proposed damages calculation, a benefit-of-the-bargain model, provided a capable measurement of damages on a classwide basis.

***Smith v. Triad of Ala., LLC*, No. 1:14-CV-324-WKW, 2017 WL 1044692 (M.D. Ala. Mar. 17, 2017)**

The plaintiffs in this case filed a class action lawsuit against the defendant hospital after a hospital employee stole personal information from nonhospital patients whose blood came to the lab from outside health care facilities. The plaintiffs sought to certify

a class of all persons who had their personal health information stolen, regardless of whether the employee subsequently used that information to commit fraud or identity theft. In granting the plaintiffs' motion for class certification, Chief Judge W. Keith Watkins of the U.S. District Court for the Middle District of Alabama rejected the defendant's argument that the class was not ascertainable because it included persons whose identities were stolen but not affirmatively misappropriated, finding that the U.S. Court of Appeals for the Eleventh Circuit has never required a showing of actual misuse to prove standing. Moreover, although the plaintiffs' implied and express contractual claims were mutually exclusive under Alabama law, the court resolved that issue by *sua sponte* creating subclasses of patients who had and had not received the defendant's "notice of privacy practices." Finally, the court engaged in a claim-by-claim predominance analysis, observing that although causation and damages determinations were individualized, common formation and breach issues predominated the plaintiffs' contract claims while common duty and breach issues predominated their negligence claims.

***Mednick v. Precor, Inc.*, No. 14 C 3624, 2017 WL 1021994 (N.D. Ill. Mar. 16, 2017)**

Judge Harry D. Leinenweber of the U.S. District Court for the Northern District of Illinois certified the plaintiffs' proposed class for the purpose of determining liability but reserved the issue of damages for individual hearings. The plaintiffs brought this class action to remedy unfair and deceptive business practices related to the defendant's marketing and sale of treadmills with "touch sensor heart rate" monitoring technology. The plaintiffs alleged that the touch sensor heart rate monitors did not provide accurate heart rate readings and sought to recover for violations of the Illinois Consumer Fraud and Deceptive Business Practices Act and the equivalent consumer protection statutes in four other states. The defendant argued that inaccuracies were driven by individualized factors such as age and body mass and also argued that its treadmills come with disclaimers about the monitors' performance. The court noted that commonality was satisfied, as multiple common questions boiled down to whether the defendant engaged in representations or omissions that were likely to deceive a reasonable consumer. The plaintiffs could not rely on representations made in brochures or on its website, but the plaintiffs could rely on common misrepresentations in the graphics on the treadmills themselves and any material omissions by the defendant. These common questions, however, did not extend to liability and the amount of any damages, as the individual recoveries would depend on the state in which the individuals reside.

Typicality was satisfied because even if the named plaintiffs did not run on the machines, the point at which the sensors were most compromised, this did not mean that they could not have been deceived or injured by the defendant's deceptive advertising. Finally, predominance was satisfied because the plaintiffs' damages model could be adjusted to more closely tie to the plaintiffs' theory that the sensor did maintain some value and was not worthless. The plaintiffs also narrowed their proposed class to five states from 10, as the consumer protection statutes of California, Illinois, Missouri, New York and New Jersey share sufficient characteristics. Accordingly, the court certified this Rule 23(b)(3) class.

Korolshteyn v. Costco Wholesale Corp.*, No. 3:15-cv-709-CAB-RBB, 2017 WL 1020391 (S.D. Cal. Mar. 16, 2017), *23(f) pet. pending

Judge Cathy Ann Bencivengo of the U.S. District Court for the Southern District of California certified a class of consumers seeking restitution and punitive damages for violations of California consumer protection statutes arising from the defendants' alleged false statements about the health benefits of their products. The court found that numerosity, typicality and adequacy were satisfied, rejecting the defendants' argument that the named plaintiff's Facebook communication with an attorney friend discussing the deceptiveness of the statements on the product barred the named plaintiff from adequately serving as class representative, as she purchased the product before the conversation. The court also rejected the defendants' arguments that commonality and predominance were not satisfied because some people may have derived benefits from the products, that others purchased the products based on competitor statements and that the damages model was flawed because it did not take into consideration whether some class members obtained some value from the product. Instead, the court noted that the common question turned on the deceptive statements themselves, that the deceptiveness of its competitors did not absolve its own deceptive statements and that the damages model based on the records of purchases of the products was workable because under the plaintiff's theory, the product provided no benefit and was thus valueless. Finally, the court rejected the defendants' arguments that its offer of a full refund lessened the superiority of the class action, as such a policy would effectively immunize the store from any lawsuits, and physically going to the store to seek a small refund was not superior to obtaining relief as a class.

***Langan v. Johnson & Johnson Consumer Cos.*, Nos. 3:13-cv-1470 (JAM), 3:13-cv-1471 (JAM), 2017 WL 985640 (D. Conn. Mar. 13, 2017)**

Langan involved two putative class actions brought by one plaintiff alleging deceptive marketing practices related to Johnson & Johnson's Aveeno line of products. In the first case,

the plaintiff challenged the claim that certain products contained 100 percent naturally sourced sunscreen ingredients and sought to certify an injunctive class of consumers who had used the products. In denying certification, Judge Jeffrey Alker Meyer of the U.S. District Court for the District of Connecticut held that the plaintiff did not have standing because an injunction requiring removal of the allegedly misleading claims from the product labels would not affect her — she now understood the products' ingredients and did not intend to buy them again. The court acknowledged that some courts have reasoned that not allowing plaintiffs to sue for injunctive relief after becoming aware of allegedly misleading advertising would defeat the purpose of consumer protection statutes. The court disagreed, however, explaining that "[r]egardless of the salutary purpose of consumer protection statutes, they cannot alter the bedrock requirements for federal constitutional standing."

In the second case, the plaintiff challenged the claim that certain baby washes used a natural oat formula and sought to certify a damages class of plaintiffs who had used the products in several states (or alternatively, Connecticut). In certifying the class, the court concluded that commonality and typicality were met because the question of whether a "reasonable consumer" would find the product labels deceptive was common to and typical of the class. The court then rejected the argument that common issues did not predominate because the plaintiff could not prove that the allegedly deceptive claim was material to all class members or that the class members had a common definition of "natural." The court found that internal documents showing that the defendant "itself recognized that consumers [were] willing to pay a premium for natural products" were "powerful evidence" that the allegedly deceptive labeling was material across the class. The court further explained that class certification does not require "clone plaintiffs that all think and perceive exactly alike" and credited the plaintiff's expert's survey showing that 70 percent of respondents believed that the baby wash was an all-natural formula. Finally, the court determined that minor variations in various states' consumer protection laws did not defeat predominance. It observed a number of similarities, including that none of the states' highest courts had required a showing of individual reliance to prove deception.

Herman v. Seaworld Parks & Entm't, Inc.*, No. 8:14-cv-3028-MSS-JSS, 2017 WL 1304302 (M.D. Fla. Mar. 10, 2017), *appeal pending

The plaintiffs in this case paid for annual passes to the defendant's theme parks on 12-month installment plans, under which "except for any passes paid in less than 12 months," the contract would "renew automatically on a month-to-month basis following the payment period" until the customer terminated it. The plaintiffs sued for breach of contract, alleging that the defendant automatically renewed contracts for which 12 monthly payments were timely made, violating the renewal provision because customers who timely pay in 12 monthly installments necessarily meet their obligation in "less than 12 months." The plaintiffs also alleged that the defendant violated the Electronic Fund Transfer Act (EFTA) for customers who paid using their debit cards because the defendant was not authorized to transfer funds from their bank accounts after the first 12 months. In certifying the plaintiffs' breach-of-contract class and EFTA subclass, Judge Mary S. Scriven of the U.S. District Court for the Middle District of Florida observed that class membership was readily ascertainable by reference to objective criteria, i.e., the number of months over which payments were made. The court further held that commonality was satisfied because the phrase "less than 12 months" was not ambiguous, which enabled the breach of contract issue to be decided classwide without the need for extrinsic evidence of its meaning. Finally, the court held that predominance was satisfied even though the substantive contract law of four states would apply because that law did not materially vary.

***Durant v. State Farm Mut. Auto. Ins. Co.*, No. 2-15-CV-01710-RAJ, 2017 WL 950588 (W.D. Wash. Mar. 9, 2017)**

Judge Richard A. Jones of the U.S. District Court for the Western District of Washington certified a class of Washington insureds asserting violations of the Washington Consumer Protection Act and Washington Insurance Fair Conduct Act, breach of contract and tortious bad faith handling of insurance claims, alleging that State Farm wrongfully terminated or limited insurance benefits because the insureds had attained "maximum medical improvement" (MMI). Because the putative class was estimated to involve thousands of claims, numerosity was satisfied. In addition, the court held that typicality and adequacy were satisfied, even though each class member's claim arose from unique individual personal injuries, because the alleged injuries all arose from the same course of conduct — denying coverage based on the MMI standard — and there was no evidence of conflicts within the class or with class counsel. The court also found that Rule 23(b)(3)'s predominance and superiority requirements were satisfied because the common question as to whether State Farm had engaged in unreasonable, unfair or illegal practices by denying claims based on the MMI standard was a central issue that would resolve most of the elements of each claim. The court noted that calculating damages might necessitate individualized review of each claim, but that the damages could be calculated based on the detailed records of each claim and the basis for denial, which also eliminated concerns about manageability and class member identification.

Mazzanti v. Gen. Elec. Co.*, No. 3:13cv1799 (WWE), 2017 WL 923905 (D. Conn. Mar. 7, 2017), *23(f) pet. denied

Judge Warren W. Eginton of the U.S. District Court for the District of Connecticut certified several liability-only subclasses of consumers who owned allegedly defective microwave ovens manufactured by the defendant, but he refused to certify damages subclasses or a nationwide class seeking declaratory and injunctive relief under Rule 23(b)(2). The plaintiffs alleged that defects caused the microwaves' glass doors to shatter, rendering them unreasonably dangerous and breaching their warranty. In certifying a multistate liability-only subclass for claims under the states' consumer protection laws, the court explained that common questions predominated because these claims hinged largely on: (1) whether the relevant microwaves all contained a defect that could cause glass to shatter regardless of consumer conduct; and (2) whether the defendant knew about the defect and failed to disclose it. The same could not be said for damages, however, because predominance was undermined by individualized inquiries into the various state statutes' remedial schemes. Similarly, the court certified a Texas implied warranty subclass on liability because the question of whether consumers received the benefit of their bargain predominated, but it refused to certify a damages subclass because it would require individualized determinations of harm. Finally, the court deferred ruling on the plaintiffs' motion to certify a nationwide declaratory and injunctive relief class until after it had determined liability.

Clark v. Trans Union, LLC*, No. 3:15cv391, 2017 WL 814252 (E.D. Va. Mar. 1, 2017), *1292(b) pet. pending

Judge M. Hannah Lauck of the U.S. District Court for the Eastern District of Virginia granted the plaintiff's motion for class certification in a putative class action alleging that the defendant violated the Fair Credit Reporting Act (FCRA) by sending consumers credit files that did not "clearly and accurately" disclose the sources of information for the file. The court first held that numerosity and ascertainability were easily satisfied because there would likely be at least 4,000 members in the class and the defendant admitted to having records that could identify each of them. Similarly, commonality and predominance were satisfied because the case would focus on the defendant's conduct, i.e., whether its policy of not disclosing the sources of public records information violated the FCRA and whether it acted willfully in withholding this information. The court also rejected the defendant's arguments that the plaintiff's claims were not typical of the class because the facts surrounding her allegations were unique. The court explained that the plaintiff's alleged injury — the defendant's failure to disclose its sources — was the same as that of the other class members and would require the same proof. The court similarly rejected the defendant's argument that the plaintiff should not represent the class because her knowledge of the case did not rise to that of her counsel's. It explained that it is "hornbook law" that a class representative is entitled to rely upon her lawyer's expertise. Finally, the court held that superiority was satisfied because the low value and technical nature of the claims would likely prevent class members from pursuing individual claims.

Kurtz v. Kimberly-Clark Corp.*, No. 14-CV-1142, 2017 WL 751231 (E.D.N.Y. Feb. 24, 2017) & *Kurtz v. Kimberly-Clark Corp.*, No. 14-CV-1142, 2017 WL 1155398 (E.D.N.Y. Mar. 27, 2017), *23(f) pet. granted

The plaintiffs in two separate but related actions — *Belfiore* and *Kurtz* — moved for class certification in this consolidated proceeding against manufacturers and retailers of moist toilet wipe products that allegedly falsely labeled the products as "flushable" when, in fact, they were not flushable and clogged household plumbing. Judge Jack B. Weinstein of the U.S. District Court for the Eastern District of New York initially declined to certify the nationwide class proposed in the *Kurtz* action. The court held that Mr. Kurtz failed to demonstrate "the financial or other capacity to adequately represent a national class," highlighting the need for a survey to determine a reasonable consumer's understanding of the term "flushable" — a costly endeavor that Kurtz was admittedly reluctant to undertake. The court noted, however, that certifying New York consumer classes in both the *Belfiore* and *Kurtz* actions would be appropriate because the events underlying the plaintiffs' claims and discovery had taken place there. A month later, the court issued a second opinion addressing both the *Belfiore* and *Kurtz* cases in which it certified those proposed statewide classes. In so doing, the court noted that its concern about willingness to finance consumer surveys was "reduced by dismissal of the national claims" in Kurtz. The court disagreed with the defendants that commonality was not met because the term "flushable" was "too amorphous and idiosyncratic to be the subject of one common definition." The court found that this representation was "sufficiently distinctive" and could be isolated from other representations made on the label. Explaining that the "injury is the purchase price" under New York consumer protection laws, the court likewise rejected the defendants' argument that commonality was not satisfied because payment of a price premium depended on the purchaser's individual experience with the product after purchase.

***In re Stericycle, Inc.*, No. 13 C 5795, 2017 WL 635142 (N.D. Ill. Feb. 16, 2017)**

Judge Milton I. Shadur of the U.S. District Court for the Northern District of Illinois granted class certification in a putative class action brought by plaintiffs alleging breaches of contract and the covenant of good faith, unjust enrichment, and violations of consumer fraud and uniform trade practices acts under Illinois and several other states' laws. The plaintiffs alleged that the defendant medical waste disposal company violated consumer contracts by using an automated price increase to increase charges to some customers without notice or explanation and charge the plaintiffs for undisclosed fees. The defendant argued that class certification was inappropriate because of the wide variance in contract language and client treatment. The court found that a Rule 23(b)(3) class was proper, as commonality was satisfied because the plaintiffs' pleadings were enough to establish a uniform scheme by the defendant with common questions applicable to the entire class. Each class member had similar contractual language, and each member was subject to the same type of automatic price increase. Predominance was satisfied as to both the breach of contract and Illinois Consumer Fraud Act claims because both claims stem from the defendant's common practice of regularly increasing customers' prices in violation of their contracts through the use of software programming. It was also satisfied as related to their fraud claim because the plaintiffs had shown a standardized pattern of misrepresentations, and damages could be calculated using a common, reliable formula after resolving the liability questions. The court also certified a Rule 23(b)(2) class because the defendant's automatic price increase policy affected all class members, and the defendant's common conduct meant that it could be enjoined or declared unlawful only as to all class members or none. Accordingly, the court certified Rule 23(b)(2) and Rule 23(b)(3) classes.

***O'Shea v. Am. Solar Sol., Inc.*, 318 F.R.D. 633 (S.D. Cal. 2017)**

Judge M. James Lorenz of the U.S. District Court for the Southern District of California certified a nationwide class of individuals seeking putative damages under the Telephone Consumer Protection Act (TCPA) for unsolicited telemarketing calls. The court concluded that the litigation turned on a common question of whether the predictive dialers utilized by the defendant were an automatic telephone dialing system under the TCPA. Moreover, the court held that the named plaintiff's claims were typical of the class, as he also received the same telemarketing calls as the proposed class members. Finally, the court held that the predominance requirement of Rule 23(b)(3) was met, as there was no applicable good faith defense. The court questioned whether the defendant could escape TCPA liability by virtue of having an honest but mistaken belief that it had prior express consent to make the call, and in any event, not having introduced evidence of any good faith. Furthermore, the potential for individualized damages could not defeat the certification of the proposed class, as damages are set by statute and therefore are less likely to involve intensive fact finding, and could be easily calculated based on records maintained by the defendant. Thus, Judge Lorenz certified the nationwide class.

Other Class Certification Decisions

***Landau v. Viridian Energy PA LLC*, No. 16-2383, 2017 WL 1232313 (E.D. Pa. Apr. 3, 2017)**

Judge Gerald Austin McHugh of the U.S. District Court for the Eastern District of Pennsylvania granted the defendant's motion to stay the plaintiff's putative class action alleging violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law. The court held that the "first-filed rule" applied based on the fact that Viridian was defending four similar actions in the District of Connecticut. Under the rule, where two courts possess the same case at the same time, the court in which the action was filed first must decide it. While the U.S. Court of Appeals for the Third Circuit had not definitively ruled on the scope of the first-filed rule, Judge McHugh applied a two-tiered approach in which, in truly related cases, transfer to the jurisdiction where the first case was filed is presumed; otherwise, the existence of a similar case that was filed earlier is a relevant, but not controlling, factor to consider as part of the Section 1404 transfer analysis. In this case, because the four Connecticut actions involved different — though similar — legal claims and parties, Judge McHugh conducted a Section 1404 analysis to conclude that the combination of Pennsylvania's local interest in trying the case and the presumed interests of the parties in trying the case in the forum in which they selected outweighed any public interest in favor of transfer. However, Judge McHugh held that staying the matter was appropriate due to the possibility of overlapping classes in *Landau* and one of the Connecticut actions, and because the burdens a stay would impose on the plaintiff were minimal.

Class Action Fairness Act Decisions

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

***Blevins v. Aksut*, 849 F.3d 1016 (11th Cir. 2017)**

The U.S. Court of Appeals for the Eleventh Circuit (Wilson, Julie Carnes, JJ., and Hall, district judge sitting by designation) affirmed the district court's denial of the plaintiffs' motion to

remand. The plaintiffs filed a class action lawsuit in Alabama state court, alleging that a heart surgeon and various health care facilities operated a racketeering enterprise through which they performed and billed for unnecessary heart procedures in violation of the Racketeer Influenced and Corrupt Organizations Act. After the defendants removed the action based on federal-question jurisdiction, the plaintiffs moved to remand, arguing that CAFA grants state courts exclusive jurisdiction over local federal-question class actions, or alternatively, that federal courts should abstain from exercising jurisdiction over local federal-question class actions. In affirming the district court's decision that CAFA was inapplicable and therefore did not require remand, the panel explained that CAFA "grants district courts jurisdictional power they did not previously have," although the local controversy exception "removes their ability to exercise that specific grant of jurisdiction in certain cases." CAFA does not, however, "preclude the exercise of any other jurisdictional power." Thus, nothing in CAFA precluded the district court from exercising federal question jurisdiction — a "jurisdictional power" it derived from an entirely different statute.

***Hargett v. RevClaims, LLC*, 854 F.3d 962 (8th Cir. 2017)**

The U.S. Court of Appeals for the Eighth Circuit (Smith, Bowman and Shepherd, JJ.) reversed the district court's grant of a motion to remand the putative class action to state court because, although the complaint limited the class to "residents" of a single state, "residents" are not the same as "citizens" under CAFA's local controversy exception. The plaintiff alleged violations of Arkansas law related to the practice of at least one hospital requiring some patients to assign their rights as Medicaid beneficiaries to the hospital, which in turn contracted with the defendant to pursue any legal claims the patients may have related to their injuries in lieu of collecting a reduced but certain payment from Arkansas Medicaid. Following removal, the district court found that the local controversy exception of CAFA — which applies where, among other requirements, "more than two-thirds of the proposed plaintiff class(es) are citizens of the state in which the action was originally filed" — applied to the class limited to "Arkansas residents." For clarity, however, the district court directed the plaintiff to immediately amend her complaints to restrict the class to Arkansas "citizens." The plaintiff filed an amended complaint, and the case was remanded. On review, the Eighth Circuit found that the citizenship/residency distinction rooted in law related to 28 U.S.C. § 1332 — *i.e.*, that citizenship requires permanence whereas residency is a more fluid concept — also applies to CAFA's local controversy exception. Therefore, the district court erred when finding that alleging a class of Arkansas residents was sufficient to satisfy this CAFA exception. The district court's requirement that the plaintiff amend her complaint suggested that the court "relied on guesswork" and "resolved doubt in [the plaintiff's] favor." The Eighth Circuit also did not consider the plaintiff's amended complaint because class citizenship must be determined as of the date of the pleading giving federal jurisdiction. Accordingly, the district court's order to remand was reversed and remanded for further proceedings to determine "through evidence" rather than "guesswork" or "presumptions" whether the local controversy exception was satisfied.

***Dammann v. Progressive Direct Ins. Co.*, 856 F.3d 580 (8th Cir. 2017)**

The U.S. Court of Appeals for the Eighth Circuit (Benton, Beam and Murphy, JJ.) affirmed the denial of the plaintiffs' motion to remand the putative class action to Minnesota state court. The plaintiffs claimed that the defendant maintained a practice of selling insurance policies with deductibles that reduced benefit payments below statutory minimums, thereby violating Minnesota law. The plaintiffs argued that the district court erred when it found that the amount in controversy exceeded $5 million. According to the defendant, approximately 600 individuals fell within the class. However, when the district court calculated the amount in controversy, it relied on premiums collected on all Progressive policies, which included the challenged deductibles. The plaintiffs argued that this calculation included those policyholders who had not made claims that led to the application of the deductibles and was thus overinclusive. On review, the panel of the Eighth Circuit found that the plaintiffs failed to show that it is legally impossible for them to recover more than $5 million. For the purposes of determining the amount in controversy, the question "is not whether the damages are greater than the requisite amount, but whether a fact finder might legally conclude that they are." The plaintiffs offered no evidence to establish the amount they collectively paid in premiums, and without such information, the panel could not determine whether it would be legally impossible for them to recover $5 million. Accordingly, the panel affirmed the district court's denial of remand.

***Davenport v. Lockwood, Andrews & Newnam, Inc.*, 854 F.3d 905 (6th Cir. 2017)**

The U.S. Court of Appeals for the Sixth Circuit (Norris, Batchelder and Gibbons, JJ.) reversed the district court's order to remand a putative class action for lack of subject matter jurisdiction, finding that the local controversy exception to CAFA jurisdiction did not apply because other class actions asserting the same allegations against some of the same defendants had been filed in the three years before the action was filed. The putative class action was one of several negligence actions filed

in Michigan against an out-of-state company hired by the city of Flint, Michigan, to advise the city regarding its water-treatment process, and the Sixth Circuit had previously held that the local controversy exception applied to the first-filed of these actions. The plaintiffs here argued that the exception's requirement that no other similar class actions were filed in the last three years should not apply to class actions filed within a single state, because the requirement was intended to prevent copycat suits in multiple forums. However, to the court, such an interpretation was inconsistent with both the plain language of the statute and Congress' intent in enacting CAFA to broaden the availability of diversity jurisdiction in class action suits.

***Ramirez v. Vintage Pharm., LLC*, 852 F.3d 324 (3d Cir. 2017)**

The U.S. Court of Appeals for the Third Circuit (Chagares, Vanaskie and Krause, JJ.) found federal jurisdiction appropriate under CAFA and reversed the opinion of the U.S. District Court for the Eastern District of Pennsylvania that had granted the plaintiff consumers' motion for remand. The plaintiffs sought remand of their action against the defendant, a manufacturer of birth control pills with allegedly defective packaging, on grounds that they had not filed a "mass action" under CAFA. They argued that their complaint, which stated that their "claims have been filed together ... for purposes of case management on a mass tort basis," disclaimed an intent to have their cases tried together. The Third Circuit rejected the plaintiffs' claim that they did not intend to seek a joint trial, finding the language in the plaintiffs' complaint to be imprecise and indefinite, holding that "[w]here, as here, more than 100 plaintiffs file a single complaint containing claims involving common questions of law and fact, a proposal for a joint trial will be presumed unless an explicit and unambiguous disclaimer is included." The court similarly rejected the plaintiffs' argument that their motion for admission to the mass tort program was evidence of their intent to try their claims separately, holding that (1) acceptance to the mass tort program would not preclude a joint trial, which can take a variety of forms; and (2) the face of the complaint and structure of the action were the best indicators of whether plaintiffs sought a joint trial.

***Bradford v. George Wash. Univ.*, No. 16-858 (RBW), 2017 WL 1383653 (D.D.C. Apr. 18, 2017)**

Judge Reggie B. Walton of the U.S. District Court for the District of Columbia denied the plaintiffs' motion to remand this putative class action brought by students against their university alleging, among other things, violations of District of Columbia Consumer Protection Procedures Act for certain shortcomings and misrepresentations in their online education. The defendant asserted that federal jurisdiction under CAFA existed because (1) the putative class consisted of over 240 members; and (2) the amount-in-controversy requirement was satisfied because the plaintiffs sought restitution of all tuition payments, statutory damages, treble damages, punitive damages and attorneys' fees. The court held that — based on a declaration from a senior university staff member familiar with the university's enrollment, tuition and attendance records, at least 248 students had paid some tuition for the online course at issue, with aggregate tuition totaling $5,911,464.02 — the defendant established by a preponderance of the evidence that the CAFA requirements were satisfied.

***Zyda v. Four Seasons Hotels*, No. 16-00591 LEK, 2017 WL 1157844 (D. Haw. Mar. 28, 2017)**

Judge Leslie E. Kobayashi of the U.S. District Court for the District of Hawaii denied the plaintiffs' motion to remand a putative class action alleging state law violations for failure to maintain and provide adequate facilities to handle the growing population and increased usage of the Hualalai Resort, after making promises regarding membership to induce home purchases. The plaintiffs argued that the defendants knew or should have known that the plaintiffs' claims exceeded the $5 million jurisdictional threshold more than 30 days before they filed their notice of removal. The plaintiffs pointed to, *inter alia*, precomplaint information that the resort was populated by multimillionaires and billionaires, to certain allegations in the complaint (which did not contain damages figures) and to documents describing lost future rental income and an example of how damages could be calculated in the action. The court reiterated that removal jurisdiction cannot be established by mere speculation and conjecture with unreasonable assumptions, and it held that none of the evidence, individually or collectively, provided the defendants with enough information to ascertain the amount in controversy. Thus, the court ruled that the removal was timely and remand was not warranted.

***Millman v. United Techs. Corp.*, Nos. 1:16-CV-312-PPS-SLC, 1:17-CV-28-PPS-SLC, 2017 WL 1165081 (N.D. Ind. Mar. 28, 2017)**

Judge Philip P. Simon of the U.S. District Court for the Northern District of Indiana denied the defendants' motion to remand the putative class action to state court. In two related matters that Judge Simon consolidated in this same order, the plaintiffs alleged that chemicals from a manufacturing plant and gas station entered the soil and groundwater in the surrounding neighborhood. The *Millman* case was a putative class action, and the proposed class consisted of all Indiana citizens within the area impacted by the contamination. Following removal, the *Millman* plaintiff argued that the case should be remanded under the local controversy exception to CAFA. While consoli-

dation mooted the plaintiff's motion to remand by providing an additional basis for federal jurisdiction — a federal question — Judge Simon noted that in any event, he did not believe the local controversy exception applied to this case. While the contamination was local, as is the case in many environmental cases, the plaintiff failed to establish that the nondiverse defendants were defendants from whom "significant relief" was sought or formed a "significant basis" for the proposed claims. Instead, the plaintiffs' exhibits seem to suggest a larger contamination related to the diverse defendants that affected more residences than the contamination from the nondiverse defendants. Therefore, even if the court had to rule on the motion to remand before ruling on the motion to consolidate, the court's conclusion would have been the same.

***Nichols v. Chesapeake Operating, LLC*, No. CIV-16-1073-M, 2017 WL 713906 (W.D. Okla. Feb. 23, 2017)**

Judge Vicki Miles-LaGrange of the Western District of Oklahoma denied the plaintiffs' motion to remand the putative class action to state court. The plaintiff argued that the defendants had not sufficiently demonstrated that CAFA's minimal diversity requirement was satisfied. The plaintiff and the defendants agreed that the defendants were citizens of Oklahoma, but the defendants argued that Austin College was a member of the plaintiff's proposed class and also a citizen of Texas. The plaintiff argued that Austin College was a member of the proposed class, defined as "Oklahoma Residents," and was in fact a resident of Oklahoma. The court found that although Austin College met the putative class' definition of an "Oklahoma Resident," and thus was a member of the class, it was actually a citizen of Texas. The discrepancy was due to the fact that the plaintiff's definition of "Oklahoma Resident" differed from the legal definition of a resident: The proposed class member definition was an individual that received royalty payments, 1099 forms and distribution checks at an Oklahoma address and was a royalty owner in one of the defendant's Oklahoma wells. Austin College received royalty payments at its bank address in Oklahoma and thus was an "Oklahoma Resident" for purposes of determining class membership, although it was in fact a citizen of Texas.

***Lavelle v. State Farm Mut. Auto. Ins. Co.*, No. 16-1082 (RBW), 2017 WL 706157 (D.D.C. Feb. 22, 2017)**

Judge Reggie B. Walton of the U.S. District Court for the District of Columbia denied the plaintiffs' motion to remand, finding that the defendant sufficiently demonstrated that CAFA's requirements for establishing federal jurisdiction were met. The plaintiffs brought this putative class action against State Farm alleging that it breached its insurance contracts with its insureds by failing to pay for the diminished value of the insureds' vehicles after they were repaired to industry standards, in violation of state consumer protection laws. While the parties agreed on the average damages amount per class member, the plaintiffs disputed State Farm's calculations of class size, the amount of attorneys' fees and the amount of punitive damages. First, State Farm offered a declaration supporting its claim that the putative class consisted of 1,171 members, based on a manual review of a statistical sample of the claims, a plan proposed by a retained economist. Given the economist's qualifications and experience, the court found that defendant met the preponderance of the evidence standard with respect to the number of putative class members.

Second, the court rejected the plaintiffs' argument that State Farm waived the right to include attorneys' fees and punitive damages in its amount in controversy by failing to put forth sufficient evidence in its notice of removal, holding that the notice need only include a "plausible allegation" regarding the amount in controversy and that evidence establishing the amount is only required when it is contested by the plaintiff. However, because State Farm calculated attorneys' fees on a "percentage of the fund" basis, rather than a lodestar basis under the District of Columbia Consumer Protection Procedures Act, the court held that such fees could not be included in calculating the amount in controversy.

***Portnoff v. Janssen Pharm., Inc.*, No. 16-5955, 2017 WL 708745 (E.D. Pa. Feb. 22, 2017)**

Judge Mitchell S. Goldberg of the U.S. District Court for the Eastern District of Pennsylvania denied consumers' motion to remand, finding that the consumers' action against the defendant pharmaceutical company alleging injuries sustained as a result of ingesting the defendant's drug Invokana was subject to federal jurisdiction under the mass action provision of CAFA. The court rejected the plaintiffs' timeliness argument with respect to the procedural requirement that the action be removed within 30 days. The plaintiffs further argued that their second petition contemplated consolidation for pretrial proceedings only and that the single reference to a joint trial in the conclusion of their second petition (stating "consolidation for pre-trial and trial will promote judicial economy") was a "scrivener's error." The court rejected this argument, holding that, "when assessing a party's argument that the basis for jurisdiction is founded on a typographical error, courts within this circuit look to the relevant document as a whole." The court found the language in the second petition to be unambiguous, explicit and supported by the reasoning for consolidation found in the remainder of the petition.

Decisions Granting Motions to Remand/ Finding No CAFA Jurisdiction

***Dunson v. Cordis Corp.*, 854 F.3d 551 (9th Cir. 2017)**

The U.S. Court of Appeals for the Ninth Circuit (Fernandez and Watford, JJ., and Staton, district judge sitting by designation), affirmed the district court's remand of eight product liability actions removed under CAFA's mass action provision. The plaintiffs requested consolidation "for all pretrial purposes, including discovery and other proceedings, and the institution of a bellwether trial process." The court focused on the last clause, holding that if the parties proposed to try the claims of a representative plaintiff in a bellwether trial, and the parties in the other cases agreed to be bound by the outcome, then the parties had proposed a joint trial for purposes of the mass action provision. However, proposing a bellwether trial where the outcome is binding only on the parties involved in the trial itself, and the result is used for settlement purposes in the other cases, is not a proposal to try the plaintiffs' claims jointly because the verdict does not actually resolve any aspect of the other plaintiffs' claims. The court rejected the defendant's argument that California Code of Civil Procedure § 1048(a) — the statute cited by the plaintiffs in requesting consolidation — precluded consolidation for purposes of pretrial proceedings alone and held that the plaintiffs' stated intent to "avoid the risk of inconsistent adjudications" may have referred to the prospect of judges rendering conflicting rulings on dispositive motions, not a bellwether trial. Finally, the plaintiffs' statement that they were not requesting consolidation "for purposes of a single trial to determine the outcome for all plaintiffs" and reference to the role of bellwether trials in settlement negated any argument that the plaintiffs intended a bellwether trial with preclusive effect in the other cases. Thus, the district court correctly held that removal jurisdiction does not exist under CAFA's mass action provision and properly remanded the cases to state court.

***Life of the S. Ins. Co. v. Carzell*, 851 F.3d 1341 (11th Cir. 2017)**

The U.S. Court of Appeals for the Eleventh Circuit (Hull, Marcus and Rosenbaum, JJ.) denied the defendants' petition for an interlocutory appeal of the district court's order remanding this action to state court. The plaintiffs brought suit on behalf of Georgia citizens, asserting a number of state law claims related to their purchase of certain insurance policies from the defendants. Both defendants were incorporated in Georgia and maintained their principal places of business in Florida. In removing under CAFA, they asserted that their Florida citizenship created minimal diversity, or alternatively, that some class members' dual foreign citizenship created minimal diversity. The district court rejected both arguments, finding that minimal diversity did not exist because all the plaintiffs and defendants were citizens of Georgia. The appellate panel agreed, explaining that for jurisdictional purposes, a corporation is a citizen of both its state of incorporation and the state where it maintains its principal place of business, and a corporation may not rely selectively on one citizenship when its other would destroy diversity. The panel further explained that because an individual who is a citizen of both the United States and a foreign country is deemed only a citizen of the United States for diversity purposes, the dual citizenship of some Georgia class members did not create minimal diversity under CAFA.

***Jordan v. Bayer Corp.*, No. 4:17-CV-01330-JAR, 2017 WL 1909059 (E.D. Mo. May 10, 2017)**

Judge John A. Ross of the U.S. District Court for the Eastern District of Missouri granted the plaintiffs' motion to remand the case to the circuit court of the city of St. Louis, Missouri. The plaintiffs filed their action seeking damages for injuries sustained as a result of the implantation and use of Essure, a contraceptive device manufactured by the defendant. The 99 plaintiffs brought multiple state law claims, including negligence, negligence per se, negligent misrepresentation and failure to warn. The defendant removed the case to federal court on multiple bases, including the mass action provision of CAFA. The defendant argued that even though this case involved only 99 plaintiffs, the case should be considered with other similar Essure cases filed in this district to form a single mass action involving more than 100 plaintiffs. The defendant argued that the cases contained the same substantive allegations, alleged the same causes of action, were filed by the same counsel and were filed in the same jurisdiction. However, the case did not involve the claims of 100 or more persons, and there was no indication that the plaintiffs wished to have the case tried jointly. Further, the defendant's argument had been repeatedly rejected by courts in this district. Accordingly, CAFA could not form a basis for subject matter jurisdiction, and the court granted the plaintiffs' motion to remand.

***Adams v. Int'l Paper Co.*, No. 17-0105-WS-B, 2017 WL 1828908 (S.D. Ala. May 5, 2017)**

In this case, 248 individuals who owned or occupied property near the defendants' paper manufacturing facility sought relief for environmental contamination allegedly caused by the defendants' industrial activities. In their motion to remand, the plaintiffs argued that the case did not fit the definition of a CAFA "mass action," and that even if it did, the court should decline to exercise jurisdiction under CAFA's "local controversy" exception. Judge William H. Steele of the U.S. District Court for the Southern District of Alabama granted the plaintiffs' motion to remand,

noting that CAFA's definition of mass action excludes any civil action in which "all of the claims arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State." In determining that the case was not a "mass action," the court refused to adopt the defendants' construction of "event or occurrence" as a "truly singular happening," instead holding that circumstances sharing some commonality and persisting for a period of time may constitute an event or occurrence under the statute. Thus, the defendants' allegedly continuous, multidecade pollution came within the exception. The court was similarly unpersuaded by the defendants' argument that the exception did not apply because the plaintiffs alleged claims for distinct and separate conduct. It explained that although one defendant manufactured paper and the other grinded asphalt, all of this conduct involved the continuous release of pollutants onto the plaintiffs' property. The court also declined to exercise jurisdiction under the local controversy exception, finding that the defendant sued for exacerbating the contamination by grinding asphalt was a citizen of the state where the action was originally filed, had not been fraudulently joined and was "a defendant from whom significant relief [was] sought" and "whose conduct form[ed] a significant basis for the claims asserted."

Liberty Mut. Fire Ins. Co. v. Ez-Flo Int'l, Inc.*, No. EDCV-17-228-MWF (SPx), 2017 WL 1745015 (C.D. Cal. May 3, 2017), *1453(c) pet. pending

Insurance companies acting as subrogees of their insureds sought remand of their suit alleging defects in the defendant's water supply lines. Two of the plaintiff insurance companies had brought suit on behalf of one insured seeking $412,000, but their case was consolidated with another action against the same defendant, brought by 24 insurance companies acting as subrogees of 111 homeowners seeking $4.2 million in damages, though the Superior Court did not clarify whether the consolidation was for pretrial purposes only. After the plaintiffs filed an amended complaint seeking monetary relief as subrogees for 145 homeowners for claims totaling $6.6 million, the defendant removed under CAFA. Judge Michael W. Fitzgerald of the U.S. District Court for the Central District of California granted the plaintiffs' motion for remand, holding that the 26 insurance companies did not satisfy CAFA's "mass action" provision because the phrase "100 or more persons" in that provision refers to "actual plaintiffs in a case" — that is, the 26 insurance companies, not their insureds. The court further held that the defendant's removal was timely because it was not clear until the amended complaint was brought by all plaintiffs that the consolidation was for more than only pretrial purposes.

Eads v. Kohl's Dep't Stores, Inc.*, No. 5:16-cv-12642, 2017 WL 1712526 (S.D. W. Va. May 2, 2017), *1453(c) pet. denied

Judge Irene C. Berger of the U.S. District Court for the Southern District of West Virginia granted a motion to remand this putative class action in which the plaintiff alleged that the defendants sent her debt collection letters without a notice that the debt was time-barred, as required under West Virginia law. In response to the plaintiff's motion to remand, the defendants submitted a declaration stating that 1,743 West Virginia accounts contained time-barred debt, each account's debtholder was sent a collection letter without a disclaimer and the aggregate balance of those accounts was approximately $5.7 million. The court found this insufficient to satisfy CAFA's amount-in-controversy requirement, explaining that the full account balances were not at stake because the defendants could not expect to recoup complete balances for time-barred debt.

***MD Haynes, Inc. v. Valero Mktg. & Supply Co.*, No. 2:17-CV-6, 2017 WL 1397744 (S.D. Tex. Apr. 19, 2017)**

Judge Hilda G. Tagle of the U.S. District Court for the Southern District of Texas granted the plaintiffs' motion to remand in this class action alleging that the defendants' negligent conduct caused municipal tap water to be contaminated. The parties did not dispute that the case met the threshold requirements for establishing federal jurisdiction under CAFA. However, the plaintiffs argued that the case fell within the statute's local controversy exception because two of the defendants were Texas citizens. The defendants claimed that remand was improper because the plaintiffs failed to allege specific facts regarding the conduct of any local defendant and simply lumped the alleged conduct of all the defendants together. The court disagreed, holding that the local controversy exception applied because the plaintiffs' complaint alleged that the events leading to the contamination of the water occurred at one of the Texas defendants' plants. Thus, the court remanded the case to Texas state court.

McGraw v. GEICO Gen. Ins. Co.*, No. C16-5876BHS, 2017 WL 744594 (W.D. Wash. Feb. 27, 2017), *amended and superseded by* 2017 WL 1386085 (W.D. Wash. Apr. 18, 2017), *1453(c) pet. pending

Judge Benjamin H. Settle of the U.S. District Court for the Western District of Washington granted the plaintiff's motion to remand its action alleging the defendant failed to pay its policyholders' diminished value loss under underinsured motorist coverage. The defendant removed the matter to federal court, claiming that although the potential class claims amounted to $4,645,038.66, the $5 million CAFA jurisdictional limit would be met because the class would be entitled to attorneys' fees.

The defendant cited the U.S. Court of Appeals for the Ninth Circuit 25 percent attorneys' fees benchmark for class actions, the plaintiff's retainer agreement with her attorney and *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wash. 2d 37 (1991) (*en banc*).

In the first remand order, the court rejected the defendant's reliance on the Ninth Circuit benchmark and the retainer agreement providing for 33 percent of gross profits to counsel as a basis to increase the amount in controversy, since these fees would only be paid out of any settlement or damage award. The court also noted that under *Olympic Steamship*, attorneys' fees are awarded when the insurer improperly denies coverage — but not when the insurer merely disputes the value of the claim — and that the instant action was a claim dispute, so fees were unavailable. After the defendant moved for reconsideration, the court amended its remand order to hold that if the action was indeed a "coverage" dispute, the issue of coverage triggering the possibility of attorneys' fees under *Olympic Steamship* was apparent from the face of the complaint, and the defendant failed to raise it in its initial removal action as required. The court also held that despite the plaintiff's inclusion of the issue of coverage in its complaint, it was more reasonable to assume that the allegations disputed the value of the claim and not coverage, thereby rendering *Olympic Steamship* fees unavailable altogether.

***McLawhorn v. GEICO Indem. Co.*, No. 8:17-cv-156-T-33AEP, 2017 WL 1277744 (M.D. Fla. Apr. 6, 2017)**

Judge Virginia M. Hernandez Covington of the U.S. District Court for the Middle District of Florida granted the plaintiff's motion to remand in this action, which involved claims that the defendant failed to provide proper notice of a bodily injury exclusion in certain insurance policies, as required by Florida law. The plaintiff sought both a determination of her coverage and a judgment declaring that the defendant failed to comply with Florida law. The court held that the value of the relief sought was too speculative and imprecise to satisfy CAFA's amount-in-controversy requirement. The court refused to extrapolate the plaintiff's situation to all putative class members because everyone was not equally confused about the extent of their coverage when purchasing insurance. Moreover, the court explained that it could not estimate the subset of putative class members who were both confused about their coverage and who incurred liability for causing a bodily injury in a collision. Nor could it determine the number of class members who were in accidents for which bodily injury claims were made against them by the other driver. Finally, the court found that the value of declaratory relief was speculative for class members who did not make claims under their policies. Thus, the value of the relief sought was not "sufficiently measurable and certain" to satisfy the amount-in-controversy requirement.

***Animal Legal Def. Fund v. Hormel Foods Corp.*, No. 16-1575 (CKK), 2017 WL 1283411 (D.D.C. Apr. 5, 2017)**

Judge Colleen Kollar-Kotelly of the U.S. District Court for the District of Columbia granted the plaintiff's motion to remand to state court, holding that diversity jurisdiction was lacking and class action jurisdiction under CAFA did not apply. The plaintiff brought this action on behalf of the general public against the defendant meat producer, alleging violations of the District of Columbia's consumer protection laws in connection with the defendant's "Natural Choice" advertising campaign. According to the court, the plaintiff failed to cite any authority requiring the plaintiff's case for injunctive relief, brought pursuant to the consumer protection statutes in D.C. rather than pursuant to Rule 23, be treated as a "class action." The court also found that diversity jurisdiction was lacking because it refused to measure the amount in controversy based on the cost of compliance with the requested injunctive relief. According to the court, such an approach would violate the nonaggregation principle, under which "separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement."

***Iglesias v. Welch Foods Inc.*, No. 17-cv-00219-TEH, 2017 WL 1227393 (N.D. Cal. Apr. 4, 2017)**

The plaintiff sought remand of a consumer class action that alleged that the defendants falsely represented that their fruit snacks did not contain any preservatives in violation of California consumer protection statutes, arguing that judicial estoppel prevented the defendants from removing the action under CAFA. Judge Thelton E. Henderson of the U.S. District Court for the Northern District of California agreed. Because the defendants had successfully argued that the plaintiffs in an earlier class action asserting the same claims in the Eastern District of New York lacked Article III standing to pursue injunctive relief, the court held that it was "clearly inconsistent" for the defendants to now seek removal of the instant plaintiff's claims for injunctive relief. The court also concluded that allowing the defendants to obtain federal jurisdiction under CAFA would permit them to forum shop and obtain an "unfair advantage" by seeking an outright dismissal of the injunctive relief claim for lack of Article III standing rather than litigating the claim on the merits. Because the defendants were judicially estopped from litigating the case in federal court, the court granted the motion to remand.

***Archavage v. Prof'l Account Servs., Inc.*, No. 3:16-CV-00319, 2017 WL 1162911 (M.D. Pa. Mar. 29, 2017)**

U.S. Magistrate Judge Joseph F. Saporito, Jr. of the U.S. District Court for the Middle District of Pennsylvania granted the plaintiff's motion to remand his action brought against the defendant debt collector for, *inter alia*, fraud and violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law. Magistrate Judge Saporito found that the defendant failed to prove diversity of citizenship because defendant PAS, indisputably incorporated under Tennessee law, failed to contest the plaintiff's allegation that it had a principal place of business in Pennsylvania, and the plaintiff limited its putative class to no more than 100 Pennsylvania citizens. The court further found that the defendant failed to demonstrate that the amount in controversy exceeded $5 million, as required by CAFA. The court looked to the value the defendant placed on the case when it offered the named plaintiff $8,000 and $11,000 on different occasions to settle the claim, holding that even multiplying the proposed settlement amount by 100 potential class members "falls woefully short of the threshold to invoke federal court jurisdiction even if attorney's fees and punitive damages were added in."

***Petkevicius v. NBTY, Inc.*, No. 3:14-cv-02616-CAB-(RBB), 2017 WL 1113295 (S.D. Cal. Mar. 24, 2017)**

Judge Cathy Ann Bencivengo of the U.S. District Court for the Southern District of California *sua sponte* dismissed the plaintiff's case for lack of subject matter jurisdiction for failure to meet the CAFA jurisdictional minimum, holding that a plaintiff has the same burden to establish CAFA jurisdiction as a defendant facing a motion to remand from a plaintiff. Both parties argued that the court had jurisdiction over the plaintiff's claims, but the court nonetheless held that the plaintiff's threadbare recitation that the amount in controversy exceeded $5 million was insufficient to establish jurisdiction. The matter arose from the defendants' allegedly false statements about the health benefits of its Gingko biloba products. The plaintiff asserted claims for violations of California consumer protection laws and breach of express warranty on behalf of a putative California class of purchasers of the defendants' product. Upon review of the plaintiff's motion for class certification, the court concluded that the defendants' California retail sales of Gingko biloba products when the original complaints were filed only amounted to $3.2 million. The court rejected the defendants' invitation to include amounts attributable to a multistate class already dismissed for lack of standing, because the named plaintiff never had standing to assert those claims on behalf of the multistate class and thus the court never had jurisdiction over those claims. The court further rejected the parties' contention that the amount-in-controversy should include damages from purchases after the complaints were filed. Further, the court held that punitive damages could not be included, as the plaintiff failed to make even conclusory allegations or provide evidence justifying a potential punitive award.

Brinkley v. Monterey Fin. Servs., Inc.*, No. 16cv1103-WQH-WVG, 2017 WL 1094062 (S.D. Cal. Mar. 23, 2017), *1453(c) pet. pending

Judge William Q. Hayes of the U.S. District Court for the Southern District of California remanded an action brought against a California corporation pursuant to the home-state exception to CAFA based on the plaintiff's showing that at least two-thirds of the proposed class members were also citizens of California. The plaintiff offered expert analysis to show that at least two-thirds of the proposed class members were California citizens and invoked the presumption of "continuing domicile" to establish their citizenship. The court reasoned that the plaintiff's presumption of continuing domicile was strengthened by the expert analysis of additional evidence of voter registration and historical address information for a randomly selected sample of the class list. The defendants did not present evidence to rebut the plaintiff's contention that the average residency of the proposed class members ranged from 13.5 to 20.91 years. Thus, the plaintiff met her burden to demonstrate that the home-state exception applied.

***Horton v. Jefferson Capital Sys., LLC*, No. 5:16-cv-08949, 2017 WL 1095058 (S.D. W. Va. Mar. 22, 2017)**

Judge Irene C. Berger of the U.S. District Court for the Southern District of West Virginia granted the plaintiff's motion to remand in this suit alleging that the defendants sent debt collection letters that did not include disclaimers that the debt was time-barred, as required under West Virginia law. Attempting to show that CAFA's class size and amount-in-controversy requirements were met, one defendant submitted a declaration claiming that more than 100 West Virginia accounts received allegedly improper collection letters and that there were at least 10,000 West Virginia accounts with time-barred debt (with an aggregate balance over $5.6 million). The court deemed this insufficient. First, with respect to class size, the court explained that the defendant incorrectly assumed that injunctive relief would affect all West Virginia accounts, when in fact the plaintiff's request for debt cancellation applied only to accountholders who had received disclaimer-free notices for expired debt — and the defendant "provided no information regarding the number of account holders who fall within the Plaintiff's class definition." Second, with respect to the amount in controversy, the court disagreed with the defendant that it could be liable for the face value of the time-barred accounts, finding instead that the defen-

dant's possible lost-opportunity costs in ceasing to attempt to collect the debts constituted the appropriate value for this issue. Thus, the court determined that the defendant had not shown that CAFA's requirements were met and remanded the case.

***Bekkerman v. California Bd. of Equalization*, No. 2:16-cv-00709-MCE-EFB, 2017 WL 1063608 (E.D. Cal. Mar. 20, 2017)**

The plaintiffs brought a consumer class action against cellphone carriers and various California state entities, alleging that although they received a discount on their cellphones as part of a "bundled" package including cellular service from the carrier, they were charged sales tax based on the unbundled price of the phone. The plaintiffs argued that the tax code provision imposing the sales tax was void and sought to force the defendant cellphone carriers to apply to the defendant State Board of Equalization for a refund on behalf of the class. After the case was removed by one of the carriers, the plaintiffs and the state of California sought remand. Judge Morrison C. England, Jr. of the U.S. District Court for the Eastern District of California held that the suit was encompassed by the Tax Anti-Injunction Act, which does not permit any suit involving state taxes to be maintained in federal court. The court further held that principles of federal/state comity mandated that federal courts refrain from entertaining suits that risk disrupting state tax administration. Finally, the court rejected the carriers' reliance on CAFA as a basis for federal jurisdiction due to CAFA's exemption if the "primary defendants" are state governments or agencies that can raise 11th Amendment defenses. Noting that the exemption is directed to the defendants that are the real "targets" of the lawsuit, the court held that the defendant state entities were the primary defendants because they charged and collected the allegedly illegal tax and would have to refund the taxes if the plaintiffs prevailed. Thus, CAFA could not provide a basis for removing the case to federal court, and remand was appropriate.

***Hamilton v. Raleigh Gen. Hosp., LLC*, No. 5:16-CV-10035, 2017 WL 833050 (S.D. W. Va. Mar. 2, 2017)**

Judge Irene C. Berger of the U.S. District Court for the Southern District of West Virginia granted a motion to remand this putative class action alleging that the defendants overcharged the plaintiff and others for copies of medical records. The complaint described the class as "all persons who: (1) requested copies of their medical records from Defendants and (2) were invoiced for the services provided by Defendants to obtain their medical records in excess of the amount allowed by" West Virginia law. The removing defendant argued that "all persons" should be read literally, implicating approximately 80,000 statewide requests for records to any one of the defendants in the relevant time period, resulting in more than $7 million in invoices and more than $5.5 million in payments. The court agreed with the plaintiff, however, that when read as a whole, the complaint was brought only on behalf of patients of Raleigh General Hospital, and separate records requests to the other defendants were inapposite. Applying this interpretation of the complaint, the court found that the amount-in-controversy requirement was not met and therefore remanded the action.

The Class Action Chronicle

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

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