Skadden

The Class Action Chronicle

This edition focuses on rulings issued between May 15, 2017, and August 15, 2017. In this issue, we cover four decisions granting motions to strike/dismiss class claims, five decisions denying such motions, 27 decisions denying class certification or reversing grants of class certification, 24 decisions granting or upholding class certification, 10 decisions denying motions to remand or reversing remand orders pursuant to the Class Action Fairness Act (CAFA), and nine decisions granting motions to remand or finding no jurisdiction under CAFA that were issued during the three-month period covered by this edition.

Class Certification Decisions

Decisions Granting/Affirming Motion to Strike

***Kline v. Mortgage Electronic Registration Systems, Inc.*, No. 16-3932, 2017 WL 3263745 (6th Cir. Aug. 1, 2017)**

A unanimous panel of the U.S. Court of Appeals for the Sixth Circuit (Gibbons, Rogers and Donald, JJ.) held that the district court did not abuse its discretion by striking class claims and declining to reopen discovery after the plaintiff missed his deadline to file a motion for class certification. The panel concluded that the plaintiff had not given a reasonable excuse for why he failed to file a class certification motion in a timely manner, noting that the plaintiff had not made any request before the class certification deadline for that deadline to be extended. Instead, the plaintiff only requested a status conference to discuss certain newly produced documents without reference to the class certification deadline, and he had not, even on appeal, presented any arguments as to how the belated discovery production had any effect on his class claims.

***Oom v. Michaels Cos.*, No. 1:16-cv-257, 2017 WL 3048540 (W.D. Mich. July 19, 2017)**

In a case over the use of tape in mounting and framing artwork for preservation, Judge Paul L. Maloney of the U.S. District Court for the Western District of Michigan struck the class allegations on the defendant's motion. The putative class included individuals who purchased preservation mounting but who did not receive it, which rendered the class nonascertainable: Class membership would be determined through individual

inquiries, including physical inspections of each piece of art, that could not be avoided without making the class overbroad. The court also held that there was no typicality, commonality or predominance because the in-store signage, representations and reasons for purchasing preservation mounting varied. Indeed, the court noted, the named plaintiffs could not even prove their own 25 claims using common proof, let alone the claims of putative absent class members.

***Martinez v. TD Bank USA, N.A.*, No. 15-7712(JBS/AMD), 2017 WL 2829601 (D.N.J. June 30, 2017)**

Judge Jerome B. Simandle of the U.S. District Court for the District of New Jersey granted a motion to strike class allegations in a putative class action where the plaintiff alleged that the defendants violated, *inter alia*, the Telephone Consumer Protection Act (TCPA) by placing telephone calls in connection with the defendants' efforts to collect consumer debts. The court concluded that the class definition — which included "individuals called without their prior express consent" — was an improper "fail-safe class" because it sought to create a class consisting only of individuals to whom the defendants were necessarily liable under the TCPA. The court reasoned that the proposed class would require extensive fact-finding to determine whether the putative class members failed to provide express prior consent to be called. Accordingly, the court struck the plaintiff's class allegations.

***Martinelli v. Johnson & Johnson*, No. 2:15-cv-01733-MCE-DB, 2017 WL 2257171 (E.D. Cal. May 22, 2017)**

Judge Morrison C. England, Jr. of the U.S. District Court for the Eastern District of California granted the defendant's motion to deny nationwide class certification of a class of purchasers of Benecol Spreads, challenging the label representations that the products contained no trans fats or trans fatty acids. The court held that, under California's choice of law rules, the plaintiff's nationwide claims would require application of the laws of all 50 states, as the claims involve non-California residents and out-of-state transactions. The court determined that there were material differences between California laws and other states' laws on breach of warranty, unjust enrichment, negligent representation, consumer protection and fraud; that those states have an interest in applying their laws, and California's interests were attenuated. The court agreed to consider the pre-emptive motion before discovery was complete and before the plaintiff filed her certification motion, noting that no additional discovery would reveal a scenario in which California law could be applied to all of the class members' claims.

Decisions Denying Motions to Strike

***Johnson v. Ally Financial Inc.*, No. 1:16-CV-1100, 2017 WL 3433689 (M.D. Pa. Aug. 10, 2017)**

Judge Christopher C. Conner of the U.S. District Court for the Middle District of Pennsylvania denied the defendant's motion to strike class allegations pertaining to the defendant's telephonic debt collection practices. The plaintiff sought to certify two subclasses: (1) an "autodialer" subclass of putative class members who received an unconsented call from the defendant with the aid of an automatic telephone dialing system; and (2) a "wrong number" subclass of putative class members whom the defendant dialed using an automated telephone dialing system when it had intended to call a different person. The court first concluded that the defendant did not demonstrate that the plaintiff's autodialer subclass was facially uncertifiable. Specifically, the court disagreed that the putative class was an impermissible "fail-safe" class, explaining that the defendant's business records could be used to determine whether putative class members fell within the class definition. The court also held that discovery was necessary to determine whether the wrong number subclass impermissibly contained members with disparate claims.

***Greene v. Gerber Products Co.*, No. 16-CV-1153 (MKB), 2017 WL 3327583 (E.D.N.Y. Aug. 2, 2017)**

Judge Margo K. Brodie of the U.S. District Court for the Eastern District of New York denied the defendant's motion to strike nationwide class allegations in this action against the manufacturer of an infant formula that allegedly misrepresented that the formula would reduce the risk of allergies. The defendant argued that individual factual issues and differences among relevant state laws defeated commonality and predominance. The court noted that motions to strike class allegations are "rarely successful" and often "premature" and accordingly held that determining whether Rule 23's requirements were satisfied should await the class certification stage — "when a more complete factual record can aid the Court in making th[e] determination." The court also noted that before class discovery, it could not determine how many states' laws would be implicated in the action and how those laws varied. Because the plaintiffs' theory for class certification was not yet foreclosed, the court deemed it inappropriate to strike the class allegations.

***Victorino v. FCA US LLC*, No. 16cv1617-GPC(JLB), 2017 WL 3149591 (S.D. Cal. July 25, 2017)**

The defendant moved to deny certification of a class of California consumers seeking damages and injunctive relief under various California consumer statutes, alleging that certain Dodge

Dart vehicles were equipped with defective manual transmission systems. Judge Gonzalo P. Curiel of the U.S. District Court for the Southern District of California denied the motion. The defendant argued that the plaintiffs' counsel violated an ethical obligation under California state law requiring an attorney to communicate to a plaintiff all settlement offers, and were thus inadequate. Applying Rule 23(g), the court held that the plaintiffs' counsel demonstrated that they had done substantial work in investigating claims in the case, and that they were highly qualified and competent based on their significant experience litigating class actions. The plaintiffs argued that the settlement offer was invalid as a matter of law and thus did not have to be communicated, and would have been rejected anyway. The court concluded that while the plaintiffs' counsel was obligated to communicate "any" settlement offer regardless of validity under California Rule of Professional Conduct 3-510, the failure to communicate such an offer by itself does not demonstrate inadequacy of counsel under Rule 23(a)(4). While the failure to convey the offer raised questions as to the plaintiffs' counsel's integrity and trustworthiness to represent the interest of the class, the court concluded that the plaintiffs' counsel had reasons (though ultimately incorrect) to believe they did not need to communicate the settlement offer, and noted that the defendant failed to point to other acts of misconduct rendering class counsel inadequate. However, the court noted that discovery was still ongoing, and denied the motion subject to the adequacy of counsel being raised again in conjunction with the plaintiffs' motion for class certification.

***In re Pella Corp. Architect & Designer Series Windows Marketing, Sales Practices & Products Liability Litigation*, No. 2:14-MN-00001-DCN, 2017 WL 3118025 (D.S.C. July 21, 2017)**

In this multidistrict litigation (MDL) proceeding involving allegedly defective windows, Judge David C. Norton of the U.S. District Court for the District of South Carolina refused to issue an order pre-emptively denying certification of all class claims pending in the MDL. The defendant's motion to deny class certification in all MDL cases arose from a prior MDL order rejecting certification in two exemplar class actions, which involved breach of express warranty claims under the laws of New York and Wisconsin, respectively. The MDL court held that certification was inappropriate in both cases because individual questions related to whether the alleged defect caused each proposed class member's window problems and whether he or she received warranty relief for those problems. The defendant then moved to apply that decision to all of the remaining class actions in the MDL, arguing that "stare decisis provides a sufficiently strong foundation for preemptively denying class certification in this MDL." The court denied the motion, holding that even if it were possible to "preemptively deny class certification motions," such relief should only be granted in "rare circumstances" where the "defendant has made an exceptionally strong showing that future" attempts at class certification "would be futile." The MDL court noted that the defendant could not make such a showing given that other plaintiffs could potentially "avoid some of the individualized inquiries that concerned the court in [the exemplar cases]" by, for example, seeking to certify different causes of action with different elements. The court also noted that New York and Wisconsin law raised certain individualized issues related to affirmative defenses that "would not apply" in other states. The court held that because these potential arguments "have not been fully explored," it would be "imprudent — if not unconstitutional — to deny the remaining plaintiffs the opportunity to advance" them.

***Gibson v. Confie Insurance Group Holdings, Inc.*, No. 2:16-cv-02872-DCN, 2017 WL 2936219 (D.S.C. July 10, 2017)**

In this action in which the plaintiffs alleged that the defendant insurers conspired to double-charge consumers who missed payment deadlines on their automobile policies, Judge David C. Norton of the U.S. District Court for the District of South Carolina granted in part and denied in part the defendants' motions to dismiss and denied their motion to strike class allegations. The defendants moved to strike the class allegations on the grounds that they were overbroad because they included individuals who had different policies or whose policies had lapsed, and lacked common questions because the claims required individual inquiries or did not allege an injury in fact. The court rejected these arguments as premature, explaining that "[t]he issues ... the ... motion to strike calls into question — such as the commonality of questions of law or fact for members in the proposed subclasses — are the same issues that could be decided in a future motion for class certification."

Decisions Rejecting/Denying Class Certification

***Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460 (6th Cir. 2017)**

A unanimous panel of the U.S. Court of Appeals for the Sixth Circuit (Suhrheinrich, Sutton and McKeague, JJ.) affirmed class certification denial in a junk fax case alleging Telephone Consumer Protection Act (TCPA) violations. The trial court had denied class certification, reasoning that it would be impossible to identify class members except through the use of individual affidavits (there was no log of recipients of the junk faxes) and determining whether the junk fax was consented to would "require manually cross-checking 450,000 potential consent

forms." In upholding the ruling, the appellate court explained, "To our knowledge, no circuit court has ever mandated certification of a TCPA class where fax logs did not exist, and we decline to be the first."

***Rahman v. Mott's LLP*, No. 15-15579, 2017 WL 2858805 (9th Cir. July 5, 2017)**

The U.S. Court of Appeals for the Ninth Circuit (Schroeder and Rawlinson, JJ., and Stafford, district judge sitting by designation) affirmed the lower court's order denying certification of a class of California consumers of apple juice labeled "No Sugar Added" (discussed in the spring 2015 *Class Action Chronicle*). The plaintiff had sought certification of injunctive relief and damages classes, but only with respect to liability issues under Rule 23(c)(4). The lower court refused, holding that the plaintiff failed to articulate why a bifurcated proceeding would be more efficient or desirable, and was vague as to whether he intended to later certify a damages class, allow class members to individually pursue damages or had some other undisclosed plan for resolving the case. Because the plaintiff had ample opportunity to establish that certification of a liability-only class would materially advance the litigation, the Ninth Circuit held that the lower court did not abuse its discretion in denying the plaintiff's motion.

I*n re Celexa & Lexapro Marketing & Sales Practices Litigation*, MDL No. 09-02067-NMG, 2017 WL 3495694 (D. Mass. Aug. 15, 2017)

Judge Nathaniel M. Gorton of the U.S. District Court for the District of Massachusetts denied a motion to certify a class of individuals who purchased Celexa and Lexapro antidepressants for patients under the age of 18 and alleged a fraudulent off-label marketing scheme aimed at inducing purchase of the drugs for pediatric use, prior to approval by the Food and Drug Administration. The plaintiffs sought reimbursement under the Racketeer Influenced and Corrupt Organizations Act and other theories, claiming that the drugs were not efficacious for treatment of pediatric depression. The court determined that individualized inquiries were needed to establish but-for causation and injury. On but-for causation, the record indicated that not every doctor was exposed to or influenced by the alleged off-label marketing, necessitating individualized inquiries. On injury, the evidence showed there was some support for pediatric efficacy of the drugs, which would necessitate case-by-case inquiries to determine whether off-label prescriptions had actually been ineffective. The court also noted that damages and statute of limitations questions posed additional individualized issues, further supporting denial of class treatment. The court also refused to certify an issues class as to liability in light of the individualized issues predominating with respect to causation and efficacy.

Legg v. PTZ Insurance Agency, Ltd.*, No. 14 C 10043, 2017 WL 3531564 (N.D. Ill. Aug. 15, 2017), *23(f) pet. pending

Judge Robert W. Gettleman of the U.S. District Court for the Northern District of Illinois granted the defendants' motion to strike the plaintiffs' class allegations and denied the plaintiffs' motion to certify the class related to alleged violations of the Telephone Consumer Protection Act (TCPA). The plaintiffs alleged that the defendants violated the TCPA by placing unsolicited advertising robocalls and telemarketing calls to the plaintiffs' cellular phones. The allegations related to the process of pet adoption where the adopters provided contact information and may have "opted in" to receiving communications from the defendants as part of that process. On review, the court focused on the predominance requirement of a Rule 23(b)(3) class and noted that "generally," when the defendant provides specific evidence showing that a significant percentage of the putative class consented to receiving calls, issues of individualized consent predominate. Here, the defendants supplied affidavits from adopters who stated that they agreed to and expected to receive calls on their cellular phones from the defendants. The defendants also submitted affidavits of shelter employees who stated that after taking the adopters' cellphone numbers, the employees told the adopters to expect to receive communications from the defendants. This evidence convinced the court that a trial would be "consumed and overwhelmed" by testimony from each class member and shelter employee to determine whether the class member consented to receive the calls in question. Accordingly, the court found that the proposed class failed the predominance requirement of Rule 23(b)(3) and granted the defendants' motion to strike class allegations and denied the plaintiffs' motion to certify a class.

***Garcia v. Portfolio Recovery Associates, LLC*, No. 15-3685 (NLH/JS), 2017 WL 3439203 (D.N.J. Aug. 9, 2017)**

Judge Noel L. Hillman of the U.S. District Court for the District of New Jersey denied the plaintiff's motion for class certification in this action alleging that the defendant violated the Fair Debt Collection Practices Act by filing collection lawsuits without intending to prove its claims. The court held that commonality and predominance were not satisfied for several reasons. First, although the defendant had written Standard Operating Procedures governing legal recovery of debts, the policy itself provided that law firms would make decisions based on individual account characteristics. Second, the plaintiff's evidence did not support the inference that the defendant did not comply with its written policy of litigating based on individualized assessments. Lastly, the undisputed fact that the defendant encouraged its lawyers to explore and pursue settlement throughout all stages of a suit was consistent with an intent to litigate worthwhile cases based on individualized assessments.

Emilio v. Sprint Spectrum L.P.*, No. 11-CV-3041 (JPO), 2017 WL 3208535 (S.D.N.Y. July 27, 2017), *23(f) pet. pending

Judge J. Paul Oetken of the U.S. District Court for the Southern District of New York denied class certification in this action alleging that a telecommunications holding company violated the Kansas Unfair Trade and Consumer Protection Act by misrepresenting a discretionary charge as a mandatory tax imposed on customers by the state of New York. The court held that typicality and commonality (which it noted "tend to merge") were not satisfied because it was unclear that the plaintiff — who had testified that he would have paid the premium whether or not it was described as a tax or a surcharge — had suffered an actual injury. In addition, the court found that predominance was not satisfied because the plaintiff continued to pay his bill despite being aware of the surcharge, whereas other putative class members did not. The court explained that this difference could "introduce individualized damages calculations that could predominate over the common damages claims."

***King v. Homeward Residential, Inc.*, No. 3:14-CV-00183 BSM, 2017 WL 3205477 (E.D. Ark. July 27, 2017)**

Chief Judge Brian S. Miller of the U.S. District Court for the Eastern District of Arkansas denied the plaintiff's motion to certify a class alleging claims of unjust enrichment and conversion. The plaintiff alleged that she maintained a mortgage contract that gave her the right to purchase insurance for her home and charge her for it if she allowed the insurance to lapse or become inadequate and that the defendant mortgage servicers wrongfully force placed insurance on her home twice. "Essentially," the plaintiff brought two distinct claims: that she should not have been double-billed for insurance because the defendants knew that she did not let her insurance lapse and that the force place insurance premiums were "excessively high" due to collusive and anti-competitive practices. The proposed class included anyone who had insurance force placed by the defendants regardless of whether the insurance policy had lapsed and regardless of what type of real estate the mortgage or deed of trust secured. On review, the court noted that commonality, typicality and adequacy presented problems. Because the plaintiff admitted that the defendants had the contractual right to force place insurance on proposed class members whose insurance lapsed, that presented a "material difference" between her claim for being double billed and the claims of other class members whose insurance lapsed. The court likened this to "comparing apples to oranges" and thus found that the plaintiff's claims were not common or typical of the proposed class and she was therefore an inadequate representative. The plaintiff also failed to satisfy Rule 23(b), in part because analysis of the "true" cost of insurance would require many individual questions regarding the class members and type of property insured. Accordingly, the court denied the motion for class certification.

***Center City Periodontists, P.C. v. Dentsply International, Inc.*, No. 10-774, 2017 WL 3142119 (E.D. Pa. July 24, 2017)**

Judge C. Darnell Jones II of the U.S. District Court for the Eastern District of Pennsylvania denied the plaintiffs' motion to certify a putative class of dentists and periodontists asserting claims for breach of express warranty arising from alleged deficiencies in the design and labeling of various models of the Cavitron ultrasonic scaler. The court held that the typicality, adequacy, numerosity, predominance, superiority and ascertainability requirements had not been met. For example, the court found that the defendant raised several plaintiff-specific defenses that undermined typicality and adequacy, such as that some plaintiffs may have relied on their professional knowledge rather than the defendant's representations. The court also found that numerosity was not met because the plaintiffs provided no evidence of their contention that there were approximately 1,000 putative class members. Lastly, the court held that predominance was not satisfied because the plaintiffs could not provide classwide proof of awareness or reliance on the defendant's alleged misrepresentations. Likewise, causation could not be proven on a classwide basis because individualized inquiries would have been necessary to determine what the class members knew about the alleged deficiencies, when they knew it and where they found the information.

***Hernandez v. Midland Credit Management, Inc.*, No. 15-CV-11179, 2017 WL 3130644 (N.D. Ill. July 24, 2017)**

Judge Joan B. Gottschall of the U.S. District Court for the Northern District of Illinois denied the plaintiff's motion for class certification related to claims that the defendant violated the Fair Debt Collection Practices Act (FDCPA). The plaintiff alleged that he received a form collection letter that was misleading under the FDCPA because it falsely and misleadingly implied that the defendant had a right to collect court costs when it sent the form letter. However, the plaintiff alleged that under Illinois law, statutory court costs are not available before a defendant obtains a judgment. On review, the court found that the class as defined failed to satisfy the implicit ascertainability requirement of Rule 23. The class definition included those individuals to whom the defendant "sent one or more letters or other communications similar[] in ... form" to the exemplar letter. The "other communications" language, however, included an amorphous group of people, including those who received communications

via phone, and there was no objective way to decide whether a communication was "substantially similar" to the exemplar letter. The plaintiff argued that the defendant, in its discovery responses, was able to identify 3,160 substantially similar letters, likely using objective criteria. However, the criteria were not in the record, and the class definition did not use the objective criteria the defendant presumably utilized. In addition, the class definition only closed upon "the conclusion of the litigation" and contained no other ending time limitation. Because the plaintiff did not propose an alternative class definition or suggest that the court should attempt to repair the proposed definition, the court denied the plaintiff's motion to certify the putative class.

Schellenbach v. GoDaddy.com*, No. CV-16-00746-PHX-DGC, 2017 WL 2902683 (D. Ariz. July 7, 2017), *23(f) pet. pending

Judge David G. Campbell of the U.S. District Court for the District of Arizona denied certification of a class of consumers who had purchased servers through the GoDaddy website or after viewing the GoDaddy website. The plaintiffs alleged that GoDaddy failed to disclose that the server was a less effective virtualized server, not a free-standing machine, in violation of Arizona and California consumer protection laws. Because around 30 percent of the visitors to certain GoDaddy webpages saw a page where the virtualized nature of the servers was clearly disclosed, individualized inquiries would be required to determine which class members were subjected to the omission or understood they were purchasing a virtualized machine. Moreover, an individualized inquiry would be necessary to determine which members spoke with a GoDaddy representative and learned the servers were virtualized, as customers do not have a uniform buying experience when purchasing servers through GoDaddy. Thus, whether a material omission occurred, the first element of the plaintiffs' claims, was not subject to common proof. For the same reasons, reliance and materiality could not be determined on a common basis. Further, the class definition included foreign purchasers, but the plaintiffs did not present any basis demonstrating that those purchasers could assert claims under California or Arizona law. Finally, an injunctive relief class could not be certified under Rule 23(b)(2) because the claims were inherently individual, some class members were not exposed to the omission and thus could not seek an injunction, and because the plaintiffs knew the virtual nature of the server and thus could not be misled in the future.

***St. Louis Heart Center, Inc. v. Vein Centers for Excellence, Inc.*, No. 4:12 CV 174 CDP, 2017 WL 2861878 (E.D. Mo. July 5, 2017)**

Judge Catherine D. Perry of the U.S. District Court for the Eastern District of Missouri decertified a class of individuals alleging that the defendant sent junk faxes to the plaintiff and thousands of others in violation of the Telephone Consumer Protection Act (TCPA). Based on the U.S. Court of Appeals for the Eighth Circuit's recent opinion discussing the ascertainability requirement for class certification in *McKeage v. TMBC, LLC*, 847 F.3d 992 (8th Cir. 2017), and because the named plaintiff failed to provide objective criteria or common evidence for identifying potential class members, the court decertified the class. The defendant argued that the inability to identify potential class members violated the commonality, predominance and ascertainability requirements of Rule 23 because there was no evidence of exactly which fax numbers were successfully sent the relevant faxes. The plaintiff also failed to provide any theory of generalized proof of liability that could be presented to the court to make a reasonable determination of class membership. Without evidence like fax logs, the court would be required to conduct "mini-hearings" on the merits of each case to identify class members, and therefore the court found that the class was not ascertainable. The class also lacked commonality and predominance because there was no common proof to resolve the question whether members received an unsolicited fax in violation of the TCPA on a classwide basis. Accordingly, the court decertified the class.

***Todd v. Tempur-Sealy International, Inc.*, No. 13-cv-04984-JST, 2017 WL 2833997 (N.D. Cal. June 30, 2017)**

Judge Jon S. Tigar of the U.S. District Court for the Northern District of California denied the plaintiffs' motion to reconsider the court's refusal to certify a class of consumers in 10 states, alleging false and misleading representations regarding the presence of allergens in the defendants' mattresses and other bedding products (discussed in the winter *2016 Class Action Chronicle*). In denying certification, the court held that Rule 23's commonality, predominance and superiority requirements were not met. The plaintiffs challenged the court's holding as being at odds with the U.S. Court of Appeals for the Ninth Circuit's recent decision in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). The court disagreed, observing that *Briseno* was limited to whether the Ninth Circuit imposed an ascertainability requirement, and did not reach questions like predominance. The plaintiffs also complained that the court only focused on exposure to alleged affirmative misrepresentations, and did not consider the defendants' alleged omissions and implied beneficial health effects. The court held that these alternative arguments were equally "doom[ed]" by the plaintiffs' failure to demonstrate classwide exposure to the marketing campaign at issue. While acknowledging that individualized issues regarding damages cannot preclude certification, the court further observed that it was not prohibited from considering the need for individualized *liability* determinations in its superiority analysis. Finally, the court denied the plaintiffs' request to create subclasses based

on exposure to misrepresentations or omissions, because such a division would not overcome the plaintiffs' failure to show classwide exposure to the defendants' marketing.

***Abraham v. Ocwen Loan Servicing, LLC*, No. 14-4977, 2017 WL 2734280 (E.D. Pa. June 26, 2017)**

Judge John R. Padova of the U.S. District Court for the Eastern District of Pennsylvania denied the plaintiffs' motion for class certification in this action involving alleged violations of state consumer fraud laws and the Fair Debt Collection Practices Act (FDCPA). The plaintiffs sought to certify FDCPA, New Jersey and Pennsylvania classes of individuals who entered into a standard form loan modification agreement that contained a "Balloon Disclosure" provision that allegedly did not disclose the amount of the balloon payment. The court first refused to certify the FDCPA class because the plaintiffs failed to satisfy the ascertainability requirement, finding that the plaintiffs' expert did not propose a specific mechanism for determining class membership or opine that the defendant's data could show that a loan was in default. The court also held that numerosity was not satisfied for the FDCPA class because the plaintiffs did not show that a sufficient number of loans were in default that had been transferred to the defendant for servicing. As to the New Jersey class, the court held that typicality was not satisfied because the named plaintiffs did not suffer an ascertainable loss, given that New Jersey's consumer fraud laws do not allow for statutory damages. As to both the New Jersey and Pennsylvania classes, the court also held that individual issues regarding what each putative class member knew and how each would have acted "swamp[ed] the inquiry" on causation, defeating predominance. Finally, the court held that the FDCPA and Pennsylvania classes could not be certified under Rule 23(b)(2) because injunctive relief is not available under the relevant statutes.

***In re Atlas Roofing Corp. Chalet Shingle Products Liability Litigation*, No. 1:13-md-2495-TWT, 2017 WL 2501754, 2017 WL 2501755, 2017 WL 2501756, 2017 WL 2501757, 2017 WL 2492579, 2017 WL 2536794, 2017 WL 2536846, 2017 WL 2540822 (N.D. Ga. June 8, 2017)**

Judge Thomas W. Thrash, Jr. of the U.S. District Court for the Northern District of Georgia denied all motions for class certification in this multidistrict litigation of consumer class actions involving allegedly defective shingles. The court held that the plaintiffs failed to put forth an administratively feasible mechanism of identifying the defendant's shingles, given that the defendant did not sell shingles directly to homeowners and the plaintiffs failed to show that the shingles carried identifiable markings. The court went on to find that even if the plaintiffs could prove a uniform defect, individual issues of causation, notice, coverage and the statute of limitations would predominate over common questions. The court noted that because roofs fail for numerous reasons, determining causation would require individualized evidence. The court also rejected the plaintiffs' argument that finding a uniform defect would negate alternative causation, reasoning that claims for replacement costs require greater proof of causation as compared to claims for pure diminution in value, where proving that a defect existed at the time of purchase typically proves causation. The court further explained that individual issues would predominate in resolving the plaintiffs' warranty claims because the defendant's express warranty was only available when certain types of notice had been provided. The court additionally concluded that the plaintiffs' fraudulent concealment claims were not suitable for class treatment due to varying degrees of reliance and material variations in the defendant's representations to consumers. Finally, as to superiority, the court explained that these cases — involving roof replacements that could cost tens of thousands of dollars — were distinguishable from class actions for minor harms that class members would not have an incentive to individually pursue.

***Lewis v. First American Insurance Co.*, No. 1:06-cv-000478-EJL-LMB, 2017 WL 3269381 (D. Idaho Aug. 1, 2017)**

Judge Edward J. Lodge of the U.S. District Court for the District of Idaho decertified a putative class action of Idaho consumers who alleged that the defendant failed to apply a discounted rate for title insurance for refinanced properties as required under Idaho law, asserting various state statutory and common law causes of action. The court overturned a 2012 magistrate judge's order denying the defendant's prior motion to decertify, holding that the required demonstration of "reasonable proof" of a prior policy meant that the defendant's liability would rise and fall on the specific information available for each class member's transaction, and was thus highly individualized. Further, while the previous decertification order was predicated on the assumption that the plaintiff could identify class members through discovery, the plaintiff encountered substantial problems analyzing the defendant's data, as reflected by a 91 percent rate of error in the proposed class list, which led the court to conclude the case was "unmanageable as a class action." After reviewing other court decisions emphasizing the highly individualized issues inherent in title insurance refinancing rate litigation, the court concluded that decertification of the class was appropriate.

***Morales v. Kraft Foods Group, Inc.*, No. LA CV14-04387 JAK (PJWx), 2017 WL 2598556 (C.D. Cal. June 9, 2017)**

Judge John A. Kronstadt of the U.S. District Court for the Central District of California decertified a class of California purchasers of an allegedly deceptively labeled "natural cheese" product, asserting violations of various California consumer protection statutes. Noting that the presence of individualized damages cannot by itself defeat certification, the court nonetheless found the analysis for restitution in the plaintiffs' damages model was flawed because it did not measure the market value of the product either with the "natural cheese" label or without it, but instead measured how much consumers value that label. The court pointed out that an award of restitution requires a plaintiff to show not only his loss, but that the defendant gained the money lost by the plaintiff. Because the plaintiffs' analysis did not establish the money the defendant received in selling the products, it was insufficient to establish a basis for calculating restitution. However, the court ordered supplemental briefing as to whether an injunctive class under Rule 23(b)(2) could be recertified. The defendant also raised issues of manageability, but the court noted that those arguments "will arise only if the remedy stage is reached." Finally, the court rejected the defendant's arguments that opposing counsel was inadequate, noting that class counsel's delay in submitting expert reports did not cause undue prejudice to the members of the class, and rejecting as insufficient the defendant's speculation as to the basis for certain strategic decisions made by class counsel.

***In re 5-Hour Energy Marketing & Sales Practices Litigation*, No. ML 13-2438 PSG (PLAx), 2017 WL 2559615 (C.D. Cal. June 7, 2017)**

The plaintiffs sought certification of classes of consumers in six states alleging various state consumer protection claims based on purportedly deceptive energy drink labels such as "five hour energy," or providing "hours of energy." Judge Philip S. Gutierrez of the U.S. District Court for the Central District of California denied the motion. The court held that the plaintiffs failed to show that they were entitled to a classwide presumption of reliance and causation under each state's laws because they failed to demonstrate that the allegedly deceptive statements were sufficiently material to consumers. The plaintiffs relied on testimony about the defendant's marketing techniques but did not introduce any consumer market research or survey demonstrating how consumers valued the allegedly deceptive statements compared to other attributes of the product and the energy supplement market generally. The defendant's consumer survey evidence showed that the representations were not material to most or even a substantial portion of the class. Predominance was also not met because the plaintiffs failed to show that a common definition for the term "energy" prevailed among all consumers. Thus, materiality was not susceptible to common proof. The court also held that the proposed damages model in four of the six states, asserting that the products were "underfilled" with caloric energy, was divorced from the theory of liability. The plaintiffs failed to account for the value of the ingredients and packaging as compared to other caffeine drinks. The plaintiffs only accounted for the cost of the ingredients to the defendant, but the court noted that the cost of the ingredients is not the same as the value of the ingredients to the consumer, and is thus not an adequate proxy of consumer value or restitution. Thus, the court denied class certification.

Kabbash v. Jewelry Channel, Inc. USA*, No. A-16-CA-212-SS, 2017 WL 2473262 (W.D. Tex. June 7, 2017), *23(f) pet. denied

In this case, Judge Sam Sparks of the U.S. District Court for the Western District of Texas denied certification of a putative class alleging misrepresentation, unjust enrichment and violation of California consumer protection statutes against an online jewelry retailer. The plaintiff claimed that all items on the defendant's website included estimated retail values (ERVs) that did not represent the actual retail value of the products, but were instead artificially inflated numbers utilized to entice customers to buy jewelry. The plaintiff claimed that the putative class of purchasers was entitled to injunctive and monetary relief. While the court found that the requirements of Rule 23(a) — numerosity, commonality, typicality and adequacy — were satisfied, it held that the plaintiff could not satisfy Rule 23(b). The court rejected the plaintiff's bid to certify the class under Rule 23(b)(2), holding that she sought primarily monetary damages, making an injunctive relief class improper. The court also found that the class failed to satisfy Rule 23(b)(3)'s predominance requirement because each proposed class member purchased different items at different times and was exposed to different ERVs.

***Physicians Healthsource, Inc. v. Allscripts Health Solutions, Inc.*, No. 12 C 3233, 2017 WL 2406143 (N.D. Ill. June 2, 2017)**

Magistrate Judge Jeffrey Cole of the U.S. District Court for the Northern District of Illinois denied the plaintiff's motion for class certification of a junk fax case under Rule 23(a) and 23(b)(3) alleging violations of the Telephone Consumer Protection Act (TCPA) related to the faxing of advertisements that failed to comply with TCPA opt-out notice requirements. Numerosity was satisfied because the unchallenged plaintiff's evidence showed the defendants sent faxes to more than 17,000 fax numbers in one proposed class. Commonality was satisfied because the main questions in TCPA cases, including whether a given fax is an advertisement, are common to all recipients. Adequacy of representation, however, was not satisfied because the named plaintiff

suffered from "serious credibility" problems regarding two defenses uniquely applicable to the named plaintiff: permission and established business relationship. The plaintiff, a "professional class action plaintiff," admitted to the falsity of numerous interrogatory answers, and the court indicated that in the light most favorable to the plaintiff, he was "recklessly indifferent" to the truth. When pressed by counsel on his interrogatory answers, he explained that "he didn't recall if he was supposed to confirm the facts to which he was [swearing] under oath" and that he "didn't really think too much about it." The court found that the plaintiff was not an appropriate representative of the class because, at best, he was merely a lackadaisical participant in the litigation and a "figurehead" plaintiff and, at worst, perjury had been committed.

***Hargreaves v. Associated Credit Services, Inc.*, No. 2:16-CV-0103-TOR, 2017 WL 2260705 (E.D. Wash. May 23, 2017)**

The plaintiffs sought certification of two classes and two subclasses alleging the defendant judgment creditor and its attorney misrepresented information in writs of garnishment and unlawfully garnished the plaintiffs' exempt property in violation of the Fair Debt Collection Practices Act, the Washington Consumer Protection Act, and the Washington State Collection Agency Act. Chief Judge Thomas O. Rice of the U.S. District Court for the Eastern District of Washington denied the motion with leave to renew. The court held that the plaintiffs failed to satisfy the numerosity requirement by offering nothing more than mere guesswork regarding the number of potential class members. The court advised the plaintiffs that they "may utilize discovery to determine the number." The court went on to find that the remaining requirements for class certification were satisfied.

In re SFPP Right-of-Way Claims*, No. SACV 15-00718 JVS (DFMx), 2017 WL 2378363 (C.D. Cal. May 23, 2017), *23(f) pet. denied

The plaintiffs sought certification of a class of past and present owners of real property adjacent to a railroad right-of-way in California, 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 declaratory judgment, trespass, quiet title, ejectment, inverse condemnation, quasi-contract, unlawful competition and accounting. Judge James V. Selna of the U.S. District Court for the Central District of California denied the plaintiffs' motions for class certification. The plaintiffs were sufficiently numerous and identified common questions for adjudication, such as whether Union Pacific acquired rights in the subsurface, whether Kinder Morgan's pipeline fulfills railroad purposes, and whether Union Pacific knew its rights were limited. Nevertheless, the court held that typicality and adequacy could not be satisfied because of certain title issues raised by the defendants against the named plaintiffs. Moreover, predominance and superiority were not satisfied because the plaintiffs' claims require threshold legal determinations of individuals' ownership of the subsurface that require individual chain-of-title analyses. Additionally, numerous affirmative defenses such as dual easements, statute of limitations, consent, acquiescence, waiver, estoppel and laches gave rise to further individualized issues, precluding certification of a Rule 23(b)(3) class. The court also refused to certify an issues class under Rule 23(c)(4) because, having already resolved two of the three common issues as a matter of law, the thrust of the case was individual ownership, which an issues class would not help resolve.

***Verde v. Stoneridge, Inc.*, No. 6:14-CV-225, 2017 WL 2257172 (E.D. Tex. May 23, 2017)**

Judge Robert W. Schroeder III of the U.S. District Court for the Eastern District of Texas affirmed the magistrate judge's refusal to certify this putative class alleging that the defendant breached warranties to the class by selling them defective clutch interlock switches — a product installed in certain manual transmission automobiles. The court focused exclusively on the plaintiff's failure to show that the putative class would satisfy the predominance requirement of Rule 23(b)(3). Specifically, the court found that the statute of limitations and statutory notice analysis for the plaintiff's claims for breach of implied warranty of merchantability and breach of express warranty would require an individualized inquiry for each class member "to determine when the alleged defect was discovered or should have been discovered and whether each class member exercised due diligence leading up to the discovery of the alleged breach." This inquiry, the court held, was not susceptible to classwide resolution. Thus, the court affirmed the magistrate judge's ruling and refused to certify the class.

***Borg v. Phelan, Hallinan, Diamond & Jones, PLLC*, No. 8:16-cv-2070-T-33TGW, 2017 WL 2226649 (M.D. Fla. May 22, 2017)**

The plaintiff in this case allegedly defaulted on her mortgage, leading her bank to initiate a foreclosure action. In response, the plaintiff filed a class action complaint against the law firm representing her bank, alleging various violations of the Fair Debt Collection Practices Act (FDCPA). Specifically, the plaintiff sought to certify a class of persons subject to foreclosure proceedings from whom the law firm assessed charges for serving process on "unknown tenants." The plaintiff argued

that because service of process on unknown tenants was a legal "nullity," charging borrowers for that service violated the FDCPA. Judge Virginia M. Hernandez Covington of the U.S. District Court for the Middle District of Florida refused to certify the class, however, because the plaintiff lacked standing. Because the plaintiff would only incur this unknown tenant fee if she lost the foreclosure action and the state court allowed the fee to be added to the judgment, her economic injury was too abstract to create standing.

***Opperman v. Kong Technologies, Inc.*, No. 13-cv-00453-JST, 2017 WL 3149295 (N.D. Cal. July 25, 2017)**

Judge Jon S. Tigar of the U.S. District Court for the Northern District of California denied certification of a nationwide class of consumers who purchased various models of the iPhone or iPad. The plaintiffs alleged that Apple had engaged in a mass marketing campaign in which it consciously misrepresented its devices as secure, and misrepresented that personal information could not be taken without the owners' consent, in violation of California consumer protection laws. The court concluded that the plaintiffs failed to demonstrate predominance under Rule 23(b) and did not demonstrate a feasible way of measuring damages. The plaintiffs were not entitled to a classwide inference of reliance, as they failed to demonstrate that Apple's privacy-related marketing was sufficiently extensive or that class members were exposed to the allegedly misleading representations about the specific security features at issue. The court, however, rejected Apple's argument that consumers' exposure to countervailing information from Apple, which undermined the plaintiffs' privacy claims, defeated predominance. The court noted that Apple could not meet its burden to show that users actually read these materials, such as the devices' privacy policies, which consumers were especially unlikely to review. Furthermore, the court deemed the plaintiffs' damages proposal, based on a conjoint analysis survey to determine the value a consumer placed on individual features, defective. The proposed model failed to identify the specific attributes to be used in the methodology and considered the value consumers attributed to security broadly — without limitation to the two challenged security features — and thus failed the requirement that the method of proving damages be tied to the theory of liability.

Pavone v. Meyerkord & Meyerkord, LLC*, No. 15 C 1539, 2017 WL 2257200 (N.D. Ill. May 22, 2017), *23(f) pet. denied

Judge Amy J. St. Eve of the U.S. District Court for the Northern District of Illinois denied the plaintiff's motion for class certification of both statewide and nationwide classes in a putative class action alleging violations of the Driver's Privacy Protection Act (DPPA). The statewide class alleged that the defendant law firm obtained addresses from Illinois Traffic Crash Reports for the purpose of sending those persons advertising material. The nationwide class alleged that other defendants sold car accident crash reports to law firms such as Meyerkord in violation of the DPAA. To establish claims under the DPAA, a plaintiff must show that the defendant (1) knowingly obtained, disclosed or used personal information; (2) from a motor vehicle record; (3) for a purpose not permitted under the DPPA. Both the statewide and nationwide classes failed the predominance and typicality requirements. The court noted that there was no evidence of a standardized Illinois procedure as to how law enforcement officers gathered information that was then inserted into crash reports. Any trial, therefore, would be "consumed" by individual questions such as whether the individuals involved in the accident provided the officers with the relevant information or, alternatively, if the officers gathered the information from a driver's license. Not every individual in the Illinois class would have given their driver's license to the police officer creating the crash report. Because of the lack of standardized procedures in creating the accident reports, typicality was also not satisfied. Finally, injunctive relief was found to be incidental to the monetary relief sought, and certification of a Rule 23(b)(2) class was also denied.

***Stallworth v. Omninet Village, L.P.*, No. 6:16-cv-546-Orl-31DCI, 2017 WL 2226600 (M.D. Fla. May 22, 2017)**

The plaintiff in this case brought a class action lawsuit against the owners and managers of his apartment complex, alleging that a leaky air conditioner and poor ventilation in his bathroom caused repeated outbreaks of mold. The plaintiff asserted claims for breach of contract and the implied warranty of habitability, alleging that the defendants did not maintain the air conditioner in good working order, provide ventilation or properly clean up the mold. In denying the plaintiff's motion for class certification, Judge Gregory A. Presnell of the U.S. District Court for the Middle District of Florida observed that membership in the plaintiff's proposed class of current and former tenants with mold or excessive moisture in their apartments could not be ascertained by reviewing lease agreements alone. The court also rejected the plaintiff's evidence of numerosity because the survey used to identify similarly situated tenants was too vague to indicate whether someone who signed it actually suffered from mold or water intrusion issues, much less complained of property management shortcomings. Finally, the court concluded that commonality and predominance were not satisfied because neither alleged common question — (1) whether the defendants had common policies and procedures for creating a safe, mold-free living environment and (2) whether the defendants violated Florida law by failing to provide a safe living environment for all class members — was dispositive of any issue in the plaintiff's claims.

***Linehan v. AllianceOne Receivables Management, Inc.*, No. C15-1012-JCC, 2017 WL 2215783 (W.D. Wash. May 19, 2017)**

Judge John C. Coughenour of the U.S. District Court for the Western District of Washington refused to certify a class claiming violations of the Fair Debt Collection Practices Act (FDCPA), alleging that the defendant sued class members in a division of King County District Court where they did not live or where they did not sign the underlying contract. The numerosity, typicality and adequacy requirements were satisfied, but commonality and predominance were not. The court found that because the common question in the case — whether the defendant violated the FDCPA by filing in the wrong subdivision of King County District Court — had already been answered, the remaining common questions were unlikely to generate common answers for the entire class and instead presented a multitude of individual inquiries, rendering a class action inappropriate. Given that only individual inquiries remained, a class action was not a superior method of adjudicating the claims against the defendant either.

Decisions Permitting/Granting Class Certification

***Carter v. Dial Corp.*, No. 17-8009, 2017 WL 3225164 (1st Cir. July 31, 2017)**

A divided panel of the U.S. Court of Appeals for the First Circuit (Torruella and Thompson, JJ., Kayatta, J. (dissenting)) denied a Rule 23(f) petition for interlocutory review of a district court's certification of a multistate class of purchasers of the defendant's soap in a consumer protection action. The district court had ruled that the class was sufficiently ascertainable because, although sales records did not appear to be available, class membership could be established through the submission of an affidavit stating that the putative class member had purchased the soap, an approach that had been proposed by a prior panel of the First Circuit in *In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir. 2015). The majority concluded that the district court's Rule 23 analysis was not sufficiently questionable to warrant immediate review. Judge William J. Kayatta, Jr., who had dissented in *Nexium*, disagreed, arguing that the use of such affidavits raised Seventh Amendment concerns because either the defendant would have no practical ability to challenge the affidavits, or the class action would become unmanageable.

***DL v. District of Columbia*, 860 F.3d 713 (D.C. Cir. 2017)**

The U.S. Court of Appeals for the District of Columbia Circuit (Tatel, Griffith and Millett, JJ.) affirmed the district court's order granting the plaintiff's motion for class certification in this action in which former preschool-aged children with various disabilities alleged failure to provide free appropriate public education (FAPE). As discussed in the winter 2013 *Class Action Chronicle*, the D.C. Circuit had previously reversed the district court's class certification order, holding that the class had been defined too broadly under *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), because the supposedly common question of whether the class members had been denied FAPE was "only an allegation that the class members 'have all suffered a violation of the same provision of law'" that may have been violated in different ways. On remand, the district court addressed these concerns by certifying four subclasses, each defined by a distinct type of failure to provide FAPE. The D.C. Circuit held that the creation of subclasses that included reference to a "uniform policy or practice" governing a specific stage of the special education process satisfied the commonality requirement. The court also agreed with the district court that the named plaintiffs were adequate representatives because, notwithstanding the mootness of their individual claims, they remained capable representatives.

***In re Processed Egg Products Antitrust Litigation*, No. 08-md-2002, 2017 WL 3494221 (E.D. Pa. Aug. 14, 2017)**

Judge Gene E.K. Pratter of the U.S. District Court for the Eastern District of Pennsylvania denied the defendants' motion to decertify a class of direct purchasers of whole eggs it had certified in *In re Processed Egg Products Antitrust Litigation*, 312 F.R.D. 171 (E.D. Pa. 2015), discussed in the winter 2015 *Class Action Chronicle*. The court rejected the defendants' argument that the plaintiff's expert's overcharge regression and egg production modeling was invalid. It also refused to undo any of its prior conclusions because the defendants' arguments could have been raised, or were raised, prior to the court's grant of class certification.

Palombaro v. Emery Federal Credit Union*, No. 1:15-cv-792, 2017 WL 3437559 (S.D. Ohio Aug. 10, 2017), *23(f) pet. pending

Judge Susan J. Dlott of the U.S. District Court for the Southern District of Ohio certified a class of mortgage customers who alleged that the credit union received kickbacks for recommending settlement services in violation of the Real Estate Settlement Procedures Act (RESPA). After determining that the class was ascertainable and that Rule 23(a)'s numerosity, commonality, typicality and adequacy requirements were met, the court turned to Rule 23(b)(3)'s predominance inquiry. The court held that RESPA's one-year limitations period did not bar the claims through application of equitable tolling, because the documentation did not put borrowers on inquiry notice of an obligation to inquire into a potential claim. Moreover, determining applicability and liability for RESPA violations did not require individualized inquiries; for example, Emery Federal's documents, supplemented with questionnaires, could be used to establish if RESPA applied to a loan.

Pettit v. Procter & Gamble Co.*, No. 15-cv-02150-RS, 2017 WL 3310692 (N.D. Cal. Aug. 3, 2017), *23(f) pet. pending

Judge Richard Seeborg of the U.S. District Court for the Northern District of California certified a class of California purchasers of premoistened disposable cleaning wipes, asserting violations of California consumer protection laws based on allegedly deceptive representations that the wipes are "flushable." Commonality and predominance were satisfied because the plaintiff produced common evidence that the wipes are not suitable for sewers, wastewater systems and the environment to resolve the common contention that the "flushable" label is false. The court rejected the defendant's argument that the class members do not share a common understanding of the term's meaning, holding that the U.S. Court of Appeals for the Ninth Circuit's "reasonable consumer" standard does not require a "uniform understanding" of the term, only a probability that a significant portion of the relevant consumers, acting reasonably, could be misled. Moreover, the plaintiff sufficiently demonstrated that common proof could answer key questions of falsity and materiality on a classwide basis. The court also rejected the defendant's challenges to the plaintiff's damages model because those arguments went to the weight of the evidence, not certification. Typicality was satisfied despite the defendant's arguments that it made three different versions of the wipes during the class period, and the plaintiff had unique plumbing problems, because the plaintiff's claims were reasonably coextensive with the class claims. Finally, the court found adequacy satisfied, holding that the plaintiff had standing to seek injunctive relief even though she testified she did not intend to purchase the wipes in the future, because she "has a cognizable interest in a market where prices are not distorted by any misrepresentations."

***Cortes v. National Credit Adjusters, L.L.C.*, No. 2:16-cv-00823-MCE-EFB, 2017 WL 3284797 (E.D. Cal. Aug. 2, 2017)**

The plaintiff sought certification of a nationwide class of recipients of autodialed or prerecorded cellular telephone calls without their consent in violation of the Telephone Consumer Protection Act (TCPA) and federal and state debt collection laws. Judge Morrison C. England Jr. of the U.S. District Court for the Eastern District of California certified the class, finding that there was a clearly defined guide for class membership, and that records existed to establish the time, duration, and date of each incoming call to as many as 1,176 potential class members' cellular telephones during the class period. Thus, numerosity was established, as were typicality and adequacy. The court further noted that as to the TCPA claims, a core common question existed as to whether the defendant used an autodialing system or prerecorded or artificial voice message, which predominated over the subsequent issues of intent and the existence or nonexistence of prior express consent with each individual call. A class action was superior because it would not be economically feasible for each individual to pursue independent litigation. Given the defendant's failure to answer, the court also entered default judgment as to the TCPA liability issue and held in abeyance the issue of damages until after discovery has been conducted.

***Neeley v. Portfolio Recovery Associates, LLC*, No. 1:15-cv-01283-RLY-MJD, 2017 WL 3311045 (S.D. Ind. Aug. 2, 2017)**

Judge Richard L. Young of the U.S. District Court for the Southern District of Indiana granted class certification in a putative class action alleging violations of the Fair Debt Collection Practices Act (FDCPA) related to form collection letters the plaintiff received in 2014 and 2015 from the defendant. The plaintiff alleged that the letters contained a misleading statement under the FDCPA: "Because of the age of your debt, we will not sue you for it and we will not report it to any credit reporting agency." The defendant opposed class certification for three reasons: lack of standing, lack of adequacy and lack of predominance. After finding that the plaintiff had standing under the FDCPA and the U.S. Court of Appeals for the Seventh Circuit's "unsophisticated consumer" standard, the court rejected the defendant's argument regarding the plaintiff's ability to represent the class as a repackaging of its standing argument. As to predominance, the defendant argued that class treatment was inappropriate because the court would need to conduct individualized inquiries into whether each class member suffered a concrete and particularized harm. However, under the Seventh Circuit's "unsophisticated consumer" standard, it was irrelevant whether each class member was truly misled or deceived by the form letters. Predominance was a "simple inquiry" because the claims are based on a form debt collection letter sent to all members of the putative class, and whether the letter violated the FDCPA was a common question of law. Accordingly, the court granted the plaintiff's motion for class certification.

***Allard v. SCI Direct, Inc.*, No. 16-cv-01033, 2017 WL 3236448 (M.D. Tenn. July 31, 2017)**

Judge Gershwin A. Drain of the U.S. District Court for the Middle District of Tennessee certified two classes in a Telephone Consumer Protection Act action, alleging that the defendant had not received express written consent to contact putative class members using autodialing or prerecorded messages and had continued contacting class members after being asked to stop.

For both classes, the court rejected the defendant's argument that individualized determinations of consent would preclude commonality, typicality and predominance. As to the "do not call" class, the court held that consent was not a defense to the plaintiff's "do not call" claim. As to the prerecording class, the court concluded that individualized determinations of consent would not be necessary because none of the forms through which the defendant had obtained phone numbers included the disclaimer language required for consent and so the defendant did not obtain consent for its conduct. Finally, the court concluded that neither the fact that the named plaintiff might have been uniquely offended by the defendant's practice nor the fact that the plaintiff's counsel had filed a similar case against the defendant in another court for different plaintiffs would defeat adequacy.

***Grubb v. Green Tree Servicing, LLC*, No. 13-07421 (FLW), 2017 WL 3191521 (D.N.J. July 26, 2017)**

Judge Freda L. Wolfson of the U.S. District Court for the District of New Jersey granted the plaintiff's motion for class certification in this suit alleging that the defendant mortgage loan servicer violated the Fair Debt Collection Practices Act (FDCPA) by failing to effectively convey alleged debts and by providing misleading information in debt collection letters. As a threshold matter, the court determined that the plaintiff's proposed class did not constitute an impermissible "fail-safe" class because the definition utilized legally objective and nonconclusory language that did not presume putative members were entitled to relief. The court next rejected the defendant's argument that the class was not ascertainable because the defendant did not provide a sworn affidavit attesting to its claim that it could not determine from its records whether a debtor should be excluded from the class, and had already identified 9,177 consumers that fell within the class definition. Likewise, commonality and typicality were satisfied because the letters received by the plaintiff were similar in form and substance to letters sent to other class members. Lastly, the court held that predominance was satisfied because the putative class members received substantially similar debt collection letters and their claims turned on the same legal determination, *i.e.*, whether the content of the debt communications violated the FDCPA.

***Hoyte v. District of Columbia*, No. 1:13-cv-00569 (CRC), 2017 WL 3208456 (D.D.C. July 27, 2017)**

Judge Christopher R. Cooper of the U.S. District Court for the District of Columbia certified two of four of the plaintiffs' claims in this action stemming from the seizure of the plaintiffs' property incident to their arrests. The court first held that the plaintiffs' claim that they were denied a prompt and meaningful opportunity to seek the interim release of their property pending an ultimate forfeiture determination could be certified. Specifically, commonality was met because the District's civil forfeiture statute constituted a uniform policy or practice that affected all class members. Moreover, although three named plaintiffs could have received a post-seizure hearing under the relevant criminal procedure rule, the hearing would not have provided complete relief and accordingly did not render those plaintiffs' claims atypical. Lastly, predominance and superiority were satisfied because the District did not provide the required hearings to any property owners. The court next concluded that the plaintiffs' claim that the District failed to take reasonable steps to notify property owners that their property had been seized and was subject to forfeiture could also be certified. As to commonality, the court found that although the failure to provide notice was not an explicit policy, the evidence suggested that the District's failure to provide notice was sufficiently widespread to constitute a common custom or practice. The court also held that predominance and superiority were satisfied for this claim because, based on the more than 10,000 seizure records obtained in discovery, it appeared that the plaintiffs could present evidence of injury on a classwide basis without conducting individualized inquiries. Finally, the court denied class certification of the plaintiffs' remaining claims — that the Metropolitan Police Department (MPD) failed to return seized cars to their owners after it determined they were no longer subject to forfeiture and that the MPD routinely denied waivers of the requirement that property owners post a cash bond in order to challenge the forfeiture — because the plaintiffs did not sufficiently present evidence of numerosity. For example, the court found that the plaintiffs did not offer evidence showing the frequency with which the alleged car seizure injury occurred, and noted that the plaintiffs were only able to identify two plaintiffs who suffered the cash-bond injury.

***McCracken v. Verisma Systems, Inc.*, No. 6:14-cv-06248(MAT), 2017 WL 3187365 (W.D.N.Y. July 27, 2017)**

Judge Michael A. Telesca of the U.S. District Court for the Western District of New York granted class certification in this suit alleging that the defendant hospitals systematically overcharged patients who requested copies of their medical records by charging $0.75 per page for records, in excess of their actual costs and in violation of the New York Public Health Law (NYPHL). The court found that numerosity was easily satisfied because the plaintiffs established that at least 38,000 medical record requests were fulfilled, invoiced and paid during the relevant time period. The court likewise found that commonality and typicality were respectively satisfied because common questions included whether the NYPHL permitted hospitals to charge for

copies of medical records by the page and the claims arose from the same allegedly unlawful conduct. As to adequacy, the court rejected the defendants' argument that the firm representing the plaintiffs was inadequate because it "waived" the class members' claims by paying the allegedly excessive price when requesting records after the plaintiffs commenced suit. According to the court, "[w]hile the common-law voluntary payment doctrine bars recovery of payments voluntarily made with full knowledge of the facts," counsel here "had no other practical means of obtaining [the plaintiffs'] medical records." The court next held that the class was ascertainable because it was limited to patients who allegedly suffered damages by requesting copies of medical records from the defendants and were charged the allegedly excessive price — and not indigent patients who received the records without cost. Finally, the court held that common issues predominated because the sole dispute was whether the per-page price was excessive under the NYPHL.

In re Simply Orange Orange Juice Marketing & Sales Practices Litigation*, No. 4:12-md-02361-FJG, 2017 WL 3142095 (W.D. Mo. July 24, 2017), *23(f) pet. denied

Judge Fernando J. Gaitan, Jr. of the U.S. District Court for the Western District of Missouri granted the plaintiffs' motion for class certification in part and certified an issues class pursuant to Rule 23(c)(4). The named plaintiffs alleged that the defendant, The Coca-Cola Company, failed to disclose its use of added flavors in various orange juice products consistent with federal labeling regulations and that the defendant omitted the proper disclosures so that consumers were deceived into paying a premium price for those products. The plaintiffs sought certification of classes under Rule 23(b)(2) and (b)(3) or, in the alternative, under Rule 23(c)(4). As related to the 23(b)(2) class, the court found that the named plaintiffs lacked Article III standing to pursue claims for injunctive relief because none of them had alleged that they intended to purchase the defendant's orange juice in the future, and under their theory of the case, the named plaintiffs were already on notice of the defendant's practices. As related to the 23(b)(3) class, the court found that the proposed classes failed the predominance requirement. The court was not convinced that common issues predominated with respect to underlying elements of the plaintiffs' state law claims, including reliance, materiality, and/or causation. However, a 23(c)(4) class was appropriate because determining particular issues on a representative basis would prove efficient and economical. There were many common dispositive answers to central questions that could be answered in a "single stroke," including whether the components in the defendants' flavorings should be disclosed under Food and Drug Administration regulations. This was particularly appropriate given the court's history with and knowledge of the matter. Accordingly, the court certified an issues class pursuant to Rule 23(c)(4).

***Smith v. GC Services Limited Partnership*, No. 1:16-cv-01897-RLY-DML, 2017 WL 3017272 (S.D. Ind. July 17, 2017)**

Judge Richard L. Young of the U.S. District Court for the Southern District of Indiana granted class certification in a putative class action where the plaintiff alleged that the defendant sent a form collection letter that violated the Fair Debt Collection Practices Act (FDCPA) because it incorrectly informed recipients that disputes must be in writing when, in fact, oral disputes are valid. The plaintiff sought to represent a class of persons situated in Indiana who received the same form collection letter. The court held that ascertainability was satisfied because the class definition was clear and objective. In addition, predominance and commonality were satisfied because, under Seventh Circuit law, whether a form debt collection letter violates the FDCPA is judged by an objective standard known as the "unsophisticated consumer" standard. Therefore, it is not necessary that the consumer have read the letter at issue, nor is it necessary that the plaintiff actually have been misled by the letter. Because the claims are based on the same letter, whether it violated the FDCPA is a common question of law. Finally, typicality was also satisfied because all relevant injuries arose out of the same violative conduct related to the same form letter. Accordingly, the court certified a Rule 23(b)(3) class.

Cordoba v. DirecTV, LLC*, No. 1:15-CV-3755-MHC, 2017 WL 3309824 (N.D. Ga. July 12, 2017), *23(f) pet. pending

The plaintiff in this case alleged that various shortcomings in DirecTV's procedures for maintaining do-not-call lists violated the Telephone Consumer Protection Act (TCPA) and related rules and regulations, seeking to certify classes of (1) persons who received marketing calls despite being on the National Do Not Call (NDNC) Registry and (2) persons who received marketing calls despite the company's failure to maintain an internal do-not-call (IDNC) list. Judge Mark H. Cohen of the U.S. District Court for the Northern District of Georgia certified both classes, first holding that the IDNC class had standing to bring their claims even without having taken affirmative steps to avoid marketing calls because the mere receipt of telemarketing calls in violation of the TCPA constituted a sufficient harm. The court rejected DirecTV's argument that membership in either class could not be ascertained from the company's call logs

because they did not distinguish between marketing and nonmarketing calls (which would not violate the TCPA), reasoning that immunizing companies from liability in these circumstances would incentivize them to keep poor records and disobey the TCPA's clear mandate that such records be kept. The court went on to find that predominance was satisfied, concluding that many of the individualized issues DirecTV raised, including whether individual customers had arbitration agreements or established business relationships and whether phone numbers belonged to residential as opposed to business subscribers, could be resolved by "simple and objectively verifiable means."

***Hart v. BHH, LLC*, No. 15cv4804, 2017 WL 2912519 (S.D.N.Y. July 7, 2017)**

Judge William H. Pauley III of the U.S. District Court for the Southern District of New York granted the plaintiffs' motion for class certification in this consumer fraud action involving allegedly defective ultrasonic pest repellers sold by the defendant. The plaintiffs alleged that the repellers were "ineffective and worthless" and sought to certify a nationwide class asserting a claim for fraud, a multistate class asserting a claim for breach of warranty and a California-only class asserting claims under California's consumer protection laws. The court found that "[c]ommon sense compel[led] the conclusion that numerosity [was] satisfied" because the defendant sold approximately 2.48 million devices during the class period. The court also found that commonality and typicality were satisfied because the class members alleged the same misrepresentations and their claims all arose from watching or reading the same advertisements. The court further held that the class was ascertainable because the plaintiffs could "subpoena customer and purchase related information from the third party retailers to whom the devices may have been distributed" and then access the database of purchasers and their specific transactions. Finally, the court found that predominance was satisfied because all of the repellers bore the same alleged misrepresentations and "even if every class member did not see the alleged misrepresentations when purchasing the device," the relevant California statute "permits an inference of reliance if the representations are objectively material."

***Chapman v. Tristar Products, Inc.*, No. 1:16-cv-1114, 2017 WL 2643596 (N.D. Ohio June 20, 2017) and *Chapman v. Tristar Products, Inc.*, No. 1:16-cv-1114 (N.D. Ohio July 3, 2017)**

Judge James S. Gwin of the U.S. District Court for the Northern District of Ohio denied a motion to decertify a class of purchasers in three states of allegedly defective pressure cookers. (The court's certification order was discussed in the summer 2017 edition of *The Class Action Chronicle*.) The defendant argued that the plaintiffs' damages model failed the requirements of *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), because the model erroneously assumed that the pressure cookers all sold at the same price and because the plaintiffs could not determine how many cookers had been sold to the class. The court rejected this argument, concluding that *Comcast* was satisfied because the damages model (in essence, the number of cookers sold multiplied by the sale price) "fit" the liability theory that the cookers were so defective that they were worthless, entitling the class members to a full refund. But the court concluded that the problems identified by the defendant necessitated a bifurcated trial, with a class trial on liability, to be followed (if necessary) with a separate phase to decide damages, either through settlement, individual hearings or subclasses. In a separate order, the court granted a motion to strike the named plaintiffs' personal injury claims, limiting them to pursuit of economic-loss claims. The court noted that class certification had been granted based on the plaintiffs' representations that only economic loss was at issue, and that class members who wished to pursue personal injury claims had been instructed that they would need to opt out of the class to pursue those claims. It concluded that the class representatives had to be subject to the same limitation.

***Caldera v. American Medical Collection Agency*, No. 2:16-cv-0381-CBM-AJWx, 2017 WL 2812898 (C.D. Cal. June 27, 2017)**

Judge Consuelo B. Marshall of the U.S. District Court for the Central District of California certified a nationwide class alleging violations of the Telephone Consumer Protection Act based on the defendant's alleged placement of unsolicited automated telephone calls seeking to collect debts after locating phone numbers of purported debtors using a skip trace method. As an initial matter, the court rejected the defendant's argument that the named plaintiff lacked standing to seek redress for a "a bare procedural violation," finding that unsolicited telemarketing calls and messages cause injury by invading the privacy and disturbing the solitude of recipients. The court also held that the Rule 23 requirements for class certification were met. Most notably, the court concluded that commonality existed because the plaintiff's claims turned on questions capable of common resolution, including whether the defendant placed calls to class members, whether the defendant used an automated system for doing so and whether the defendant used a skip trace system to identify phone numbers. In addition, the court rejected the defendant's argument that the class was not ascertainable, finding that the U.S. Court of Appeals for the Ninth Circuit has not adopted an ascertainability requirement and, in any event, the defendant's records could be used to identify individuals who were skip traced. The court also rejected the defendant's argument that

individual questions related to whether proposed class members had consented to automated calls would predominate, noting that the defendant failed to produce any evidence that any potential class members had given such consent.

Geary v. Green Tree Servicing, LLC*, No. 2:14-CV-00522, 2017 WL 2608691 (S.D. Ohio June 16, 2017), *1292(b) pet. pending

Judge Algenon L. Marbley of the U.S. District Court for the Southern District of Ohio certified a class of recipients of six form debt collection letters from the defendant, which allegedly violated the Fair Debt Collection Practices Act (FDCPA). At the outset, the court found that the plaintiffs had Article III standing to assert FDCPA claims, reasoning that the failure to include FDCPA-required disclosures in a debt collection letter was a substantive violation of the statute, conferring the plaintiffs with Article III standing. Turning to the class certification issue, the court determined that Rule 23(a)'s four requirements were established, including that there were common questions (such as whether the defendant was a debt collector and whether the letters were subject to a bona fide error defense), which were class- or letter-wide, and not plaintiff-specific. In addition, the court determined that the named plaintiffs were adequate representatives on FDCPA claims for liability and statutory damages, even though they also had individual damages claims. Because the issues in the case were based on the contents of the six form letters, the court determined that common issues predominated on each of those letters, and thus Rule 23(b)(3) was satisfied.

***Mohamed v. American Motor Co.*, No. 15-23352-Civ-COOKE/TORRES, 2017 U.S. Dist. LEXIS 107447 (S.D. Fla. July 12, 2017), *adopting in part Mohamed v. Off Lease Only, Inc.*, No. 15-CV-23352-COOKE/TORRES, 2017 U.S. Dist. LEXIS 89031 (S.D. Fla. June 8, 2017)**

The plaintiff in this case alleged that the defendants violated the Telephone Consumer Protection Act (TCPA) by hiring a company to harvest telephone numbers from online classified ads and texting the persons who placed the ads without prior consent. Judge Marcia G. Cooke of the U.S. District Court for the Southern District of Florida granted the plaintiff's motion for class certification, although narrowing the class to persons who were contacted on a particular dialing platform. In adopting the report and recommendation of Magistrate Judge Edwin G. Torres, the court agreed that standing and ascertainability were satisfied because violations of the TCPA occur when text messages are sent, avoiding the need for "mini-trials" about text message receipt. The court also held that commonality was satisfied because the case centered on an alleged common course of conduct and did not require individualized inquiries into consent because whether the act of posting an ad indicated consent could be resolved classwide. Finally, the court agreed that a class action was the superior method for litigating these claims because the adjudication of individual cases would be inefficient and wasteful. The court explained that potentially "ruinous" damages did not preclude a finding of superiority because it would be premature to deny certification on the mere possibility that damages would be disproportionate to the harm allegedly suffered.

***A&M Gerber Chiropractic LLC v. GEICO General Insurance Co.*, No. 16-cv-62610-BLOOM/Valle, 2017 WL 2464674 (S.D. Fla. June 7, 2017)**

The plaintiff in this case provided medical treatment to an individual who sustained injuries in an automobile accident and later submitted charges to the defendant insurance company for reimbursement. The defendant paid insurance claims pursuant to a statutory fee schedule, and according to its endorsement, paid 100 percent of the billed amount when it was less than the amount permitted by the schedule. However, the plaintiff alleged that the defendant had a widespread practice of paying only 80 percent of the billed amount in these circumstances, and sought a declaratory judgment interpreting the fee schedule statute to require full payment. In granting the plaintiff's motion for class certification, Judge Beth Bloom of the U.S. District Court for the Southern District of Florida concluded that commonality was satisfied because the case involved the resolution of a single issue as to all putative class members: whether the defendant's policy, as modified by the endorsement, provided for payment of 80 percent of all claims submitted, or payment of 100 percent of any claims submitted below the fee schedule amount. The court also held that typicality was satisfied, emphasizing that because the plaintiff sought *only* an interpretation of the defendant's policy, the court would not need to apply different facts and defenses to individual insurance claims. Finally, the court concluded that certification under Rule 23(b)(2) was appropriate because the defendant's alleged discounting scheme was a uniform practice applicable to all members of the putative class. According to the court, the requested declaratory relief qualified as "corresponding injunctive relief" because the plaintiff alleged a threat of future injury and the class was defined to include subsequent policies with similar language; thus, the lawsuit was not just a precursor to individualized proceedings for damages.

***Smith v. SEECO, Inc.*, No. 4:14-CV-00435 BSM, 2017 WL 2390640 (E.D. Ark. June 1, 2017)**

Chief Judge Brian S. Miller of the U.S. District Court for the Eastern District of Arkansas denied the defendants' motion to disqualify class counsel, remove the class representative and decertify the class in an action alleging that the defendants underpaid royalties owed from generating natural gas on the class members' properties. The defendants' motion was filed on the eve of trial and in the wake of a preliminary agreement to settle a parallel class action in Arkansas state court (*Snow v. SEECO, Inc.*) asserting similar claims. The thrust of the motion was that the plaintiffs' counsel in *Smith* could not adequately represent the federal class because they had entered an agreement to split fees with the counsel for the *Snow* plaintiffs in the event that either case reached a settlement — an agreement that the defendants claimed created an undue pressure not to settle and to push toward trial. The court rejected this argument on multiple grounds, including a finding that the agreement had not been in effect for some time and the fact that the agreement, even if in effect, did not produce undue pressure not to settle, as indicated by the fact that the *Snow* counsel had reached an agreement to settle the state-court action.

Johnson v. Hartford Casualty Insurance Co.*, No. 15-cv-04138-WHO, 2017 WL 2224828 (N.D. Cal. May 22, 2017), *23(f) pet. denied

After a fire partially damaged his building, the plaintiff sued the defendant insurance company for allegedly calculating the insurance policy's "actual cost value" (ACV) payout by depreciating the sales tax and/or components of the structural loss without regard to whether the components were normally subject to repair and replacement. Judge William H. Orrick of the U.S. District Court for the Northern District of California certified a class of California residents insured by the defendant claiming that this alleged miscalculation was purposeful and in violation of California Insurance Code Section 2051. After finding the class sufficiently numerous and ascertainable, the court held that commonality was satisfied because the plaintiff's Section 2051, breach of contract, declaratory relief, bad faith and unfair competition claims all turned on whether the class members were disadvantaged by the defendant's depreciation practices. Further, typicality and adequacy were met because the plaintiff suffered the same harm the putative class allegedly suffered — reduction in ACV payment via unlawful depreciation — and had sufficient familiarity with the claims. Predominance was met because the claims could be resolved through the interpretation of one statute and factual determinations regarding whether certain components were normally subject to repair and replacement. Finally, the court held that the plaintiff's requested potential damage award of $30,000 was not sufficiently large to make an individual action "superior" to a class action, noting that the lack of other suits suggested that individuals were either unwilling or unable to litigate on their own.

***Navelski v. International Paper Co.*, No. 3:14cv445/MCR/CJK, 2017 WL 2239579 (N.D. Fla. May 21, 2017)**

Chief Judge M. Casey Rodgers of the U.S. District Court for the Northern District of Florida denied a motion for reconsideration of a previous order certifying a liability-only class of property owners whose homes flooded when a creek running through the defendant's land overflowed a dam (discussed in the summer 2017 *Class Action Chronicle*). The defendant sought reconsideration of the class certification order on several grounds, each of which the court rejected. As an initial matter, the defendant argued that the court had failed to properly evaluate the relative merits of the parties' conflicting expert testimony on causation at the class certification stage. The court disagreed, holding that the dispute between the parties' experts went to the merits alone and did not need to be resolved to decide class certification. As the court explained, the plaintiffs' expert asserted that the failure of the dam caused all of the proposed class members' homes to flood and the defendant's expert contended that the dam caused none of the damage. Accordingly, the court held that neither expert presented any "individualized, plaintiff-specific evidence" relevant to deciding the issue of causation. The court also rejected the defendant's criticisms of the court's decision to approve a liability-only class. For one thing, the court noted that, because the plaintiffs had long advocated for a liability-only class, the defendant had a full opportunity to argue that such an approach was improper in opposing class certification. The court found that the fact that the defendant "elected not to fully address this potential outcome in its opposition brief" did not warrant reconsideration. Further, the court held that its decision to certify a liability-only class did not violate the Seventh Amendment because the issues of causation and damages were not so "interwoven" that they could not be considered separately.

AA Suncoast Chiropractic Clinic, P.A. v. Progressive America Insurance Co.*, No. 8:15-cv-2543-T-26MAP, 2017 WL 2123467 (M.D. Fla. May 16, 2017), *23(f) pet. granted

The plaintiffs in this case, providers of medical services and assignees of their patients' personal injury protection (PIP) benefits, sued the defendant insurance companies over their practice of reducing policy limits based on the opinions of nontreating physicians. The plaintiffs contended that the Florida Motor Vehicle No-Fault Law does not allow nontreating physicians to decide that an injured patient does not have an emergency medical condition (EMC), as required to limit benefits. Judge

Richard A. Lazzara of the U.S. District Court for the Middle District of Florida certified the plaintiffs' claims for declaratory and injunctive relief, first finding that the loss of full insurance coverage was a sufficient injury to create standing. The court also concluded that class membership could be ascertained without highly individualized assessments of coverage because the defendants' claims files clearly indicated whether insureds received a negative EMC and whether their limits were reduced. Finally, the court concluded that certification was appropriate under Rule 23(b)(2) because monetary damages were merely incidental to the plaintiffs' declaratory and injunctive relief, reasoning that once the court decided whether the defendants' use of negative EMC determinations was lawful under the PIP statute, no additional supervision would be needed to evaluate damages. For the same reason, however, the court denied the plaintiffs' motion to certify a Rule 23(b)(3) subclass seeking damages for breach of contract, recognizing that individualized issues would predominate.

Class Action Fairness Act Decisions

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

***Scott v. Cricket Communications, LLC*, 865 F.3d 189 (4th Cir. 2017)**

A unanimous panel of the U.S. Court of Appeals for the Fourth Circuit (Gregory, C.J., Duncan and Diaz, JJ.) vacated and remanded the district court's order remanding this putative class action to state court. The plaintiffs brought suit on behalf of "all Maryland citizens," alleging that Cricket had sold them mobile phones that operated on a network it knew would be discontinued. Cricket removed the case under CAFA and provided the affidavit of a former employee who attested that although Cricket could not provide an exact number of Maryland *citizens* who purchased the phones, records showed that at least 47,000 of the phones were sold to customers with Maryland addresses. Using the "conservative estimate" of $200 per phone, Cricket asserted that the amount in controversy was more than $9 million. The district court disagreed, holding that because "residency is not tantamount to citizenship," Cricket's evidence was "overinclusive," and therefore remanded the case. The Fourth Circuit reversed, explaining that "[e]stimating the amount in controversy is not nuclear science," and that the district court erred by finding the overinclusive nature of Cricket's amount-in-controversy evidence dispositive. Rather, the district court should have attempted to determine whether Cricket's evidence was more likely than not to satisfy the amount in controversy requirement.

***Broadway Grill, Inc. v. Visa Inc.*, 856 F.3d 1274 (9th Cir. 2017)**

The U.S. Court of Appeals for the Ninth Circuit (Schroeder and Rawlinson, JJ., and Logan, district judge sitting by designation) reversed the lower court's order granting remand of a putative class action alleging California state law antitrust violations. The plaintiff alleged that the defendant prevented merchants who accept Visa-branded credit cards from applying a surcharge for the use of credit cards (discussed in the winter 2016 *Class Action Chronicle*.) Initially, the lower court denied remand but allowed the plaintiff to amend its complaint to include only "California citizens" (rather than "California individuals" as originally proposed) in order to invoke CAFA's "local controversy" exception, based on the decision in *Benko v. Quality Loan Service Corp.*, 789 F.3d 1111 (9th Cir. 2015), which allowed the plaintiffs to set out the percentage of claims asserted against the in-state defendant, in order to show it was a "significant defendant" within the exception. The panel explained that the amendment after removal in *Benko* clarified the court's jurisdiction without altering the class definition, by explaining the impact of the complaint's allegations on one of the defendants. But the *Broadway Grill* amendment did not merely provide relevant information, it changed the nature of the action by changing the class definition. Citing various circuit decisions and CAFA's legislative history, the panel held that citizenship of the class is determined at the time of removal; the limited holding in *Benko* did not permit the plaintiffs to amend their class definition, add or remove defendants, or add or remove claims in such a way that would alter the essential jurisdictional analysis.

***Mays v. Snyder*, No. 17-cv-10996, 2017 WL 3484498 (E.D. Mich. Aug. 14, 2017)**

Judge Judith E. Levy of the U.S. District Court for the Eastern District of Michigan determined that a putative class action over the Flint, Michigan, water crisis was not subject to the local controversy exception to CAFA jurisdiction because an earlier action had been filed "that contained virtual identical allegations against the same or similar defendants." (The local controversy exception does not apply if a similar case had been filed within the past three years.) The court reasoned that even though this action was the first filed by date (a U.S. Court of Appeals for the Sixth Circuit opinion referred to a later-filed case as the first filed), other cases were filed later, and when the plaintiff amended the complaint to add a new party, it commenced a new action for purposes of CAFA, and the local controversy exception therefore did not apply.

***Stoddard v. Oxy USA Inc.*, No. 17-1067-EFM-GLR, 2017 WL 3190354 (D. Kan. July 27, 2017)**

The plaintiff sought remand of a class action alleging the defendant breached lease agreements by underpaying royalty fees from natural gas wells, claiming that the defendant had failed to satisfy CAFA's $5 million amount-in-controversy requirement. The proposed class contained all the gas wells and royalty owners in Kansas who have lease agreements with the defendant — which is responsible for almost 9 percent of the total gas production in Kansas — and sought damages arising from the underpayment of royalties for gas and helium sales, as well as improperly deducted fees. The complaint did not allege a specific amount in controversy in good faith but did allege that the damages were less than $5 million. Based on the facts in the complaint, the defendant submitted an affidavit plausibly asserting that the damages were potentially $7.5 million. Judge Eric F. Melgren of the U.S. District Court for the District of Kansas denied remand, holding that the defendant had established that federal jurisdiction under CAFA was appropriate by a preponderance of the evidence, because the affidavit used a reasonable 12.5 percent royalty rate and a helium price/value based on a government report, and the plaintiff failed to present any evidence to contradict the affidavit.

***Brahamsha v. Supercell OY*, No. 16-8440, 2017 WL 3037382 (D.N.J. July 17, 2017)**

Judge Freda L. Wolfson of the U.S. District Court for the District of New Jersey denied the plaintiff's motion to remand a putative class action brought by purchasers of the defendant's mobile game alleging violation of the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act. As a threshold matter, the court noted that the plaintiff did not advance any affirmative arguments compelling remand to state court and that accordingly it would accept the defendant's allegations pertaining to CAFA as a basis for removal as true, without the need for evidentiary support. The plaintiff's argument, asserted in opposition to the defendant's motion to dismiss, was that given the defendant's position that the plaintiff lacked Article III standing as needed for federal jurisdiction, the defendant lacked a reasonable basis to remove the case to federal court in the first place, requiring remand. The court found, however, that because the defendant could not anticipate how the court would rule on the standing issue, it was objectively reasonable to first remove under CAFA and then promptly move to dismiss for lack of standing. Absent any controlling precedent rendering the basis for the defendant's removal "frivolous" or "insubstantial," the defendant articulated an objectively reasonable basis for removal under CAFA, and remand was inappropriate.

***Martin v. Trott Law, P.C.*, No. 15-12838, 2017 WL 2972137 (E.D. Mich. July 12, 2017)**

Judge David M. Lawson of the U.S. District Court for the Eastern District of Michigan denied a motion to dismiss a putative class action for lack of subject matter jurisdiction where the defendant argued that the home state exception to CAFA jurisdiction applied. The court found that the defendant had not satisfied his burden of proving that two-thirds or more of the class were residents of the forum state. The court noted that, in support of its assertion that more than two-thirds of the putative class were citizens of the forum state, the defendant had only offered speculation based on the named plaintiffs' inability at their depositions to identify any out-of-state class members and on census data regarding migration trends for the general population. In addition, the defendant's motion to dismiss for lack of subject matter jurisdiction was not timely raised because it was filed as part of the second round of dispositive motions in the action, and the defendant had not explained why it could not have raised the same arguments earlier.

***Zyda v. Four Seasons Hotels & Resorts*, No. 16-00591 LEK, 2017 WL 2829596 (D. Haw. June 30, 2017)**

Judge Leslie E. Kobayashi of the U.S. District Court for the District of Hawaii denied the plaintiffs' motion to reconsider the court's order denying remand of their putative class action (discussed in the summer 2017 *Class Action Chronicle*). The plaintiffs alleged state law violations for failure to maintain and provide adequate facilities to accommodate increased population and usage of the Hualalai Resort. The crux of the plaintiffs' argument was that the defendants knew the amount in controversy was more than $5 million based on the plaintiffs' demand for rescission in their amended complaint. And because that demand for rescission was filed more than 30 days before the defendants filed the notice of removal, the plaintiffs contended that the removal was untimely under 28 U.S.C. § 1446(b)(3). In so arguing, the plaintiffs relied on deposition testimony from the defendants' counsel that they could have relied upon in their initial motion to remand. Because the plaintiffs simply rehashed arguments and evidence they could have raised in the initial motion, the court denied the motion for reconsideration.

***In re Atlas Roofing Corp. Chalet Shingle Products Liability Litigation*, No. 1:14-CV-1-TWT, 2017 WL 2501752 (N.D. Ga. June 8, 2017)**

The plaintiff filed a putative class action in a multidistrict litigation proceeding involving allegedly defective roofing shingles. The defendant initially moved to dismiss the case for lack of subject matter jurisdiction under CAFA, which the court denied. In so doing, the court explained that CAFA's minimal diver-

sity requirement had been satisfied given that the plaintiff had plausibly defined the class to encompass at least one non-Mississippi citizen who owned a structure in Mississippi containing the shingles in question. The defendant subsequently renewed its motion to dismiss in response to the plaintiff's motion for class certification. At this stage, Judge Thomas W. Thrash, Jr. of the U.S. District Court for the Northern District of Georgia agreed with the defendant that the burden was on the plaintiff to establish minimal diversity by a preponderance of the evidence. And because the plaintiff lacked evidence of a single non-Mississippi citizen, the court resolved that it lacked subject matter jurisdiction under CAFA. While the plaintiff argued that it was improper for the defendant to challenge subject matter jurisdiction at the class certification stage, the court disagreed, stressing that subject matter jurisdiction must be satisfied throughout the case.

***Chuang v. Dr. Pepper Snapple Group, Inc.*, No. CV 17-1875-MWF(MRWx), 2017 WL 2463951 (C.D. Cal. June 7, 2017)**

Judge Michael W. Fitzgerald of the U.S. District Court for the Central District of California refused to remand a putative class action alleging that the defendants misrepresented the fruit content and nutritional qualities of Mott's brand fruit snacks. The plaintiff did not dispute that the basic CAFA requirements were met. Instead, he argued that, because the court could later decide he lacked Article III standing to request injunctive relief for his false advertising claims, partial remand of those claims to state court was warranted. The court noted that the plaintiff's argument was premature, as the standing question had yet to be decided. However, even if the court eventually concluded there was no standing, remand would still be inappropriate because the court would still have jurisdiction over the plaintiff's request for damages. The court held that permitting two very similar lawsuits to go forward in different courts would "produce immense inefficiencies" and circumvent CAFA's goal of providing a federal forum for class actions implicating interstate interests. Thus, the court held, a class action plaintiff seeking to obtain injunctive relief unavailable in federal court "must narrow her class to take it outside of CAFA's purview" or proceed in federal court without the prospect of obtaining an injunction.

***Carter v. CIOX Health, LLC*, No. 14-CV-6275-FPG, 2017 WL 2334886 (W.D.N.Y. May 26, 2017)**

Chief Judge Frank P. Geraci, Jr., of the U.S. District Court for the Western District of New York held that CAFA jurisdiction existed over a class action alleging that the defendants overcharged individuals in New York for copies of medical records in violation of the New York Public Health Law. The defendants conceded that CAFA's jurisdictional requirements were satisfied but sought remand under CAFA's local controversy exception. However, the court found that the local controversy exception was not met because the exception requires that no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons during the three-year period preceding the filing of the class action. Here, another case with "nearly interchangeable" facts — *Spiro v. HealthPort Technology LLC* — had been filed against one of the defendants two months prior to this case. Thus, "the plain language of the 'no other class action' element and the legislative history of the local controversy exception direct[ed] the Court to treat *Spiro*[] as an 'other class action.'"

Decisions Granting Motions to Remand/Finding No CAFA Jurisdiction

***Hunter v. City of Montgomery*, 859 F.3d 1329 (11th Cir. 2017)**

The plaintiffs in this case brought a class action lawsuit against the city of Montgomery and the third-party manager of its red-light camera program, asserting that creating a separate category of civil offenses for traffic violations caught on camera in Montgomery violated the Alabama Constitution and state law. After the defendants removed the case to Alabama federal court, the district court remanded under CAFA's local controversy and home-state exceptions. The U.S. Court of Appeals for the Eleventh Circuit (Carnes, C.J., Rosenbaum, J., and Higginbotham, circuit judge sitting by designation) affirmed. The panel first explained that it had jurisdiction to hear the appeal because: (1) the district court itself raised the possibility that a CAFA exception required remand and (2) the remand was not based on the district court's lack of subject matter jurisdiction, but rather on whether the district court could exercise its subject matter jurisdiction in these circumstances. The panel then addressed only the home-state exception, which applies if "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." Recognizing that the city and at least two-thirds of the proposed plaintiff classes were citizens of Alabama, the panel focused on whether the third-party manager of the city's program was a "primary defendant." The panel explained that the primary factor in answering this question is the potential monetary loss that a defendant faces, *i.e.*, whether the defendant has potential exposure to a significant portion of the class and would sustain a substantial loss as compared to other defendants if found liable. Applying that standard here, the panel concluded that the third-party manager was not a primary defendant because the monetary relief sought — a refund of all

traffic fines collected in connection with the red-light camera program — was aimed at the city, and even if the city sought contribution or indemnification, such secondary liability would not be enough to make the third party a primary defendant.

***Little v. Pfizer Inc.*, No. 14-cv-01177-EMC, No. 14-cv-01195-EMC, No. 14-cv-01196-EMC, No. 14-cv-01204-EMC, No. 14-cv-01488-EMC, 2017 WL 3412300 (N.D. Cal. Aug. 9, 2017); *In re Pfizer*, No. SAMC 17-00005-CJC(JPRx), 2017 WL 2257635 (C.D. Cal. May 23, 2017)**

Judge Edward M. Chen of the U.S. District Court for the Northern District of California ordered remand of five related cases asserting that the plaintiffs developed Type 2 diabetes after taking Lipitor. The court overseeing the multidistrict litigation suggested that the U.S. Judicial Panel on Multidistrict Litigation (JPML) transfer the cases back to the transferor court for a determination of whether the cases constituted mass actions under CAFA. The JPML heeded that suggestion and remanded the cases to the transferor court to determine whether CAFA's mass action provision applied. The parties agreed to stay the actions pending a decision by Judge Cormac J. Carney of the U.S. District Court for the Central District of California, who was overseeing thousands of other related cases that had also been remanded from the MDL court to determine the mass action question. The thrust of Pfizer's argument in the related cases was that a sufficient number of proposals for a joint trial (*i.e.*, 100 or more plaintiffs) had been made in California Judicial Council Coordination Proceedings (JCCP). Judge Carney agreed with Pfizer that an initial 65 plaintiffs in the JCCP had affirmatively requested a joint trial "for all purposes," not simply pretrial matters, but that that number fell far short of the 100 required by CAFA's mass action provision. Judge Carney reasoned that the rest of the thousands of other plaintiffs did nothing more than file their complaints in state court.

The court also refused to "assume" 35 more plaintiffs would be coordinated in the action, despite the thousands of plaintiffs seeking relief, because such plaintiffs were free to structure their actions to avoid CAFA jurisdiction; for example, plaintiffs with severe injuries might desire to distance themselves from plaintiffs with weaker claims. Judge Chen analyzed Judge Carney's remand ruling and order denying a stay pending appeal, and concluded that Pfizer was rehashing arguments made to Judge Carney and criticizing his reasoning. The court rejected Pfizer's argument that Judge Carney erred in refusing to find that designating a case as subject to coordination with related pending actions sufficiently established a joint trial proposal. Judge Chen agreed that merely checking a box for inclusion in the JCCP was insufficient, because even if the plaintiffs were asking to be part of the coordinated proceeding, that did not mean they were proposing a joint trial. The court also rejected Pfizer's argument that one plaintiff's proposal for a joint trial can bind another plaintiff, even if that plaintiff had not made such a proposal for a joint trial, as "problematic" in light of Ninth Circuit law, emphasizing that a plaintiff is the master of his or her complaint, and legislative history suggesting that consent is needed.

***Mealer v. Regional Management Corp.*, No. 3:16-CV-3343-B, 2017 WL 3421130 (N.D. Tex. Aug. 8, 2017)**

Judge Jane J. Boyle of the U.S. District Court for the Northern District of Texas granted the defendants' motion to dismiss this putative class action alleging that the defendants' debt-collection efforts were unlawful. The plaintiff claimed that the defendants violated the Texas Debt Collection Practices Act by calling and visiting the houses of putative class members in attempts to collect on debts. The defendants moved to dismiss based on lack of subject matter jurisdiction, or in the alternative, to deny class certification and compel arbitration. However, the court did not reach the latter issue as it found that it did not have subject matter jurisdiction over the case. The plaintiff did not attach any evidence to the complaint and failed to respond to any of the defendants' challenges to jurisdiction; thus, the court held that the plaintiff failed to make even a threshold showing of subject matter jurisdiction. The court further noted that even if the plaintiff had made a threshold showing, the court would not have subject matter jurisdiction over the case. The court rejected the plaintiff's claim that the court had CAFA jurisdiction because the plaintiff did not allege any amount in controversy, let alone one that exceeded the sum or value of $5 million. Thus, the court granted the defendants' motion to dismiss for lack of subject matter jurisdiction.

Waters v. Kohl's Department Stores, Inc.*, No. 2:17-cv-02325-ODW (AFMx), 2017 WL 2800845 (C.D. Cal. June 27, 2017), *1453(c) pet. granted

The plaintiffs sought remand of their California consumer class action arising from a customer rewards program where customers earn "Kohl's Cash" to spend at Kohl's stores. The plaintiffs alleged that Kohl's Cash was advertised as equivalent to real currency, yet customers do not receive the full value when buying discounted items, because Kohl's Cash is deducted from the original price of sale items, before the discount is applied. Judge Otis D. Wright II of the U.S. District Court for the Central District of California granted remand, holding that Kohl's had failed to establish that the amount in controversy exceeded CAFA's $5 million minimum. The defendant submitted declarations establishing that Kohl's customers in California redeemed

more than $25 million in Kohl's Cash while also using a percentage-off coupon during the proposed class period. But the court noted that the plaintiffs were seeking to recover only the value of "unredeemed" Kohl's Cash — that is, the amount of Kohl's Cash they would have saved if it was applied after the discount — which could not be calculated simply by referencing the total amount of redeemed Kohl's Cash. Instead, Kohl's was required to — but did not — show the total price of the purchased products and the percentage-discount offered for the specific products to establish the amount in controversy. Thus, remand was required.

***Hoy v. Clinnin*, No. 17-cv-788-BTM-KSC, 2017 WL 2686216 (S.D. Cal. June 22, 2017)**

The plaintiff sought remand of his putative class action for violations of California's unfair competition law (UCL), alleging that the defendants, a foreign limited law partnership and its employees, sent out debt collection letters without proper supervision by California attorneys as required by the California Rules of Professional Conduct and Corporations Code. Chief Judge Barry Ted Moskowitz of the U.S. District Court for the Southern District of California granted the plaintiff's motion, finding CAFA's local controversy exception applied. The court rejected the defendants' contention that the conduct of the lone California defendant in the case — one of the supervising attorneys — could not be a significant basis for the UCL claim, because an "unlawful" UCL claim can be based on a violation of the California Rules of Professional Conduct. Moreover, the complaint also stated an "unfair" UCL claim, based on the California defendant's alleged failure to properly supervise debt collectors. The court also concluded that the plaintiff was seeking significant relief from the California defendant in the form of restitution and an injunction requiring him to properly supervise the debt collectors in sending out demand letters. Because the proposed class members were California citizens, the underlying alleged misconduct violated California law, and the California defendant allegedly failed to supervise the debt collectors, which resulted in the unauthorized practice of law, the court held that the plaintiff met his burden to show that the local controversy exception applied. However, the court denied the plaintiff's request for fees because the local controversy exception was "not so obvious so as to render the grounds for removal unreasonable."

***Waters v. Ferrara Candy Co.*, No. 4:17-cv-00197-NCC, 2017 WL 2618271 (E.D. Mo. June 16, 2017)**

Magistrate Judge Noelle C. Collins of the U.S. District Court for the Eastern District of Missouri granted the plaintiff's motion to remand the putative class action to the Circuit Court for the City of St. Louis, Missouri. The plaintiff alleged that the defendant was leaving too much empty space (or slack-fill) in the cardboard boxes of a particular candy product in violation of the Missouri Merchandising Practices Act (MMPA). The defendant removed the case, alleging jurisdiction under CAFA and asserting that the amount in controversy exceeded CAFA's $5 million threshold. The defendant asserted that compensatory damages could be up to $780,000, attorneys' fees could be as much as 40 percent of that figure, and punitive damages under the MMPA could be as much as five times those two figures.

On review, the court found that CAFA's amount-in-controversy threshold was not met. The court found that the defendant had not satisfied the requirement of showing by a preponderance of evidence that punitive damages were a possibility under the MMPA. Nothing in the plaintiff's petition supported a claim for punitive damages, the plaintiff made no mention of punitive damages in her pleadings, and the plaintiff did not include the statutorily required separate statement as to any amount of punitive damages sought. Because punitive damages could not be recoverable as pleaded, the defendant's estimate of possible punitive damages was not to be included in the jurisdictional amount calculation. While the plaintiff did request injunctive relief, the court adopted the plaintiff's-viewpoint test to determine the value of the requested relief. The defendant proposed a "speculative" $7.19 million injunctive relief cost, but the court relied on "long-standing" Eighth Circuit precedent predating CAFA that required the value of injunctive relief to be assessed from the "putative class's point of view." Because the defendant failed to submit any evidence demonstrating that the contemplated injunctive relief would exceed the jurisdictional minimum from the point of view of the class, the injunctive relief could not be factored into the calculus. Accordingly, the court granted the plaintiff's motion to remand the case.

***Black v. Bayer Corp.*, No. 4:17-cv-01333-JCH, 2017 WL 2592425 (E.D. Mo. June 15, 2017)**

Judge Jean C. Hamilton of the U.S. District Court for the Eastern District of Missouri granted the plaintiffs' motion to remand the putative class action to the Circuit Court of the City of St. Louis, Missouri. The plaintiffs brought this putative class action alleging negligence, strict liability, fraud and other claims alleging that a permanent birth control system manufactured and distributed by the defendants led to "severe injuries and damages" that arose from the defendants' failure to warn of the risks, dangers and adverse events associated with the birth control system at issue. The defendants removed the action, asserting, *inter alia*, jurisdiction under CAFA. On review, the court found that jurisdiction under CAFA was lacking because

the case involved only 95 plaintiffs. The defendants argued that the case should be considered along with similar cases filed in the district to form a single mass action involving more than 100 plaintiffs. The defendants further argued that the cases were part of the same mass action because the complaints contained the same substantive allegations, alleged the same causes of action, and were filed by the same counsel in the same jurisdiction. The court disagreed, holding that the case law made it "clear" that separate multiplaintiff cases may not be aggregated to satisfy the 100-plaintiff requirement of CAFA's mass action provision and that the defendants' argument had been repeatedly rejected by the courts in that district. Accordingly, the court granted the plaintiffs' motion to remand the case. Judge John A. Ross of the U.S. District Court for the Eastern District of Missouri issued a similar ruling in *Hines v. Bayer Corp.*, No. 4:17-CV-01395-JAR, 2017 WL 2535709 (E.D. Mo. June 12, 2017).

Speed v. JMA Energy Co.*, No. CIV-17-006-RAW, 2017 WL 2547240 (E.D. Okla. June 13, 2017); *Grellner v. Devon Energy Corp.*, No. CIV-16-537-RAW, 2017 WL 2256646 (E.D. Okla. May 23, 2017), *1453(c) pet. granted

Judge Ronald A. White of the U.S. District Court for the Eastern District of Oklahoma granted remand of two similar class actions alleging willful and ongoing violations of Oklahoma law related to payment of oil and gas production proceeds to well owners. The court evaluated the six factors enumerated in 28 U.S.C. § 1332(d)(3) permitting a federal court to decline to exercise jurisdiction over a class action otherwise covered by CAFA. The court determined that no national or interstate interests were sufficiently implicated to warrant CAFA jurisdiction, because all of the subject oil and gas wells were located in Oklahoma, all class members owned interests in the subject Oklahoma wells, the named plaintiffs, defendant companies and nearly half the class members were Oklahoma citizens, and the business activities that gave rise to the action occurred in Oklahoma. Further, Oklahoma law would govern the plaintiffs' claims. The court found that the class was not inappropriately defined so as to avoid federal jurisdiction, and that the Oklahoma state court forum had a sufficient nexus to the class members, alleged harm and/or the defendants. While acknowledging that both classes encompassed a significant number of non-Oklahoma residents, the court held that Oklahoma's connection to the action was substantially greater than any other state. This was so because the number of Oklahoma citizens was larger than the number of citizens from any other state. Finally, no other class action asserting the same or similar claims on behalf of the same plaintiffs had been filed within three years. Thus, the court exercised its discretion to decline jurisdiction pursuant to 28 U.S.C. § 1332(d)(3) and remanded the actions to state court.

***Grisham v. Welch Foods, Inc.*, No. 4:17-CV-3 RLW, 2017 WL 2257342 (E.D. Mo. May 22, 2017)**

Judge Ronnie L. White of the U.S. District Court for the Eastern District of Missouri granted the plaintiff's motion to remand the putative class action to the Circuit Court of Phelps County, Missouri. The plaintiff brought this action based on the defendants' allegedly misleading conduct in packaging fruit snacks in nontransparent packaging that was substantially underfilled and purported to bring claims under the Missouri Merchandising Practices Act. The plaintiff defined the class as "all Missouri citizens" who had purchased the fruit snacks in the last five years. The defendants removed the case to federal court, asserting jurisdiction under CAFA. On review, the court noted that the only dispute between the parties was whether the $5 million amount-in-controversy threshold under CAFA was satisfied. The plaintiff alleged in her complaint that the class damages would not exceed $4,999,999. In quantifying the amount in controversy, the defendants cited to the sales of particular fruit snacks, attorneys' fees and the cost of an injunction. The defendants argued that the sales of particular fruit snacks were relevant because the plaintiff's definition of "products" included at least 14 different products. However, the court found that the plaintiff lacked Article III standing to bring claims relating to 13 of the 14 products that the plaintiff did not purchase. The plaintiff did not suffer any particularized and actual injury related to those 13 products, and sales related to those products could not be included in the calculation. Accordingly, CAFA could not extend jurisdiction for those claims, and the plaintiff's claims required remand for failure to satisfy CAFA's amount-in-controversy requirement.

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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