Skadden

The Class Action Chronicle

This edition focuses on rulings issued between August 16, 2017, and November 15, 2017.

In this issue, we cover two decisions granting motions to strike/dismiss class claims, three decisions denying such motions, 26 decisions denying class certification or reversing grants of class certification, 22 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 10 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 or Dismiss

***Carlisle v. Normand,* No. 16-3767, 2017 WL 4918997 (E.D. La. Oct. 31, 2017)**

In a putative class action involving an alleged therapist-patient relationship in drug court, Judge Jane Triche Milazzo of the U.S. District Court for the Eastern District of Louisiana granted the defendant's motion to strike the plaintiffs' class allegations. The defendant (and his company) served as clinical director of the drug court and recommended the plaintiffs to the program. Under a negligence theory, the plaintiffs had sought to certify a class of individuals harmed by the defendants' allegedly substandard treatment. Finding a therapist-patient relationship plausible, the court nonetheless dismissed the class allegations because common issues of fact or law did not predominate. Rather, the court explained that the negligence claims were "highly individual," because they depended not only on the facts underlying the therapist-patient relationship but also the defendants' breach of duty. Accordingly, the court struck the class allegations.

***Eldridge v. Cabela's Inc.*, No. 3:16-cv-536-DJH, 2017 WL 4364205 (W.D. Ky. Sept. 28, 2017)**

Judge David J. Hale of the U.S. District Court for the Western District of Kentucky struck class allegations regarding two "consent revocation" classes in a Telephone Consumer Protection Act case alleging that the defendant made auto-dialed or prerecorded calls without consumers' prior express consent or after consumers had told the defendant to stop calling them. The plaintiff sought to certify two classes of consumers who had been contacted without prior consent ("no consent" classes) and two class

of consumers who had been contacted after telling the defendant to stop calling them ("consent revocation" classes). The court granted the defendant's motion to strike the two "consent revocation" classes, noting that although the parties disputed the scope of those classes, the classes could be stricken under either interpretation. If, as the defendant argued, the classes consisted of consumers who had given and then revoked their consent, the class would not satisfy the predominance or typicality requirements: Individualized inquiries into whether putative class members had revoked their consent would be necessary, and the named plaintiff was not a typical member of that class because he alleged that he had never consented to be called, so he could not have revoked that consent. If, as the plaintiff argued, the class consisted of all consumers who told the defendant to stop calling them whether or not they had previously consented, the class was a subset of the no-consent classes and redundant. The court further noted that there was a potential typicality issue with one of the no-consent classes — because the definition referred to marketing calls while the plaintiff had allegedly received debt collection calls — but accepted the plaintiff's explanation that this was due to a drafting error and granted him leave to file an amended complaint to remedy the error.

Decisions Denying Motions to Strike

***AMP Automotive, LLC v. B F T, LP,* No. 17-5667, 2017 WL 5466817 (E.D. La. Nov. 13, 2017)**

The Telephone Consumer Protection Act (TCPA), as amended by the Junk Fax Prevention Act, makes it unlawful to use a fax machine to send unsolicited advertisements. The plaintiff in this case alleged that B F T, LP, d/b/a Great American Business Products (Great American) sent thousands of junk faxes in violation of the TCPA and various FCC regulations and sought to certify a class of all subscribers of telephone numbers to which Great American sent unsolicited promotional facsimile transmissions within four years of the complaint and without the opt-out notice required by 47 U.S.C. § 227(b)(2)(D) and 47 C.F.R. § 64.1200(a)(4)(iii). Despite Great American's contention that this definition was administratively infeasible, Judge Jay C. Zainey of the U.S. District Court for the Eastern District of Louisiana denied the motion to strike, reasoning that early administrative concerns can be addressed by case management orders and do not warrant striking class allegations. Judge Zainey explained that whether Great American's faxes were solicited, complied with the TCPA or complied with FCC regulations were issues of merit, not of improper pleading. Thus, the class definition was not necessarily administratively infeasible, and Great American's arguments were premature. Similarly, the court went on to hold that Great American's arguments contending that the plaintiff was not part of the proposed class and that the plaintiff proposed an impermissible "fail safe" class were also merits issues, not issues of improper pleading.

***Cone v. Sanitarios Lamosa S.A. de C.V.,* No. 4:17-CV-00001, 2017 WL 4532636 (E.D. Tex. Sept. 22, 2017), *report and recommendation adopted by* 2017 WL 4517973 (E.D. Tex. Oct. 10, 2017)**

In a putative class action involving allegedly defective toilet tanks, Judge Amos L. Mazzant of the U.S. District Court for the Eastern District of Texas adopted the report and recommendation of Magistrate Judge Kimberly C. Priest Johnson to deny the defendants' motion to strike the plaintiffs' class allegations. Proposing five causes of action — strict products liability, breach of implied warranty, negligence, punitive damages and violations of the Texas Deceptive Trade Practices Act — the plaintiffs had sought to certify a class of "any and all consumers of toilet tank models #3464, #3412, #3404, #3425, #3408, and #3471 manufactured produced, designed, marketed, or distributed by the named Defendants." The defendants argued that this description violated the threshold requirement of ascertainability, while the plaintiffs promised to clarify the proposed definition and possible subclasses when moving for class certification. Finding the description of the putative class sufficient, the court refused to strike the class allegations. The court explained that the defendants' motion was premature, because they could object to the plaintiffs' motion for conditional certification.

***Riaubia v. Hyundai Motor America,* No. 16-5150, 2017 WL 3602520 (E.D. Pa. Aug. 22, 2017)**

Judge C. Darnell Jones II of the U.S. District Court Judge for the Eastern District of Pennsylvania, denied the defendant's motion to dismiss the plaintiff's putative class action alleging that his 2014 Hyundai Sonata's "Smart Trunk" — a feature advertised as being able to automatically open the car's trunk — was defective in that it would often fail to open more than a few inches. The defendant moved to dismiss the complaint on various grounds, including lack of standing and failure to allege a defect. Specifically, the defendant argued that the failure of the trunk to open all the way every time was not a defect and that the plaintiff could not maintain a claim on behalf of the class because some of the class members had different vehicles (although all vehicles in the class were equipped with the Smart Trunk feature). The court disagreed. First, the court noted that the plaintiff had standing to pursue the class claims because he alleged a defect in

his vehicle that was present in all of the class members' vehicles. The court rejected the defendant's argument that there was no defect just because the "Smart Trunk" did not open all of the way each time. Taking all of the allegations in the complaint as true, the court noted that consumers were led to believe that the smart trunk would open completely each time. Next, the court found that although the model of the vehicle differed between class members, the same mechanism — the Smart Trunk — was present in each; thus, the plaintiff had standing to pursue the claim on behalf of the class. Therefore, the court denied the defendant's motion to dismiss and allowed the claim to proceed.

Decisions Rejecting/Denying Class Certification

***Priddy v. Health Care Service Corp.*, 870 F.3d 657 (7th Cir. 2017)**

The U.S. Court of Appeals for the Seventh Circuit (Wood, C.J., Sykes, J., and Coleman, district judge sitting by designation) reversed the certification of four classes alleging violations of Illinois law and the Employee Retirement Income Security Act (ERISA). The plaintiffs alleged that the defendant health insurance provider violated these laws by the way it used third-party affiliates to provide various services. More specifically, the plaintiffs alleged that the defendant contracted with outside affiliates for various services and work and that these relationships were often not at arm's length. The plaintiffs argued that the affiliates overcharged beneficiaries and returned the proceeds to the defendant via rebates and that this self-dealing violated the defendant's fiduciary duties under the relevant laws. On appeal, the defendant argued that commonality and typicality were not satisfied, but the plaintiffs argued these were satisfied because "everything" turned on the fiduciary duty the defendant owed to its insureds. The panel found that the district court failed to adequately consider the commonality and typicality requirements in certifying the classes. The panel noted that whether a fiduciary duty was violated was a context-specific endeavor, and it was unclear whether the defendant acted to its beneficiaries' detriment while wearing a fiduciary hat. Indeed, it was "not even clear" that the defendant owed many class members any fiduciary duty at all, and the district court did not undertake the inquiry. Further, ERISA only applies to plans established or maintained by an employer or an employee organization, yet the class encompassed individuals who bought insurance directly from the defendant. Accordingly, the panel reversed the order granting class certification and remanded the case for further proceedings.

***Riffey v. Rauner*, 873 F.3d 558 (7th Cir. 2017)**

The U.S. Court of Appeals for the Seventh Circuit (Wood, C.J., Manion and Hamilton, JJ.) affirmed the district court's refusal to certify a Rule 23(b)(3) class of health care assistants seeking a classwide refund of fair-share fees they paid to a union for collective bargaining representation. The plaintiffs, considered public employees for the purposes of collective bargaining, were subject to "fair-share fees" that were collected by the union from those who chose not to join the union in order to help cover the cost of activities, including the collective bargaining representation furnished to everyone. The plaintiffs sought a refund of the fair-share fees paid by all non-union-member assistants, arguing that the fair-share fees violated the First Amendment. The district court denied certification for multiple reasons. On review, the panel noted it had no way of knowing whether or how many of the class members (other than the named plaintiffs) objected to the collection of fair-share fees and to collective bargaining representation. The union had in fact presented much evidence suggesting that numerous would-be class members supported the union and the fees. Therefore, typicality was not satisfied because "a class representative who wants to undermine a union is not likely to be a suitable representative for a group that includes people who have no such hostility." These differences in opinion regarding the union "go to the heart" of both the question of consent to the fee collection and motivation to seek monetary damages from the union. The issue that remained — compensatory damages — required a showing of actual injury caused by the constitutional deprivation. This causation inquiry could only be resolved after highly individualized inquiries, and thus predominance was not met, either. Accordingly, the panel affirmed the judgment of the lower court.

***In re State Farm Fire & Casualty Co.*, 872 F.3d 567 (8th Cir. 2017)**

The U.S. Court of Appeals for the Eighth Circuit (Wollman, Loken and Murphy, JJ.) reversed the district court's certification of a class alleging breach of insurance contracts due to the defendant's practice of deducting labor depreciation from estimated replacement costs in determining actual cash values. In certifying the Rule 23(b)(3) class, the district court noted that common questions predominated because the "overarching" common fact was the defendant's practice of withholding payment from its insureds of the depreciated labor component. The court had also resolved a "central legal question" — that the "actual cash value" and "depreciation" terms as used in the insurance policies

were ambiguous and needed to be construed in favor of the insureds. On review, the panel found that there were no predominant common facts at issue in the case, because the defendant's method of estimating the "actual cash value" does not breach its replacement cost contract and there was no basis to certify a class that suffered unique, individual covered losses. The panel first noted that the district court erred in finding that "actual cash value" and "depreciation" were ambiguous under Missouri law. The panel noted that the district court, in finding that the defendant's method of calculating replacement cost depreciation was a breach of contract every time it was employed, ignored what the defendant was estimating — the depreciated value at the time of loss. The district court never addressed the question of whether depreciating a contractor's charges to replace the partial loss is a reasonable estimate of the property immediately before and after the loss. That issue could only be determined based on all the facts surrounding a particular insured's partial loss. As such, there were no predominant facts at issue. Accordingly, the panel reversed the district court's decision certifying the class.

Giron v. Hong Kong & Shanghai Bank Co.*, No. 2:15-cv-08869-ODW(JC), 2017 WL 5495504 (C.D. Cal. Nov. 15, 2017), *appeal pending

Judge Otis D. Wright, II of the U.S. District Court for the Central District of California denied certification of a putative class of individuals who alleged that they invested and lost money in connection with a Ponzi scheme. The plaintiffs claimed that the defendant served as the intermediary bank for wire transfers from the investor-victims and alleged various aiding and abetting claims, violations of the Racketeer Influenced and Corrupt Organizations Act and violations of California's Unfair Competition Law. The court noted "multiple reasons" to deny certification but focused on "typicality" and "adequacy" under Rule 23(a), which it described as "most problematic." Regarding typicality, the court held that the plaintiffs had not submitted sufficient evidence of causation because the defendant had not wired their money, so their claims were subject to a unique defense compared to other putative members who may have transferred their money through the defendant. Regarding adequacy, the court noted an "inherent conflict of interest" between the named representatives, who did not wire money through the defendants, and the remaining putative class members, who may have. The court described other concerns regarding the plaintiffs' knowledge of the case and motives for representing the class, including that one plaintiff was asked by his father to participate and did not ask further questions, that another plaintiff did not see the filed complaints and did not know the difference between the two originally named defendants, and that the third named plaintiff could not remember whether his lawyer provided him anything beyond the signature page to his English-language declaration, despite the fact that he only reads Spanish. The court denied counsel's request to substitute new representatives, given that the court had already given several extensions of time to move for certification, and any substitution would require additional discovery on the new representatives.

Alpha Tech Pet Inc. v. LaGasse, LLC*, Nos. 16 C 513 & 16 C 4321, 2017 WL 5069946 (N.D. Ill. Nov. 3, 2017), *23(f) pet. granted

Judge Thomas M. Durkin of the U.S. District Court for the Northern District of Illinois granted the defendants' motion to deny certification of a class alleging that the defendants sent faxes in violation of the Telephone Consumer Protection Act. In support of its motion, the defendants relied on *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017), which held that the FCC's "Solicited Fax Rule" was "unlawful to the extent that it requires opt-out notices on solicited faxes." Here, the defendants offered several types of consent-related evidence, including more than 5,000 consent forms, database evidence showing 25,000 fax numbers from which a consent form was collected, and multiple declarations. Accordingly, the court found that "individualized consent issues would require a series of mini-trials, thus defeating predominance and superiority."

***League of United Latin American Citizens v. Texas*, No. 5:15-cv-219-RP, 2017 WL 5077902 (W.D. Tex. Nov. 1, 2017)**

In a putative class action involving allegedly unequal education for Spanish-speaking students, Judge Robert Pitman of the U.S. District Court for the Western District of Texas denied class certification. The plaintiff, a Latino political association, had sought to certify two classes: a statewide class of "all Latino English Language Learner [ELL] students attending public secondary schools in Texas," and a subclass of "all Latino [ELL] students attending public secondary schools in" a particular school district. Citing Rule 23(a)(4), the court first explained that the plaintiff must "fairly and adequately protect the interests of the class." According to the court, this required the plaintiff to "be part of the class." The plaintiff, however, identified only two of its members, both of whom were parents with children in Texas schools. In addition, two of these children exited the ELL program, leaving only one — a rising fifth grader who would not

enter secondary school until August 2018, and would not necessarily be an ELL when he got there. Accordingly, the court held that the plaintiff failed to show that its members were part of the proposed class, and denied class certification. However, because the plaintiff had represented a statewide class of Latino students in related litigation since it intervened to enforce a district court's order in 1972, the denial of certification was without prejudice.

***Harding v. Jacoby & Meyers, LLP*, No. CV145419JMVMF, 2017 WL 4922010 (D.N.J. Oct. 30, 2017)**

Judge John Michael Vazquez of the U.S. District Court for the District of New Jersey denied the plaintiffs' class certification motion in a case alleging that a litigation support company improperly charged them for additional work that should have been covered by their former lawyers' contingency fee arrangement. The court found that the plaintiffs failed to proffer evidence to support their legal theory, including whether the litigation support company was doing work that the plaintiffs' former lawyers should have done and whether the litigation support company's fees were unreasonably high rates. Due to this evidentiary void, the court held that the plaintiffs did not satisfy their burden of proving typicality, commonality or predominance.

***In re Amla Litig.*, No. 16-CV-6593, 2017 WL 4792256 (S.D.N.Y. Oct. 24, 2017)**

Judge Jed S. Rakoff of the United States District Court of the Southern District of New York partially denied and partially granted class certification in this action alleging that the manufacturers of a hair relaxer misled consumers into believing that the product was gentler and safer than other relaxers. The plaintiffs sought to certify a nationwide class and a multistate class of consumers who purchased the product since December of 2012, as well as a New York state class and a Florida state class of consumers who purchased the product since August of 2013 and December of 2013, respectively. The court denied certification for the nationwide and multistate classes, but granted certification for the state classes. With respect to the nationwide class, for which the plaintiffs asserted affirmative and negligent misrepresentation claims, the court found that there were too many variances among the states' laws. As the court explained, "various [ ] states have their own idiosyncrasies" and plaintiffs "ma[d]e no effort to harmonize these state laws, nor to show that these differences fall into a limited number of predictable patterns that could be readily managed at trial." Similarly, with respect to the multistate class, for which the plaintiffs asserted warranty claims, the court found that the differences among the states' laws with respect to the element of reliance precluded certification. However, the court certified the New York and Florida classes of purchasers bringing unjust enrichment claims and seeking full refunds. Although the defendants argued that individualized issues predominated, the court disagreed. According to the court, common issues predominated because "each of [the elements] of the unjust enrichment claims [was] susceptible to proof with common evidence."

***Jacobs v. Quicken Loans, Inc.*, No. 15-81386-CIV-MARRA, 2017 WL 4838567 (S.D. Fla. Oct. 19, 2017)**

Judge Kenneth A. Marra of the U.S. District Court for the Southern District of Florida denied the plaintiffs' motion to certify a class of plaintiffs alleging that the defendant made telephone calls using an automatic telephone dialing system or prerecorded voice to their cellular telephones without their express consent. The court found that the plaintiffs had not demonstrated compliance with Rule 23 because they failed to show that the issue of consent for the challenged calls could be resolved by common, classwide evidence.

***Hargreaves v. Associated Credit Services, Inc.*, No. 2:16-CV-0103-TOR, 2017 WL 4543791 (E.D. Wash. Oct. 11, 2017)**

Chief Judge Thomas O. Rice of the U.S. District Court for the Eastern District of Washington denied the plaintiffs' second motion for certification of three classes and five 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 Collection Agency Act (WCAA). The previous denial of certification was based on the plaintiffs' failure to establish that the classes were sufficiently numerous, as discussed in the summer 2017 *Class Action Chronicle*. In their second motion, the plaintiffs argued, based on public records, that the defendants filed 2,463 writs of garnishment in 1,299 lawsuits during the class period and analyzed a sample of 40 files, which they argued established numerosity. The court disagreed, because even "expanding the universe to include every garnishment action filed," the plaintiffs had not introduced "concrete evidence" of sufficient wronged class members to satisfy numerosity. Moreover, the plaintiffs were not "representative" of their proposed classes because their complaint only concerned collection of consumer debt by garnishment of bank accounts, not the universe of garnishment proceedings, and had "no standing to assert more violations than those for which they were allegedly

harmed." The court also rejected the plaintiffs' attempt to add a class for the WCAA claim because it was not raised in their initial motion for class certification and was raised for the first time in the plaintiffs' reply brief.

***RJF Chiropractic Center, Inc. v. BSN Medical, Inc.*, No. 3:16-CV-00842-RJC-DSC, 2017 WL 4542389 (W.D.N.C. Oct. 11, 2017)**

Judge Robert J. Conrad, Jr. of the U.S. District Court for the Western District of North Carolina denied the plaintiff's placeholder motion to certify a class of putative class members alleging that the defendants violated the Telephone Consumer Protection Act by sending unsolicited advertisements to the plaintiff via telephone facsimile machine. The court held that the plaintiff's placeholder class certification motion was an obsolete procedural tactic aimed at preventing the defendants from offering individual named plaintiffs relief while giving nothing to the class. Accordingly, this motion failed to establish the requirements of numerosity, commonality, typicality and adequacy, and the court denied the class certification motion.

In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. MC 07-0489 (PLF), 2017 WL 5311533 (D.D.C. Oct. 10, 2017), *23(f) pet. pending

Judge Paul L. Friedman of the U.S. District Court for the District of Columbia denied the plaintiffs' motion for class certification of a putative class of shippers claiming that defendants violated Section 1 of the Sherman Act. The plaintiffs alleged that the defendants had coordinated their fuel surcharge programs to increase prices to shippers. Judge Friedman initially certified the class, but the ruling was vacated by the D.C. Circuit in light of the Supreme Court's decision in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). The defendants contended that the plaintiffs' model found damages where none could exist and that the purported class contained numerous uninjured shippers. The D.C. Circuit held that if those contentions were correct, the plaintiffs would be unable to meet the predominance requirement of Rule 23. After a week-long hearing, Judge Friedman found that the class could not be certified because common issues did not predominate. Specifically, the court found that the plaintiffs' damages model could not prove classwide injury because it did not distinguish between allegedly conspiratorial and nonconspiratorial surcharges and there were too many uninjured shippers for the plaintiffs to establish that "all or virtually all" of the proposed class had sustained injury. Therefore, the court denied the plaintiffs' motion for class certification.

***Abraham v. WPX Energy Production, LLC*, No. CIV 12-0917 JB/CG, 2017 WL 4402398 (D.N.M. Sept. 30, 2017)**

Judge James O. Browning of the U.S. District Court for the District of New Mexico denied the plaintiffs' second motion for class certification of a nationwide class and two state subclasses of individuals seeking recovery on natural gas royalty underpayments based on various state contract claims. The previous denial of certification was due to the plaintiffs' failure to establish commonality and predominance required under Rules 23(a) and (b)(3). The proposed class was also not ascertainable, as the class only applied to natural gas processed at a specific location. In their second motion, the plaintiffs revised their proposed class by omitting reference to the location of processing and limited the class to those who were paid on a "keep-whole" methodology. The court agreed that the plaintiffs' proposed new class solved the prior fatal flaw by removing reference to the location of the natural gas processing, and the new class was ascertainable by records kept by the defendants. However, while the keep-whole methodology was uniform, the court had to consider each lease form, containing varying language and terms; these lease variations meant both commonality and predominance could not be satisfied. The court further found problematic that the class sought recovery for both royalty payments and overriding royalty payments, the latter of which are not created through the use of form contracts and are based on many non-uniform factors. Thus, certification was denied.

Chruby v. Global Tel*Link Corp.*, No. 5:15-CV-5136, 2017 WL 4320330 (W.D. Ark. Sept. 28, 2017), *23(f) pet. denied

Judge Timothy L. Brooks of the U.S. District Court for the Western District of Arkansas denied the plaintiffs' motion to certify four classes that alleged that the defendant obtained exclusive contracts to provide telephone services to inmates at U.S. correctional facilities in exchange for the payment of kickbacks to those facilities known as "site commissions." The plaintiffs also alleged that the defendant then charged them excessive rates to cover the cost of those "site commissions." The case related only to intrastate communications services, as other litigation involved related interstate communication services. The court found that the proposed classes all failed to meet the predominance requirement of Rule 23(b)(3) in light of the "voluntary payment doctrine" that the defendant may assert as an affirmative defense. That doctrine indicates that voluntary payments may not be recovered except for those made as a result of duress, fraud, mistake or failure of consideration. The defendant offered concrete evidence in the form of a contract and

relevant deposition transcripts that at least some class members had the option of not paying recoupments of site commissions at least some of the time in light of free calling options. For the unjust enrichment classes, the defendant could assert this defense for every putative class member, and it could not be resolved without inherently individualized inquiries. The issues underlying this defense also applied to the state consumer law classes. For example, the California class would require the court to weigh the gravity of the harm to the alleged victim against the utility of the defendant's conduct. Accordingly, the motion for class certification was denied.

***Bouton v. Ocean Properties, Ltd.*, No. 16-cv-80502, 2017 WL 4413994 (S.D. Fla. Sept. 27, 2017)**

Judge Beth Bloom of the U.S. District Court for the Southern District of Florida denied the plaintiff's motion for certification of a putative class of plaintiffs alleging that the defendants violated the Fair and Accurate Credit Transactions Act by issuing noncompliant credit card receipts that included the cards' expiration dates on the receipts. The court found that the class was not adequately defined because the class definition impermissibly sought to expand the scope of the class beyond those theories pleaded in the operative complaint. The court also found that the class was not ascertainable because the court would have to make an individualized inquiry as to each putative class member to determine whether that class member received any noncompliant receipts during his or her stays at certain hotels, and whether he or she obtained the receipt from the hotel's front desk.

***Lowe v. Maxwell & Morgan PC*, No. CV-15-02481-PHX-DLR, 2017 WL 4150441 (D. Ariz. Sept. 19, 2017)**

Judge Douglas L. Rayes of the U.S. District Court for the District of Arizona denied certification of two classes of property owners alleging violations of the Fair Debt Collection Practices Act (FDCPA) based on the defendant's alleged attempts to garnish post-judgment attorneys' fees and costs not authorized by Arizona law. The court held that the requirements of Rule 23(a) were satisfied because the classes consisted of at least 40 members and two common questions governed the claims: whether the defendant garnished or attempted to garnish post-judgment fees and costs, and whether it did so prior to the entry of judgment. Further, the named plaintiff's claims were typical, despite a statute of limitations defense, which the court described as weak and "not ... a major focus of the litigation." However, class certification under Rule 23(b) was not appropriate because the plaintiff sought damages for the violations, rather than just declaratory or injunctive relief. The plaintiff also failed to demonstrate that common questions of law or fact predominated or that a class action was superior under Rule 23(b)(3). A "plethora" of individualized inquiries would be necessary, including assessing whether each class member had incurred a qualifying debt under the FDCPA, and whether post-judgment fees and costs were authorized by each member's homeowner's association agreement. Additionally, bankruptcy petitions by certain property owners would give rise to complexities regarding those owners' status as plaintiffs and the related need to obtain approval from bankruptcy court for bankruptcy estates to pursue the claims.

Prunty v. Agency for Healthcare Administration*, No. 2:17-cv-291-FtM-99CM, 2017 WL 3782790 (M.D. Fla. Aug. 31, 2017), *appeal pending

Judge Jennifer A. Dorsey of the U.S. District Court for the Middle District of Florida denied the *pro se* plaintiff's motion for certification of a class of African-American parents who completed Individual Education Plans over a five-year period. The court explained that a *pro se* plaintiff may plead his or her own personal case but cannot litigate on behalf of others.

***Johnson v. Time Warner Entertainment-Advance/Newhouse Partnership*, No. 3:15-cv-01727-CMC, 2017 WL 3765551 (D.S.C. Aug. 31, 2017)**

Judge Cameron McGowan Currie of the U.S. District Court for the District of South Carolina denied the plaintiff's motion to certify a class for alleged unauthorized placement of cable transmission lines and related equipment on putative class members' land. The court held that the plaintiff failed to establish ascertainability because he relied solely on an expert whose class certification opinion was excluded. The court also held that individualized issues did not predominate because the class definition required, *inter alia*, that the plaintiff establish that each putative class member owned a parcel of land burdened by the defendant's cable transmission lines, an inherently individualized determination that would require a title search and physical examination of each property. There were similarly individualized issues raised as part of the defense, including the existence of an easement or affirmative consent. Accordingly, the court held a class could not be maintained under either Rule 23(b)(2) or Rule 23(b)(3).

Schellenbach v. GoDaddy Inc.*, No. CV16-0746 PHX DGC, 2017 WL 3719883 (D. Ariz. Aug. 29, 2017), *23(f) pet. denied

Judge David G. Campbell of the U.S. District Court for the District of Arizona denied the plaintiffs' motion to reconsider the court's denial of certification of a class of consumers who had purchased virtual servers after viewing the GoDaddy website (discussed in the fall 2017 *Class Action Chronicle*). The court rejected the plaintiffs' contention that it should have applied the "least sophisticated consumer" standard to their false advertising claim alleging that the virtual nature of the server was not disclosed. The court declined to apply that standard because under Arizona law, a consumer sufficiently sophisticated "to know the truth" about a representation or omission was not injured and cannot bring a false advertising claim. Thus, individual questions about whether class members saw and understood the GoDaddy advertising indicating that the server was virtual predominated. Rejecting the plaintiffs' contention that a questionnaire would eliminate these individual questions, the court held that it could not require GoDaddy to accept a class member's questionnaire answer on a central fact of liability without testing each class member's assertion through discovery and evidence of the information each member received. The plaintiffs ignored virtually all the authority the court cited in support of its decision that a presumption of reliance was inappropriate, and did not provide any basis for challenging the expert estimate as to how many class members visited the website or otherwise learned the servers were virtual. Even accepting their unsupported lower number, individualized inquiries would still be required. Finally, the plaintiffs' contention that the court should have narrowed the class rather than denying certification was incorrect, because the plaintiffs, not the court, "bore the obligation of properly defining the proposed class." The court rejected the plaintiffs' narrowed definition because it did not address the court's concerns and "might well be an improper fail-safe class."

***Clark v. Bumbo International Trust*, No. 15 C 2725, 2017 WL 3704825 (N.D. Ill. Aug. 28, 2017)**

Judge Jorge L. Alonso of the U.S. District Court for the Northern District of Illinois denied the plaintiff's motion for class certification in a case alleging that the defendant deceptively marketed and advertised a floor seat for babies in making a representation on its website related to the seat. The plaintiff asserted that the defendant violated the statutory consumer fraud and unjust enrichment laws of the 50 states and the District of Columbia. The court found that the plaintiff's class definitions were necessarily overbroad because the representation at issue was not simply on the website as described in the class definition, but instead on a particular piece of the page related to the specific baby seat. The proposed class definition required merely that the class member have visited the website, not the specific page with the representation at issue. Even if the court reviewed the motion for class certification under a proposed alternative definition for those that read the quote, the plaintiff still failed to meet the Rule 23(b) requirements for a class. A Rule 23(b)(2) class was not appropriate because the plaintiff's request for injunctive relief was moot, as the representation had been removed from the website and the defendant had no intention of using the representation again. Further, a Rule 23(b)(2) class is only appropriate if the injunctive relief is the predominant remedy requested, but the second amended complaint alleged that the matter exceeded $5 million. Under a Rule 23(b)(3) analysis, predominance was not satisfied because the plaintiff failed to submit any evidence that the representation was material to any portion of the seat's purchasers and thus caused them to suffer damages. Accordingly, the court denied the plaintiff's motion for class certification.

Brodsky v. HumanaDental Insurance Co.*, No. 10-cv-03233, 2017 WL 3704824 (N.D. Ill. Aug. 28, 2017), *23(f) pet. granted

Judge John Robert Blakey of the U.S. District Court for the Northern District of Illinois granted the defendant's motion to decertify a class related to the receipt of faxes allegedly in violation of the Telephone Consumer Protection Act. The plaintiff insurance wholesaler received two faxes from the defendant insurance company, and the court had previously certified a Rule 23(b)(3) class. After the certification order, however, the defendant received a retroactive waiver from the Federal Communications Commission (FCC) that explicitly excused the defendant for any failure to comply with the opt-out notice requirement for fax advertisements sent with prior express invitation or permission. The court found that the resulting consent issues defeated superiority and predominance such that decertification was appropriate. The court noted that because of the FCC waiver, in order to ascertain liability, the court needed to determine whether each individual recipient "solicited" the faxes he or she received such that individual questions overwhelmed the common issues previously identified by the court. Controlling precedent explained that individual consent issues are context-dependent, and, in addition, the facts of the case reflected different relationships among and between various fax recipients. Accordingly, the court granted the defendant's motion to decertify the class.

King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797, 2017 WL 3705715 (E.D. Pa. Aug. 28, 2017), *23(f) pet. denied

Direct purchasers of the drug Provigil brought a supplemental motion for class certification after the U.S. Court of Appeals for the Third Circuit vacated and remanded the district court's certification ruling in a putative antitrust class action over reverse payment patent settlements. Specifically, the Third Circuit held that the district court's numerosity analysis was flawed because it improperly emphasized the late stage of the proceeding and did not consider the ability of individual class members to pursue their cases through the use of joinder (as opposed to individual cases). On remand, Judge Mitchell S. Goldberg of the U.S. District Court for the Eastern District of Pennsylvania concluded that numerosity had not been satisfied and denied the direct purchasers' supplemental motion for class certification. Judge Goldberg stressed that where, as here, the class consists of fewer than 40 members, the inquiry into impracticability should be particularly rigorous. Despite concerns that joinder would greatly expand discovery, multiply the number of experts and render trial unmanageable, Judge Goldberg concluded that such issues could be addressed through cost-sharing mechanisms (*e.g.*, joint motions) and carefully implemented limitations on cumulative or duplicative discovery under Rule 26(b)(2)(C)(i). As for the direct purchasers' ability and motivation to litigate as joined plaintiffs, Judge Goldberg dispelled any contention that joinder would be uneconomical, reasoning that while direct purchasers with relatively small claims could see a net loss if they litigated individually, the calculus would be different for joined plaintiffs who could arrange to share costs, especially if the class sought representation on a contingent basis.

***Adam v. Devos*, No. 3:15-3592, 2017 WL 3633744 (S.D. W. Va. Aug. 23, 2017)**

Chief Judge Robert C. Chambers of the U.S. District Court for the Southern District of West Virginia denied the plaintiff's motion for certification of a proposed class consisting of members whose eligibility for a guaranteed student loan during a specified time period was falsely certified by the PTC Institute of Florida (PTC) and/or whose loans were secured through Florida Federal and were subject to restitution. The court held that the plaintiff failed to satisfy the numerosity requirement where the plaintiff relied solely on unsupported speculation about the size of the potential class. For example, the plaintiff provided no support for the speculative conclusion that because a large number of students enrolled in PTC, a large number were also affected by the decision to rehabilitate loans.

***Lanteri v. Credit Protection Association L.P.*, No. 1:13-cv-1501-WTL-MJD, 2017 WL 3621299 (S.D. Ind. Aug. 22, 2017)**

Judge William T. Lawrence of the U.S. District Court for the Southern District of Indiana denied the plaintiff's motion to certify two classes related to allegations that the defendant violated the Telephone Consumer Protection Act (TCPA) by continuing to send text messages to cell phones regarding debts after the plaintiff replied "stop" to opt out from receiving further messages and by contacting her when her debt was subject to an automatic stay order of a bankruptcy court. The plaintiff sought to certify two TCPA classes: a Stop Texting class and a Bankruptcy class. As for the Stop Texting class, the proposed definition did not meet the ascertainability requirement because the language related to replying "with the message to stop" was impermissibly vague. The court removed the impermissibly vague language and continued to review the other class certification requirements but found typicality lacking because the plaintiff's message did not meet the criteria in the updated class definition. In addition, predominance was not met because of inherent dissimilarities between the plaintiff's text messages and those in the proposed class — namely, the plaintiff sent a completely different text message that is not included in the listed messages in the class definition. As for the Bankruptcy class, typicality was not met because the plaintiff had not shown that she was called after the debt was discharged in bankruptcy, contrary to the claims of others in the class. The court identified two possible class definitions but was unable to make a certification decision without additional information. Accordingly, the court denied the motion for class certification but ordered the plaintiff to file a new motion for class certification under the proposed definitions, if desired, within 21 days of the entry.

***Proctor v. Globe Life & Accident Insurance Co.*, No. CIV-15-750-M, 2017 WL 3585790 (W.D. Okla. Aug. 18, 2017)**

Judge Vicki Miles-LaGrange of the U.S. District Court for the Western District of Oklahoma refused to certify a nationwide class of life insurance policyholders who challenged the defendant's practice of retaining payments of premiums on lapsed insurance policies when those payments were insufficient to make the policy current and reinstate it. The plaintiff claimed that the defendant instead should have returned those premiums to the insured. Noting that the plaintiff would likely also have difficulty satisfying Rule 23(a)'s typicality and adequacy prerequisites, the court held that the plaintiff had not established that common questions of law or fact would predominate over any questions affecting only individual members, and that a class action was superior to other available methods of adjudicating

the controversy. The plaintiff failed to identify the particular state law claims he was asserting on behalf of the class or offer any analysis of state law variances, such as varying statutes of limitations. The plaintiff also failed to show that certification of a nationwide class would not present insuperable obstacles or provide "any suitable or realistic plan for trial of the class claims in light of any variations in state law." Thus, the court denied the plaintiff's motion for class certification.

Byrd v. Aaron's, Inc.*, No. 11-101, 2017 WL 4269715 (W.D. Pa. Sept. 26, 2017), *adopting* 2017 WL 4326106 (W.D. Pa. Aug. 4, 2017), *23(f) pet. pending

In a case where the defendants allegedly used spyware in violation of the Electronic Communications Privacy Act (ECPA), Judge Cathy Bissoon of the U.S. District Court for the Western District of Pennsylvania adopted Magistrate Judge Susan Paradise Baxter's report and recommendation that class certification be denied because the plaintiffs could not satisfy the predominance requirement. The court found predominance was lacking because the questions of liability required individualized proof and predominated over other issues common to the putative class. Specifically, the court noted that individualized proof would be needed to establish whether: (1) class members used the computers at issue; (2) the information captured by the spyware constituted an electronic communication under the ECPA; and (3) the user consented to the capture.

Decisions Permitting/Granting Class Certification

***Dickens v. GC Services Limited Partnership*, No. 16-17168, 2017 WL 3616345 (11th Cir. Aug. 23, 2017) (per curiam)**

The U.S. Court of Appeals for the Eleventh Circuit (Martin, Jill Pryor and Anderson, JJ.) reversed the district court's denial of class certification in a class action brought by plaintiffs alleging that the defendant issued a debt collection letter that failed to comply with the Fair Debt Collection Practices Act. First, the Eleventh Circuit reversed the district court's finding that the proposed class representative failed to satisfy Rule 23's adequacy requirement because he sought only statutory and not actual damages, while some class members alleged they suffered actual damages. The court found that the fact that the class representative sought only statutory damages was only a minor conflict and, thus, could not defeat certification. Second, the Eleventh Circuit also reversed the district court's determination that a class action was not the superior method of adjudicating the dispute. The court explained that the district court considered the cost of the potential class action in a vacuum, without comparing it to other forms of litigation. In fact, "[m]any courts ... have concluded that class actions are a more efficient and consistent means of trying the legality of collection letters." The Eleventh Circuit also faulted the district court for failing to meaningfully consider the ways in which the high likelihood of a low recovery for each class member would militate in favor of class adjudication.

***City Select Auto Sales Inc. v. BMW Bank of North America Inc.*, 867 F.3d 434 (3d Cir. 2017)**

A car dealership brought a putative class action against a bank and its contractor for junk faxes allegedly sent in violation of the Telephone Consumer Protection Act (TCPA). Specifically, the dealership claimed that the bank contracted with an internet-based lending facilitator to connect with prospective car buyers in need of financing, and both the bank and its contractor violated the TCPA by pulling fax numbers from the contractor's database of car dealers and sending them roughly 21,000 unsolicited fax advertisements. Judge Noel L. Hillman of the U.S. District Court for the District of New Jersey concluded that the dealer had failed to demonstrate ascertainability and denied its motion for class certification. The U.S. Court of Appeals for the Third Circuit (Krause, Scirica and Fuentes, JJ.) disagreed, however, vacating the decision and remanding. The panel reasoned that while affidavits from potential class members, alone, do not constitute a reliable and administratively feasible means of determining class membership, they could satisfy the ascertainability standard if used with other materials — in this case, the contractor's database. The panel went on to explain that ascertainability had not been properly assessed because the district court had denied the dealer's motion to compel production of the database, and without that database, the record was inadequate to support the district court's finding that ascertainability had not been shown. Indeed, the panel observed that it could not take a position on the level of individualized fact-finding necessary to identify class members without access to the database.

***Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (9th Cir. 2017)**

The U.S. Court of Appeals for the Ninth Circuit (Paez, Berzon and Christen, JJ.) reversed the district court's order decertifying a class of consumers who brought a putative class action against a manufacturer of a dietary supplement. The plaintiff alleged that the manufacturer violated California consumer protection laws by falsely advertising that the product would enhance its users' sexual performance. The district court had originally granted class certification on the basis of the full refund damages

model, which applies when a product is shown to be worthless and results in damages of the average retail price multiplied by the number of units sold. After discovery, the district court granted a motion to decertify, finding that common issues did not predominate because although the full refund model was consistent with the plaintiff's theories of liability, he had only provided the suggested retail price, not the actual average retail price. The Ninth Circuit held that it was an abuse of discretion to decertify the class on the basis of the plaintiff's inability to prove restitution damages through the full refund model, emphasizing that uncertain damages should not defeat certification, as long as a valid method has been proposed for calculating damages. Further, classwide damages calculations under the California consumer protection statutes are "particularly forgiving" and accept an approximation as long as a "reasonable basis" for damages is used. Because the plaintiff presented evidence that the product was valueless and amenable to full refund treatment, he was only required to show that the full price amount of retail sales could be approximated over the relevant time period. Whether he could prove damages to a reasonable certainty was a question of fact to be decided at trial.

***Farar v. Bayer AG*, No. 14-cv-04601-WHO, 2017 WL 5952876 (N.D. Cal. Nov. 15, 2017)**

Judge William H. Orrick of the U.S. District Court for the Northern District of California granted in part the plaintiffs' motion for certification of three state-wide classes and a nationwide class of consumers who purchased One A Day multivitamin products marketed by the defendants using allegedly false or misleading health claims. The gravamen of the lawsuit was that because studies have concluded that multivitamin supplementation does not have any benefit to heart health, immunity or physical energy, the health claims were deceptive. The court found that Rule 23(a) was satisfied, rejecting the defendants' argument that the class representatives were not typical since the plaintiffs and class members all alleged injury from the same conduct. The plaintiffs were adequate despite close personal relationships between class counsel and two of the three named plaintiffs because the relationships alone, without further evidence of impropriety, did not indicate a conflict of interest. The court also found the plaintiffs had standing to sue for injunctive relief under Rule 23(b), because the plaintiffs stated they would like to buy the products in the future provided the challenged conduct ceased. Further, the court found predominance satisfied, rejecting the defendants' argument that the plaintiffs could not show that the products are absolutely "worthless." The court reasoned that the plaintiffs' damages theory was not that the products were totally worthless, but rather that they did not provide value to the average American because the average American is not biochemically deficient. The court rejected the defendants' argument that materiality could not be proven, given the defendants' internal documents listing such claims as "Supports my immunity levels" and "Maintains a healthy heart" as driving purchasing decisions by both women and men. The court certified the three state-law classes but rejected certification of a nationwide class applying California law, as the plaintiffs failed to meet their burden showing that California had the necessary significant contacts to the class members' claims.

Gold v. Lumber Liquidators, Inc.*, No. 14-cv-05373-RS, 2017 WL 5513641 (N.D. Cal. Nov. 15, 2017), *23(f) pet. pending

Judge Richard Seeborg of the U.S. District Court for the Northern District of California granted in part the plaintiffs' motion for certification of six state classes challenging the defendant's business practices with respect to the sale and marketing of allegedly defective bamboo flooring. The court rejected the defendant's arguments that variations in ambient moisture and unique circumstances involving installation and environmental conditions in each home precluded commonality. The court observed that these "arguments may prove compelling later in this litigation in attacking the merits of plaintiffs' claims" but did not affect the common question of whether the flooring's alleged inability to withstand normal humidity changes undermined its durability. Moreover, common questions of law or fact predominated as to each state's consumer protection laws, and damages could be measured on a classwide basis. Typicality was satisfied because the plaintiffs asserted injuries stemming from a uniform design defect and seeking relief under the same legal theories; the court held that differences in how the plaintiffs acclimated and/or installed their floors or the problems they experienced do "not defeat typicality where the alleged defect is in the product itself." The court found the named representative of the Illinois class was not adequate because while the litigation was pending, his bamboo flooring was destroyed by a leak and replaced by his insurance; thus, he no longer shared an interest with putative class members whose primary goal is to obtain full replacement of their bamboo flooring. However, because other Illinois representatives existed, the court conditionally certified that class pending the substitution of an adequate named plaintiff in his place, and certified the other five classes.

***Underwood v. Kohl's Department Stores, Inc.,* No. CV 15-730, 2017 WL 5261535 (E.D. Pa. Nov. 13, 2017)**

Judge Wendy Beetlestone of the U.S. District Court for the Eastern District of Pennsylvania partially granted a motion for class certification involving Kohl's credit card users alleging unjust enrichment against Kohl's and Capital One for charging the full price for PrivacyGuard services where the putative class members never completed the second step of the registration process to activate the full set of monitoring services. Due to a change in the card issuer, Delaware law applied to customers who opened a Kohl's card before April 1, 2011, and Virginia law applied to customers who opened a card thereafter. The court certified the class of users bringing unjust enrichment claims under Delaware law but denied certification to the claims arising under Virginia law. The court first determined that the Rule 23(a) requirements were satisfied under both Delaware and Virginia law because the class had more than 26,000 similarly situated plaintiffs whose legal claims were all based on one common fact. However, the court held that the commonality and predominance requirements were not satisfied for the Virginia class. Specifically, the defendants argued that the "voluntary payment defense" — barring unjust enrichment recovery where payment was made with full knowledge of the facts — called for individualized inquiries that predominated over common questions. Under Delaware law, the voluntary payment defense places the burden on the defendants to prove that payments were voluntary, and the court held the defendants were unable to establish this defense. Under Virginia law, the burden is reversed — there is a presumption that payments are voluntary until each individual plaintiff proves otherwise. Thus, the Virginia unjust enrichment claims failed the commonality and predominance requirements because they necessitated individualized questions into a card users' subjective knowledge. Accordingly, the court certified the class of users bringing unjust enrichment claims under Delaware law but denied certification to the claims arising under Virginia law.

***In re Asacol Antitrust Litigation*, No. 15-cv-12730-DJC, 2017 WL 5196381 (D. Mass. Nov. 9, 2017)**

Judge Denise J. Casper of the U.S. District Court for the District of Massachusetts certified a class of end-payors in an antitrust class action alleging that pharmaceutical companies removed a drug from the market as its patent was expiring (a move they argued was prompted by FDA safety concerns) to force patients to switch to newer treatments, still under patent, also offered by those companies. The end-payors sought to certify a class of individuals or entities who purchased one of the newer treatments after the original drug was pulled from the market. The court rejected the defendants' argument that the named plaintiffs lacked standing to bring claims under the laws of those states in which they did not make a purchase, finding that the named plaintiffs need only show that they suffered the same injury as other class members, and not identical claims. The court also rejected the defendants' argument that the named plaintiffs, labor unions, had suffered no net injury (because they received rebates or passed any putative overcharge on to others) and thus were not adequate or typical class representatives. According to the court, because an antitrust injury occurs at the moment of an overcharge, the named plaintiffs had experienced the same injury as other class members, and their later ability to offset that injury did not make them inadequate or atypical class representatives. Further, the court found that the plaintiffs' expert had offered a reasonable explanation for the exclusion of certain individual consumers from the plaintiffs' damages model, when similar third-party payor class members were not excluded, meaning that the exclusion did not create a conflict between the named plaintiffs and other class members.

Finally, the court found that the plaintiffs had satisfied predominance. The court agreed with the plaintiffs that injured-versus-uninjured class members could be distinguished by having class members submit affidavits or other evidence during the claims administration process. The court also concluded that the plaintiffs' damages model, which estimated what the price of the original drug would have been if it remained on the market once generic versions were available, was consistent with their theory of liability and could be used to provide common proof of antitrust impact. In particular, the court was not convinced that the level of potentially uninjured class members included in the model — around 10 percent of the class — was more than the *de minimis* number that, according to the U.S. Court of Appeals for the First Circuit, would not defeat class certification.

***Nio v. United States Dep't of Homeland Sec.*, No. CV 17-998 (ESH), 2017 WL 4876276 (D.D.C. Oct. 27, 2017)**

Judge Ellen S. Huvelle of the U.S. District Court for the District of Columbia certified a class of non-citizen U.S. service members applying for naturalization through the Military Accessions Vital to the National Interest program (MAVNI), which provides members with an expedited path to citizenship.

The plaintiffs alleged multiple claims under the Constitution and the Administrative Procedure Act (APA), seeking declaratory and injunctive relief based on the government's decisions to delay MAVNI enlistees from beginning service until after enhanced security screenings and to recall and decertify a form necessary to MAVNI naturalization applications. The defendants argued that factual differences between MAVNI enlistees — such as being at different stages in the naturalization process and requiring fact-specific background checks — prevented certification. The court, however, rejected these arguments, clarifying that the proposed class was merely challenging the application of standardized policies, rather than adjudicating naturalization applications. The court further rejected the defendants' argument that the plaintiffs' counsel was inadequate merely because they had never specifically handled immigration matters in the class action context, noting that Rule 23 does not require such specific experience. Finding all of the other Rule 23(b)(1)(A) and 23(b)(2) requirements satisfied, the court granted the plaintiffs' motion for class certification.

***Spuhler v. State Collection Services, Inc.*, No. 16-CV-1149, 2017 WL 4862069 (E.D. Wis. Oct. 26, 2017)**

Magistrate Judge Nancy Joseph of the U.S. District Court for the Eastern District of Wisconsin granted class certification to a class alleging violations of the Fair Debt Collection Practices Act (FDCPA) related to form collection letters sent by the defendant that allegedly contained false representations regarding the debts' interest. The court held that commonality was satisfied because the complaint alleged standardized conduct in the form of the sending of allegedly illegal form letters; typicality was satisfied because the plaintiffs' claims arose from the same course of conduct that gave rise to the other class members' claims — the receipt of a form letter allegedly in violation of the FDCPA — and because each class member's claim also relied on the same legal theory under the FDCPA in that the letters allegedly falsely represented the character, amount or legal status of the debt; and adequacy was satisfied even though a named plaintiff "showed very little knowledge about the facts of his own case," because he did understand the basic premise of the case. As to predominance, the court held that each class member's claim relied on the same legal theory — that the defendant falsely represented the character, amount or legal status of the debt.

***Kirwa v. United States Department of Defense*, No. CV 17-1793(ESH), 2017 WL 4862763 (D.D.C. Oct. 25, 2017)**

Judge Ellen S. Huvelle of the U.S. District Court for the District of Columbia granted the plaintiffs' motions for a preliminary injunction and provisional class certification for a class of non-citizens serving in the U.S. Army's Selected Reserve of the Ready Reserve. The plaintiffs enlisted in the Army under the Department of Defense's Military Accessions Vital to the National Interest (MAVNI) program, which provides an expedited path to citizenship for soldiers who serve during specified periods of military hostilities. The plaintiffs alleged the U.S. government violated the Administrative Procedure Act (APA) when it instructed the military to refuse to complete a form that certifies a MAVNI's qualifying military service as required for naturalization. After finding that the plaintiffs satisfied all requirements for preliminary injunctive relief, the court summarily granted provisional class certification. The court stated that the Rule 23 requirements were fulfilled but acknowledged that certification could be altered or amended before a decision on the merits. Accordingly, the court granted the plaintiffs' motion for a preliminary injunction and provisional class certification.

Beaton v. SpeedyPC Software*, No. 13-cv-08389, 2017 WL 4740628 (N.D. Ill. Oct. 19, 2017), *23(f) pet. granted

Judge Andrea R. Wood of the U.S. District Court for the Northern District of Illinois granted class certification in a case alleging the fraudulent and deceptive marketing of a software product that the defendant claimed diagnoses and repairs various computer errors. The court certified a class seeking to litigate the contractual warranty claims arising under British Columbia law and a subclass of those litigating under the Illinois Consumer Fraud and Deceptive Business Practices Act. The court held that commonality was satisfied because common legal questions arose, including whether the class members could avail themselves of the warranties and whether the software performed the function for which it was marketed. Typicality was satisfied, according to the court, because the named plaintiff appeared to have seen the same representations as other users and the software appeared to operate in the same way on each computer. Predominance was satisfied because the class members received the same software product, the software appeared to operate in the same way on each computer, and all of the class members were exposed to the same representations related to the software. The court further held that individualized issues identified by the defendant, such as whether some claims were time-barred and whether refunds were issued, could be addressed through a form affidavit with accompanying audit procedures.

***Bautista v. Valero Marketing & Supply Co.*, No. 15-cv-05557-RS, 2017 WL 4418681 (N.D. Cal. Oct. 4, 2017)**

Judge Richard Seeborg of the U.S. District Court for the Northern District of California certified a class action seeking damages and injunctive relief for violations of various California consumer protection laws. The plaintiff alleged that the defendant's marketing program, which indicated separate pricing for gasoline purchased through credit cards versus cash, was deceptive because debit cards were charged the same higher price as credit cards. The court rejected the defendant's argument that the plaintiff's claims failed as a matter of law as debit was not equivalent to cash, because the common question was whether a reasonable consumer would perceive debit and cash to be the same. The court further held common issues existed as to Valero's marketing practices and materials that it knew would be used in conjunction with split-pricing at branded stations, and whether those signs were misleading. Typicality was satisfied even though the plaintiff only visited one Valero station, because her claim that ambiguous signage caused her to pay a higher price was typical of consumers exposed to the signage. The court rejected the defendant's challenge to adequacy, arguing that the named plaintiff was an employee of her counsel, because one of her attorneys merely sat on the board of the named plaintiff's employer, and had no power to fire or exercise direct control over the named plaintiff. Finally, the court held that the plaintiff had satisfied the predominance and superiority requirements, because the plaintiff offered a reasonable estimate of damages, and the defendant failed to show that the proposed class would be more unmanageable than in other deceptive advertising class actions.

***Arwa Chiropractic, P.C. v. Med-Care Diabetic & Medical Supplies, Inc.*, No. 14 C 5602, 2017 WL 4339788 (N.D. Ill. Sept. 29, 2017)**

Judge John Z. Lee of the U.S. District Court for the Northern District of Illinois granted class certification to a class alleging, *inter alia*, violations of the Telephone Consumer Protection Act (TCPA) and the Illinois Consumer Fraud and Deceptive Business Practices Act. The plaintiff alleged that the defendants sent six "broadcasts" of faxes to thousands of medical providers, totaling more than 46,000 faxes, that did not contain an opt-out notice. The plaintiff alleged that each fax was identical except for the date and patient- and doctor-specific identifying information. Commonality was satisfied because whether the faxes at issue would qualify as "advertisements" under the TCPA is a central question common to all recipients. Adequacy was satisfied because the defendants' consent defenses lacked viability based on the record, and the defendants made factual claims that were "unsupported" by the evidence before the court. Predominance was also satisfied because each of the class members' claims arose under the TCPA, the defendants sent all class members the same form by fax, and there did not appear to be any viable individualized defenses based on the record. Calculating damages would also be a "simple matter" of tallying the number of unsolicited advertisements received and computing statutory damages. Accordingly, the court granted certification to this 23(b)(3) class.

***Gunter v. United Federal Credit Union*, No. 3:15-cv-00483-MMD-WGC, 2017 WL 4274196 (D. Nev. Sept. 25, 2017)**

Judge Miranda M. Du of the U.S. District Court for the District of Nevada certified two proposed classes alleging that the defendant charged overdraft fees based on the "available balance" of bank accounts — the amount not counting holds, including debit holds — instead of the actual balance, in breach of the account and opt-in agreements governing overdrafts and in violation of Regulation E governing disclosure under the Electronic Fund Transfer Act. Because the defendant's own witness testified that a large number of its clients opted into the overdraft service, the court held numerosity was satisfied. Commonality was also met, because all of the proposed class members were subject to the same language regarding overdraft fees in the agreements, all were charged an overdraft fee based on the available balance, and all of the members opted into the overdraft service. The court rejected the defendant's arguments that the plaintiff was not typical because the agreements differed slightly, and the named plaintiff incurred overdraft charges at higher than average rates. The overdraft language was consistent, and the named plaintiff's higher charges only indicated more damages than other class members. Finally, the court concluded that the Rule 23(b)(3) requirements were met, stressing that the common overdraft language predominated throughout, that the legal questions predominated over individual factual characteristics, and that a class action was the superior method for resolving these claims, in part because data could sufficiently ascertain class membership.

Reyes v. Educational Credit Management Corporation*, No. 15-cv-00628-BAS-AGS, 2017 WL 4169720 (S.D. Cal. Sept. 19, 2017), *23(f) pet. pending

Judge Cynthia Bashant of the U.S. District Court for the Southern District of California certified a class of California consumers who placed calls to the defendant, ECMC, and were recorded without consent, allegedly in violation of California's Invasion of Privacy Act (CIPA). The court found that the Rule 23(a) prerequisites of commonality, numerosity, typicality and adequacy were satisfied, and addressed certification under Rules 23(b)(3) and 23(b)(2). Certification under Rule 23(b)(3) was appropriate because common issues predominated, including whether ECMC's recording practice violated the CIPA; whether the prerecorded message disclosing recording was transmitted to callers and was sufficient to establish awareness of recording all subsequent calls; and whether a caller's hold time could determine notice and consent. Contrary to ECMC's arguments, the "hold time" defense did not present unmanageable individualized inquiries, as objective call log data could identify class members who did not stay on hold long enough to receive the warning. Similarly, the existence of prior awareness of messages announcing recording of the call could be determined from ECMC records and did not require an individualized inquiry into each member's subjective knowledge. Superiority was also satisfied because the potential damages were unlikely to incentivize individual claims, given litigation costs. The court also certified a Rule 23(b)(2) class to pursue injunctive relief requiring ECMC to provide a warning at the outset of all incoming calls that the calls would be recorded. Despite ECMC's argument that it had corrected the error that had caused the recording not to play for all inbound callers, the court held that the prospective relief was not moot because it was "not implausible" that the same settings leading to the lawsuit could occur again.

***Marquez v. Weinstein, Pinson & Riley, P.S.*, No. 14 C 739, 2017 WL 4164170 (N.D. Ill. Sept. 20, 2017)**

Judge John J. Tharp, Jr. of the U.S. District Court for the Northern District of Illinois granted certification of a class alleging violations of the Fair Debt Collection Practices Act (FDCPA). The litigation arose out of efforts to collect student loan debts, and the plaintiffs allege that the defendants filed form debt collection complaints that contained a false, deceptive or misleading paragraph in violation of the FDCPA. The court previously dismissed the case after finding that the paragraph was not misleading under the FDCPA, but the Seventh Circuit reversed and held that the paragraph was "plainly deceptive and misleading" to an unsophisticated consumer. On review, the court granted class certification. Commonality was satisfied because the case involved "exactly the type of standardized conduct contemplated under Rule 23(a)(1)." The defendants filed a standard debt collection complaint against hundreds of Illinois consumers. The common question was whether the content of those complaints violated the FDCPA. Typicality was satisfied because the plaintiffs' claims arose out of the same course of conduct, insofar as the defendants filed a standardized complaint against all of them. The defendants argued that adequacy was not satisfied because some class members may have suffered greater harm and may have claims for actual damages, but the plaintiffs only sought statutory damages and no actual damages. Therefore, there could be no conflict among class members over who suffered actual damages, and there was no evidence in the record that a significant portion of the class would have claims for actual damages. Such claims could also be dealt with by providing a clear notice of the right to opt out. Predominance was also satisfied because the issue of whether the complaints violated the FDCPA was not just significant to the litigation but was "dispositive of the defendants' liability." Accordingly, the court granted class certification.

***McMillion v. Rash Curtis & Associates*, No. 16-cv-03396-YGR, 2017 WL 3895764 (N.D. Cal. Sept. 6, 2017)**

Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California granted in part the plaintiffs' motion for certification of injunctive and damages classes based on allegations that the defendant debt collection agency called the plaintiffs without consent in violation of the Telephone Consumer Protection Act (TCPA), Fair Debt Collection Practices Act and California Rosenthal Fair Debt Collection Practices Act. In analyzing the Rule 23(b)(3) class, the court found commonality and predominance satisfied and rejected the defendant's contention that individualized issues regarding consent would predominate, when the defendant offered no evidence demonstrating that this would be an issue with respect to the proposed classes. The court acknowledged Ninth Circuit precedent that the potential existence of individualized damage assessments "does not detract from the action's suitability for class certification," and noted that the defendant's willfulness and knowledge presented a common question. The court held that one named plaintiff was atypical since she provided her cellular telephone number in an application for credit to a creditor and fell within the definition's exclusion, but found the other named plaintiff did not fall within the exclusion and satisfied the typicality require-

ment. The court also found superiority satisfied, rejecting the defendant's argument that a class action could result in excessive damages because Congress allowed for sufficiently high statutory damages for individual actions under the TCPA. The court also found that certifying both damages and injunctive relief classes was appropriate and promoted judicial efficiency.

Corcoran v. CVS Health*, No. 15-cv-03504-YGR, 2017 WL 3873709 (N.D. Cal. Sept. 5, 2017), *appeal pending

The plaintiffs sought to certify six state classes and raised claims under each state's statutory laws proscribing unfair and deceptive acts and practices, and common law fraud and negligent misrepresentation claims. The plaintiffs alleged that the defendants submitted falsely inflated drug prices to pharmacy benefit managers and third-party payor insurance providers (together, intermediaries) resulting in higher copayment obligations for the plaintiffs. Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California ultimately certified four state classes, but narrowed them on typicality grounds by excluding any intermediaries within each state class that did not adjudicate a class representative's claims. The court refused to certify the other two state classes because the class representatives had no transactions adjudicated by the intermediaries at issue. Considering predominance and commonality together, the court rejected the defendants' argument that potential class members knew about the allegedly offending pricing, reasoning that most members would not likely understand the "opaque" copayment adjudication process at issue to be aware of the alleged fraudulent acts. The court also rejected the defendants' argument that due to individualized insurance plans, no common evidence could establish a class member's damages, because differences in damages calculations do not defeat class certification under Ninth Circuit law. The court also found superiority satisfied, because the plaintiffs sufficiently demonstrated that jury instructions and a verdict form may be structured to account for statewide classes, since many of the state law claims raised common issues.

***Suchanek v. Sturm Foods, Inc.*, No. 11-CV-565-NJR-RJD, 2017 WL 3704206 (S.D. Ill. Aug. 28, 2017)**

Judge Nancy J. Rosenstengel of the U.S. District Court for the Southern District of Illinois denied the defendants' motion for decertification of a class alleging violations of the consumer protection statutes of eight states related to the packaging and marketing of the defendants' coffee products. In granting certification, the court previously found that damages were susceptible to measurement on a classwide basis using two models — a Retail Damages model and Price Premium Damages model — presented by the plaintiffs' expert. After denying the defendants' *Daubert* motions to exclude the testimony of the plaintiffs' expert, the court analyzed the defendants' motion to decertify the class, arguing that neither damages model provided a damages measurement attributable only to the alleged misconduct that could be calculated on a classwide basis. As to statutory damages, the court did not believe the expert's testimony was even necessary and held that the claims could proceed even if the damages models were thrown out. As to the Retail Damages model that would provide class members with a full refund of their purchase price, the defendants argued that evidence in the record showed that the coffee at issue was not worthless and that some consumers received a benefit from it. However, the court noted that a passage cited by the defendants from a survey was "cherry-picked" and that there was evidence that the defendants had their employees write fake positive reviews and, thus, the evidence cited by the defendants did not make it even "relatively clear" that some consumers received such a benefit. The court also rejected the defendants' characterization of the plaintiffs' two theories of liability and did not conclude that this model was an invalid model for measuring damages across the entire class. As to the Premium Damages model, the defendants' principal argument "simply dispute[d] the precision" of the plaintiffs' expert's methodology and contended that she needed to include additional variables in the analysis. The court rejected this argument and accordingly denied the defendants' motion to decertify the class.

***Baumann Farms, LLP v. Yin Wall City, Inc.*, No. 16-CV-605, 2017 WL 3669616 (E.D. Wis. Aug. 25, 2017)**

Magistrate Judge William E. Duffin of the U.S. District Court for the Eastern District of Wisconsin granted certification to a class alleging violations of the Lanham Act related to the marketing of ginseng. The plaintiffs, Wisconsin growers of ginseng, alleged that Wisconsin ginseng is of superior quality to ginseng grown elsewhere and that the defendants sold ginseng labeled as having been grown in Wisconsin when, in fact, it had not been grown there and was most likely grown in China. On review, the court found that the plaintiffs satisfied the Rule 23 requirements and certified a Rule 23(b)(3) class. Commonality was satisfied because the claims of every class member would rise or fall on the question of whether the defendants sold ginseng with a false designation of origin that was likely to cause confusion or mistake or to deceive in violation of the Lanham Act. The defendants argued that the named plaintiffs had no claim typical of those of the proposed class because they were not entitled to an injunction since the defendants had already stopped selling the allegedly misbranded product and no plaintiff could demonstrate any monetary damages from the defendants' sales. The court found typicality was satisfied, however, because the court could award disgorgement of the defendants' profits, and it was premature to determine whether there was a real and immediate threat of repeated injury caused by the defendants. The defendants did not meaningfully address the plaintiffs' arguments on predominance and superiority, and the court found those satisfied. Accordingly, the court granted class certification.

Washington v. Marion County Prosecutor*, No. 1:16-cv-02980-JMS-DML, 2017 WL 3581641 (S.D. Ind. Aug. 18, 2017), *appeal pending

Chief Judge Jane Magnus-Stinson of the U.S. District Court for the Southern District of Indiana granted class certification and issued a permanent injunction enjoining the defendants' use of Indiana's civil forfeiture statute. The plaintiff challenged the defendants' use of the statute specifically as it applied to the seizure and pre-forfeiture retention of vehicles because it allowed law enforcement to seize and hold vehicles for up to six months without judicial oversight and without an opportunity to challenge the seizure and deprivation, contrary to the Due Process Clause of the Fifth and Fourteenth Amendments. In granting the permanent injunction, the court also certified a class of those who owned vehicles seized and held pursuant to the Indiana statute at issue by certain Indiana law enforcement officials who were not afforded a post-seizure, pre-forfeiture hearing. The class was identifiable because the definition referred to objective criteria: vehicle owners whose vehicles had been seized pursuant to the Indiana law by the defendants. Commonality was satisfied because all the class members were subject to the same course of conduct — vehicles were seized and held without a post-seizure, pre-forfeiture hearing in violation of their Fifth and Fourteenth Amendment due process rights. Adequacy was satisfied because, in part, the plaintiff continued to diligently pursue the case even after his vehicle was returned to him. Further, the case was a "prime example" of a Rule 23(b)(2) case because it sought injunctive relief to prevent future allegedly illegal deprivation of civil rights. Accordingly, the court certified the class and later granted the injunction.

***G.M. Sign Inc. v. Stealth Security Systems, Inc.*, No. 14 C 09249, 2017 WL 3581160 (N.D. Ill. Aug. 18, 2017)**

Judge John J. Tharp, Jr. of the U.S. District Court for the Northern District of Illinois granted certification to a class alleging violations of the Telephone Consumer Protection Act related to the receipt of unsolicited faxes advertising the defendant's security systems products in 2006. The defendant argued that the class was not sufficiently ascertainable and that the plaintiff was not a member of the proposed class but otherwise did not challenge the motion for class certification. The argument that the named plaintiff was not a member of the class was "frivolous," however. The plaintiff's president testified in his deposition that the company received the fax at issue, and this effectively unrebutted testimony was sufficient for the plaintiff company to be considered a member of the class. The class was ascertainable because it was defined by objective criteria: persons who received during a specific time period faxes from specific parties relating to specific services. The fact that the fax distribution lists had not been unearthed during discovery was not fatal to certification. There were other sources of information to confirm receipt of the fax, and there was a list of more than 1,700 individuals who had requested to opt out of subsequent faxes after receipt of an initial fax. However, the court found that the proposed class definition did constitute an improper fail-safe class because membership would be predicated on the defendant's liability. The court modified the class definition and removed the component where the defendant could not prove express permission or invitation of the sending of the faxes. As modified, the court accordingly granted class certification.

Other Class Action Decisions

***In re Insulin Pricing Litigation*, No. 3:17-cv-0699-BRM-LHG et al., 2017 WL 4122437 (D.N.J. Sept. 18, 2017)**

In appointing interim class counsel, Judge Brian R. Martinotti of the U.S. District Court for the District of New Jersey addressed whether an alleged conflict of interest precluded a certain law firm from representing the putative class in an antitrust litigation over inflated insulin prices. Specifically, other applicants for class counsel pointed to the firm's involvement in a consumer fraud litigation over inflated insulin prices and argued that tying inflation to consumer fraud in that case would necessarily reduce damages in the antitrust case by attributing inflation to a different course of conduct. The court disagreed, finding that the firm's efforts to prove consumer fraud would be distinct from its efforts to prove anticompetitive behavior and concluding that there would be no overlap in damages between the two cases.

***Abante Rooter & Plumbing, Inc. v. Alarm.com Inc.*, No. 15-cv-06314-YGR, 2017 WL 4073792 (N.D. Cal. Sept. 14, 2017)**

Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California denied the plaintiffs' request to amend the class definitions of three nationwide classes of cell phone and residential telephone users alleging violations of the Telephone Consumer Protection Act (TCPA). (The three classes were certified in May, as discussed in the summer 2017 *Class Action Chronicle*.) The plaintiffs sought to limit each definition to telephone numbers "included in the calling data obtained by Plaintiffs in this case" due to their inability to obtain calling data that could be used to identify additional class members from the defendants' recently bankrupt dealer, Alliance Security. The court found that the proposed amendments "are not an appropriate mechanism to eliminate individuals from the proposed classes which cannot be identified with readily available data," as the proposed modifications would improperly and arbitrarily exclude individuals whose TCPA claims are substantially similar to those of other class members. Moreover, the plaintiffs did not show that the additional data can never be obtained, or that they tried and failed to obtain it, as they did not seek relief from the stay or compel discovery in the bankruptcy proceeding, and conceded that the additional data was produced in a related MDL litigation. Finally, the court concluded that the proposed amendments would deprive the defendants of "the benefit of a fair and efficient adjudication of the controversy," rejecting the plaintiffs' argument that the defendants could still move for summary judgment with regard to the members of the amended classes as "piecemeal litigation."

Weitzner v. Sanofi Pasteur, Inc.*, No. 3:11-CV-02198, 2017 WL 3894888 (M.D. Pa. Sept. 6, 2017), *appeal pending

Judge A. Richard Caputo of the U.S. District Court for the Middle District of Pennsylvania granted the defendants' motion for summary judgment of a putative class action alleging violation of the Telephone Consumer Protection Act (TCPA). In this case, the plaintiffs alleged violations of the TCPA related to faxes they received promoting the sale of commercial products and sought to represent other individuals who had received similar faxes from the defendants. The plaintiffs moved for class certification, and the defendants moved for summary judgment, arguing, *inter alia*, that the plaintiffs' claims were time-barred by the statute of limitations. The plaintiffs countered that their claims were not time-barred because a similar class action had been filed against the same defendants in Pennsylvania state court, thus tolling the statute of limitations under the principles of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974). In *American Pipe*, the Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." However, the defendants in this case argued — and the court agreed — that under Third Circuit precedent, tolling only occurs where the subsequent class actions are brought by *new* would-be class representatives. Because the *same plaintiff* brought the state claim, tolling did not occur and the plaintiffs' claims were time-barred. Therefore, the court granted the defendants' motion for summary judgment and denied the plaintiffs' motion for class certification as moot.

Class Action Fairness Act Decisions

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

***Brinkley v. Monterey Financial Services, Inc.*, 873 F.3d 1118 (9th Cir. 2017)**

The U.S. Court of Appeals for the Ninth Circuit (M. Smith and Nguyen, JJ., and Motz, circuit judge sitting by designation) vacated the district court's order remanding a putative class action under CAFA's home state exception (discussed in the summer 2017 *Class Action Chronicle*). The plaintiff alleged violations of California and Washington state laws based on the defendant's alleged recording of telephone conversations without consent. The class consisted of all individuals who spoke by telephone with Monterey "while physically located or residing in California and Washington" and thus included individuals who were physically located in, but were not residents

of, California or Washington. The plaintiff's expert analyzed Monterey accounts to which telephone calls were recorded listing California and Washington street addresses and opined that two-thirds of all class members are California citizens. But that list addressed only a portion of the class — those who were "residing in California and Washington" — and did not contain information about members "located in" California and Washington. Without that information, the panel held, "the size of the entire class is unknown," and the district court could not determine whether two-thirds of all class members are California citizens. Thus, the plaintiff had not met her burden to show that the home-state controversy exception applies. The panel further noted that Monterey had put the plaintiff on notice of the "located in" class definition problem during discovery, but the plaintiff did not attempt to resolve the issue. The panel rejected the plaintiff's argument that Monterey did not identify any non-California or Washington citizen whose telephone conversation was recorded, because it was not the defendant's burden to prove the CAFA exception was inapplicable. The panel vacated the remand order and remanded to the district court.

***Roppo v. Travelers Commercial Insurance Co.*, 869 F.3d 568 (7th Cir. 2017)**

The U.S. Court of Appeals for the Seventh Circuit (Wood, C.J., Ripple and Williams, JJ.) affirmed the district court's dismissal of the plaintiff's third amended complaint and, as part of the analysis, confirmed that the court had jurisdiction over the case under CAFA. The plaintiff alleged that the defendant insurance company engaged in a practice of not disclosing the existence of umbrella insurance policies of its insureds facing claims from a third party related to personal injury motor vehicle claims. The defendant removed the action to federal court, and the plaintiff moved to remand the case, arguing that the defendant failed to establish the jurisdictional minimums under CAFA and that the "local controversy" exception applied. On review, the Seventh Circuit noted that the plaintiff herself had described the size of the class of 500 persons and it was reasonable for the defendant to rely upon that estimate. With respect to damages, the plaintiff set forth two types of damages, the greater of which related to an actual decrease in settlement amounts due to the misinformation about insurance policy limits. The plaintiff also alleged that the insurance policy limits acted as a de facto cap on damages. On this basis, the defendant argued that even if the additional damages per putative class member were as small as $10,000, the jurisdictional minimum would be met. Alternatively, if each putative class member sought the full value of the umbrella policies, the aggregate damages would be more than $500 million. The panel found these arguments reasonable. Additionally, the local controversy or discretionary exceptions did not apply because the gravamen of the action was directed at the defendant insurance company, a citizen of Connecticut. Accordingly, the panel affirmed the district court's dismissal and federal jurisdiction over this case.

Livi v. Hyatt Hotels Corp.*, No. CV 15-5371, 2017 WL 5128173 (E.D. Pa. Nov. 6, 2017), *appeal pending

Judge Anita B. Brody of the U.S. District Court for the Eastern District of Pennsylvania held that CAFA jurisdiction was proper in this wage and overtime case. The plaintiffs filed suit in Pennsylvania federal court alleging violation of state and federal overtime law. The plaintiffs claimed that the defendant hotels failed to properly compensate a class of banquet servers for overtime hours. The parties subsequently stipulated to dismiss the federal claims, leaving only the plaintiffs' state-law overtime claims. The defendants then filed an affidavit in support of their contention that the court retained CAFA jurisdiction. The court agreed, finding that neither the local controversy nor home state exception applied. Specifically, the judge held that (1) the out-of-state corporation was the "primary defendant" and (2) the local defendants' conduct did not form "a significant basis for the claims asserted." This was so, the court held, because the out-of-state corporation paid, hired and supervised the putative class members.

***Allen v. Nationwide Mutual Insurance*, No. 2:17-cv-561, 2017 WL 4985517 (S.D. Ohio Nov. 2, 2017)**

Magistrate Judge Elizabeth A. Preston Deavers of the U.S. District Court for the Southern District of Ohio recommended denying a motion to remand a putative nationwide class action that had been removed by the defendant three days before the plaintiff filed an amended complaint seeking an Ohio-only class in state court. The plaintiff did not dispute that the original complaint satisfied CAFA's requirements, and instead argued that the federal court should decline jurisdiction because CAFA's home state exception applied to the later-filed amended complaint. The magistrate judge concluded that the fact that CAFA jurisdiction existed under the operative complaint at the time of removal justified federal jurisdiction over the action: Jurisdiction is determined at the time of removal, and post-removal amendments do not affect CAFA jurisdiction. Moreover, the magistrate judge noted that the amended complaint was not properly before the court, because it had been filed only in state court after the notice of removal had divested the state court of jurisdiction.

***Hall v. Welch Foods, Inc.*, No. 17-3997, 2017 WL 4422418 (D.N.J. Oct. 4, 2017)**

Judge Anne E. Thompson 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 Welch's Fruit Snacks, which the plaintiff alleged were deceptively marketed as nutritious and healthful. Subsequent to removal under CAFA, the plaintiff amended her complaint to change the class definition from "persons in New Jersey" to "citizens of New Jersey" that purchased the defendants' products. The court held that the operative complaint for CAFA jurisdiction purposes was the complaint existing at the time of removal. Additionally, the court found that removal was not warranted under any CAFA exception. The home state exception did not apply because the plaintiff relied on supposition, not evidence, and thus did not meet the burden of proving that two-thirds of the putative class were citizens of the same state as the primary defendant. The totality of the circumstances exception also did not warrant remand because the dispute had nationwide consequences.

***Hyman v. TV Guide Magazine, LLC*, No. 15-cv-13769, 2017 WL 4405009 (E.D. Mich. Oct. 4, 2017)**

Judge Stephen J. Murphy III of the U.S. District Court for the Eastern District of Michigan denied a motion to dismiss a putative class action alleging state law privacy claims, finding that the plaintiff had adequately alleged CAFA jurisdiction. First, the court found that the parties were diverse: The plaintiff was a Michigan citizen seeking to represent a class of Michigan residents, and the defendant, a Delaware limited liability company, was a citizen of Delaware and New York, its principal place of business. Although the defendant argued it should be deemed a Michigan citizen because it had a Michigan member and the general rule is that a limited liability company's citizenship is that of the citizenship of its members, the court concluded that a different rule applies when the entity is a party to a class action: Its citizenship is determined by its principal place of business and the state under whose laws it is organized. Therefore, the defendant was not a Michigan citizen, and the parties were diverse. Second, the court found that the plaintiff met the amount in controversy requirement by alleging that all class members were entitled to statutory damages of $5,000, even though a later amendment to the state law at issue barred such damages. (As the court noted, the Sixth Circuit had already ruled that the amendment was not retroactive.)

***Stone v. Government Employees Insurance Co.*, No. C16-5383 BHS, 2017 WL 4161692 (W.D. Wash. Sept. 19, 2017)**

Judge Benjamin H. Settle of the U.S. District Court for the Western District of Washington denied the plaintiffs' second motion to remand their putative class action consisting of Washington GEICO policyholders claiming "loss of use" damages while their vehicles were being repaired or replaced (discussed in the fall 2016 *Class Action Chronicle* and January 2017 *Class Action Chronicle*). The plaintiffs contended that the removal was untimely because GEICO ran electronic database searches to determine class size and an average claim amount more than 30 days before it removed the matter, and argued that "GEICO must show that it did not have the information it relied upon for removal more than 30 days before the removal." The court noted that no authority existed to support that proposition, and that the removal period started "only when defendants receive a qualifying document from plaintiffs upon which it is reasonable to conclude that the amount in controversy" exceeded CAFA's $5 million threshold. GEICO's subjective knowledge that damages could potentially exceed the jurisdictional limit did not trigger the removal period. Further, the amount-in-controversy requirement was met because there were $3.6 million in actual damages, and the court had already determined that the attorneys' fees in a related and similar class action could "easily exceed" $1.6 million. Since the plaintiffs failed "to present any plausible argument that awardable fees would potentially be less in this highly contested matter," the court denied the plaintiffs' motion to remand.

***Tubbs v. AdvoCare International, LP*, No. CV 17-4454 PSG (AJWx), 2017 WL 4022397 (C.D. Cal. Sept. 12, 2017)**

Judge Philip S. Gutierrez of the U.S. District Court for the Central District of California denied the plaintiffs' motion to remand an action on behalf of California consumers alleging illicit business practices regarding the defendant's energy and weight-loss products. The plaintiffs alleged causes of action under various California consumer protection laws, breach of implied and express warranty, and common law restitution. In their motion to remand, the plaintiffs argued that the defendant failed to timely remove the action based on the pleadings. The court noted that a defendant does not have a duty of inquiry if the initial pleading or other document is "indeterminate" with respect to removability, even if a defendant could have discovered grounds for removability through investigation, because courts do not "charge defendants with notice of

removability until they've received a paper that gives them enough information to remove." The court agreed with the defendant that the plaintiffs' initial and amended complaints were both indeterminate as to CAFA jurisdiction because no amount in controversy was pleaded. Rather, as pleaded, the two complaints revealed only that the putative classes consisted of more than 60 members, each spending at most $500 apiece, for a total of $60,000 in controversy, far below CAFA's $5 million requirement. The fact that the defendant's investigation eventually revealed that the amount in controversy was actually $30 million did not justify remand.

***Varga v. Wells Fargo Bank, N.A.*, No. CV 16-9650-DMG (KSx), 2017 WL 4022367 (C.D. Cal. Sept. 12, 2017)**

The plaintiff sought to remand its putative class action on behalf of California adjustable-rate mortgage holders who allegedly received ineffective notices of change that omitted certain title and telephone number information, asserting various California state law claims. Wells Fargo Bank, N.A. (WFB) removed the state court action, asserting that it had erroneously been sued as Wells Fargo Home Mortgage, Inc., and that jurisdiction was proper under CAFA in part because WFB is a citizen of South Dakota and the plaintiff is a California citizen. In response, the plaintiff added Wells Fargo & Co. (WFC) as an additional defendant and purported citizen of California and sought remand based on lack of diversity. Judge Dolly M. Gee of the U.S. District Court for the Central District of California granted the defendants' motion to strike WFC from the complaint, rejecting the plaintiff's claims that its presence was required to procure complete relief. The court found that the plaintiff's awareness of removal when she added WFC, the lack of significant changes to the complaint's allegations relating to its purported liability, and the plaintiff's failure to explain why she did not join WFC before removal gave rise to the inference that the plaintiff added WFC solely for the purpose of defeating the court's jurisdiction. Because the plaintiff's motion to remand was predicated entirely on WFC's presence as a non-diverse defendant, the court denied the motion to remand. Separately, the court granted the defendants' motion to dismiss all the plaintiff's claims with leave to amend.

***Truglio v. Planet Fitness, Inc.*, No. 15-7959 (FLW)(LHG), 2017 WL 3595475 (D.N.J. Aug. 21, 2017)**

Judge Freda L. Wolfson of the U.S. District Court for the District of New Jersey held that CAFA jurisdiction existed in a case alleging that the defendant health clubs failed to conspicuously disclose certain terms in their membership agreements in violation of the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA). The defendants previously removed the case pursuant to CAFA, and the court subsequently dismissed all claims except the TCCWNA claim. Because the remaining TCCWNA claim carried only a $100 statutory remedy per class member, the court *sua sponte* ordered the defendants to show cause that the amount in controversy still exceeded $5 million. The court found that declarations from the defendants' managers established that there were approximately 133,318 fitness membership contracts at issue, resulting in a possible aggregate award of more than $13 million. Accordingly, the court held that the defendants established by a preponderance of the evidence that the CAFA amount-in-controversy threshold was satisfied.

Decisions Granting Motions to Remand/Finding No CAFA Jurisdiction

***Roberts v. Mars Petcare US, Inc.*, 874 F.3d 953 (6th Cir. 2017)**

A unanimous panel of the U.S. Court of Appeals for the Sixth Circuit (Gibbons, Sutton and Thapar, JJ.) reversed a district court's denial of a motion to remand a putative class action, finding that the parties did not meet the minimum diversity requirements for CAFA jurisdiction. The plaintiff was seeking to represent a class of Tennessee citizens in an antitrust action against a corporation incorporated in Delaware but with its principal place of business in Tennessee. Although the defendant argued that it could be treated as a citizen of *either* Delaware or Tennessee, the Sixth Circuit concluded that CAFA did not change the general rule that a corporation is a citizen of *both* its place of incorporation *and* its principal place of business. Thus, the defendant was a citizen of Delaware and Tennessee, and CAFA's minimum diversity requirement — that at least one class member and one defendant are citizens of different states — was not met. In addition, the court held that the fraudulent joinder rule did not apply because there was no evidence that the defendant

had been joined to defeat diversity jurisdiction when it was the original and only defendant in the action, even though the defendant's affiliate (a nonparty) that actually manufactured the product was not a citizen of Tennessee, and the defendant argued that the affiliate should have been sued instead. Moreover, the panel noted, the district court could not join the manufacturing entity as a necessary party in order to create federal jurisdiction, because jurisdiction must exist at the time of removal and an act of joinder presupposed that the court had jurisdiction over the existing claims.

***Waters v. Ferrara Candy Co.*, 873 F.3d 633 (8th Cir. 2017) (per curiam)**

The U.S. Court of Appeals for the Eighth Circuit (Loken, Shepherd and Kelly, JJ.) affirmed the district court's order remanding the putative class action to the state court from which it was removed because the defendant failed to establish that the amount in controversy exceeded the $5 million threshold necessary for federal jurisdiction under CAFA. The plaintiff alleged that the defendant engaged in "false, deceptive, and misleading conduct" by selling substantially under-filled boxes of candies. The defendant removed the action to federal court, alleging jurisdiction under CAFA, but the district court remanded the action to state court. On review, the Eighth Circuit found that under the viewpoint of either the plaintiff or the defendant, the defendant failed to meet its burden. The defendant offered two affidavits in support of its contention. In one affidavit, a vice president of the defendant company attested that sales of the candy in question totaled $27 million. In a second affidavit, an executive at the defendant company averred that necessary changes to the defendant's packaging equipment that could result from an injunction would exceed $6 million. The panel noted that the affidavits were "insufficient to quantify, beyond mere speculation" the costs of complying with an injunctive award in the case. The second affidavit did not specify whether the assumed injunction would require additional filling of the existing candy packaging or shrinking the existing packaging or whether the assumed injunction would require modification of every candy production line or only a few production lines. Accordingly, the panel affirmed the district court's order remanding the case to state court.

***Speed v. JMA Energy Co.*, 872 F.3d 1122 (10th Cir. 2017)**

The U.S. Court of Appeals for the Tenth Circuit (Hartz, McKay and Matheson, JJ.) affirmed a district court decision remanding a class action alleging willful and ongoing violations of Oklahoma law related to payment of oil and gas production proceeds to well owners (discussed in the fall 2017 *Class Action Chronicle*). The Tenth Circuit first upheld the district court's holding that no national or interstate interests were sufficiently implicated to warrant CAFA jurisdiction: All of the subject oil and gas wells were located in Oklahoma, all class members owned interests in the subject Oklahoma wells, the parties and nearly half the class members were Oklahoma citizens, and the business activities that gave rise to the action occurred in Oklahoma. The Tenth Circuit rejected the defendant's contention that the district court should have focused on the location of the plaintiffs across the nation, because the proposed plaintiffs all shared a common interest centered on wells physically located in Oklahoma, and "[t]he geographic dispersion of the class plaintiffs should not be overemphasized as a factor favoring federal jurisdiction." The Tenth Circuit emphasized that the primary class claim — failure to pay interest — undoubtedly must be decided under Oklahoma law, and that the appellants failed to show Oklahoma law would not govern any other claims; indeed, "everything about this case is suffused with the distinct aroma of Oklahoma." The panel further found that the class was not pleaded in a manner seeking to avoid federal jurisdiction, and that the Oklahoma state court forum had a sufficient nexus to the class members, alleged harm and the defendant, affirming the district court's rejection of the defendant's argument that the forum referred to in the statute is not the state, but the specific county in which the action is filed. Thus, the court affirmed the remand of the action to state court.

***Karlberg v. Santander Bank, N.A.*, No. CV 17-3561, 2017 WL 4810800 (E.D. Pa. Oct. 25, 2017)**

Judge Harvey Bartle of the U.S. District Court for the Eastern District of Pennsylvania granted the plaintiff's motion to remand this putative class action to the Court of Common Pleas of Philadelphia County. The plaintiff alleged that the defendant bank improperly overcharged mortgage borrowers for private mortgage insurance that was held in trust and distributed by Santander Bank. The defendant removed the case alleging jurisdiction under CAFA. The defendant argued that the plaintiff was seeking damages in excess of $50,000 for each of the alleged 281 overcharging incidents, far exceeding the $5 million threshold requirement. Conversely, the plaintiff argued the CAFA amount in controversy was not satisfied because he only alleged an actual loss of $52, and that the $50,000 demanded in the complaint was "in the aggregate and was simply stated to conform to a local procedural requirement in the Court of Common Pleas of Philadelphia County to avoid having the case placed in the court's mandatory arbitration program." On review, the court acknowledged that the plaintiff's complaint was "inart-

fully drafted," but agreed that the CAFA amount-in-controversy threshold could not plausibly be met because class members could only seek tens of dollars for each incident of overcharging — leaving the aggregate amount far short of the necessary $5 million. Accordingly, the court granted the plaintiff's motion to remand the case.

***Thomas v. American Family Mutual Insurance Co.*, No. C17-475-RAJ, 2017 WL 4707895 (W.D. Wash. Oct. 20, 2017)**

The plaintiff sought remand of a putative class action alleging that the defendants violated the Washington Consumer Protection Act in collecting debts arising from car accidents with the defendants' insureds. Judge Richard A. Jones of the U.S. District Court for the Western District of Washington granted the motion, finding that the defendants failed to satisfy CAFA's $5 million amount-in-controversy requirement. The plaintiff had alleged damages of less than $5 million in her complaint. The defendants asserted in the notice of removal that at least $10.2 million was in dispute, based on the total value of potential subrogation claims against motorists residing in Washington state during the period at issue. After further research, the defendants narrowed their estimate to encompass subrogation claims involving uninsured motorists in accidents that involved both physical property damage and medical expenses, valued at $6.5 million. The defendants argued that this represented the value of compensatory damages for amounts actually paid and injunctive relief to prevent the collection of amounts yet unpaid, which, combined with claims for attorneys' fees and treble damages, exceeded the jurisdictional threshold. The court held that the defendants provided no data to support the original estimate of $10.2 million, and while the lower number was supported by some data, the defendants did not show by a preponderance of the evidence that the interpretation of that data was reasonable. The estimate made assumptions about typical collection practices unsupported by any evidence and did not assert any actual knowledge of debt collection procedures. Thus, remand was warranted.

***Rosenbloom v. Jet's America, Inc.*, No. 4:17 CV 1930 RWS, 2017 WL 4404429 (E.D. Mo. Sept. 29, 2017)**

Judge Rodney W. Sippel of the U.S. District Court for the Eastern District of Missouri granted the plaintiff's motion to remand a putative class action to Missouri state court. The plaintiff brought this action under the Missouri Merchandising Practices Act, alleging that she was charged extra for premium pizza toppings that the defendant failed to disclose. The defendant removed the case to federal court and alleged, in part, jurisdiction under CAFA. On review, the court found that the defendant failed to demonstrate that the amount-in-controversy requirement was satisfied. In its notice of removal, the defendant relied on the plaintiff's request for punitive damages and attorneys' fees and the plaintiff's allegation that there are hundreds or thousands of members in the proposed class. The court noted, however, that the defendant offered "nothing but speculation," which was insufficient to demonstrate that the jurisdictional threshold was met. The court had no way to determine whether a fact finder would conclude that punitive damages were applicable, and, even if the court were to find as much, punitive damages would have to be awarded in a ratio "grossly" in excess of the plaintiff's actual damages of $2.56 to come close to meeting the jurisdictional threshold. Additionally, the defendant offered no evidence that any attorneys' fees incurred by the plaintiff would exceed the threshold, and any speculation "would be unreasonable" at this juncture. Accordingly, the court granted the plaintiff's motion to remand the case.

***Wiegand v. National Enterprise Systems, Inc.*, No. 2:17-cv-00246-TLN-EFB, 2017 WL 4037635 (E.D. Cal. Sept. 11, 2017)**

The plaintiff sought remand of a putative class action on behalf of California residents asserting claims under California's Rosenthal Fair Debt Collection Practices Act (FDCPA) and consumer protection laws. Judge Troy L. Nunley of the U.S. District Court for the Eastern District of California granted remand, holding that CAFA's $5 million amount-in-controversy requirement was not met. The court held that the defendants' estimation of the amount in controversy "is not derived from any practical calculus and instead relies upon the theoretical future claims of potential class members not yet present in this action." Moreover, because the California FDCPA caps recovery at $1,000 for individual claims and $500,000 for class claims, in order to keep the case from being remanded, the defendant "would have to plead an additional $4,500,000 in punitive damages aside from the $500,000 maximum statutory amount that Plaintiff has asserted." Because of the "procedural and substantive constitutional limitations" on punitive damages awards, the court noted that a proper exemplary damages award can equal no more than four times the compensatory damages awards. Thus, the maximum the defendant could plausibly assert was $2 million in punitive damages for a total of $2.5 million in controversy. Because the defendant failed to meet its burden to demonstrate the amount in controversy, the court granted remand.

Jerry Venable Revocable Family Trust & Nichols v. Chesapeake Operating, LLC*, No. CIV-16-782-M, 2017 WL 4052808 (W.D. Okla. Sept. 13, 2017); *Nichols v. Chesapeake Operating, LLC*, No. CIV-16-1073-M, 2017 WL 4052810 (W.D. Okla. Sept. 13, 2017), *1453(c) pet. denied

Judge Vicki Miles-LaGrange of the U.S. District Court for the Western District of Oklahoma denied the plaintiffs' motions to abstain under CAFA's home state exception. The plaintiffs separately brought putative class actions in Oklahoma state court relating to royalty payments for gas and its constituents, which the defendant removed to federal court. The plaintiffs' two proposed classes consisted of Oklahoma and Texas residents to whom the defendant mailed a royalty check to an address in Oklahoma or Texas, respectively. The proposed classes included individuals, entities and trusts, each of which has a unique citizenship test. In support of the motions, the plaintiffs submitted expert testimony attesting, based on analysis of a random sample, that more than two-thirds of the proposed classes in the aggregate were citizens of Oklahoma. They also submitted survey data regarding the random sample of the Oklahoma class, a skip-trace investigation of the random sample and the plaintiffs' counsel's conclusions about the data. The court found that the evidence in support had "significant flaws." First, counsel's data and conclusions failed to properly determine the citizenship of trusts as part of the analysis. Second, the data revealed that certain individuals deemed Oklahoma citizens were deceased, which required an additional analysis to determine citizenship of heirs, among others. Finally, the court found that the determination of Oklahoma citizenship for certain members of the random sample was unfounded. As a result, the court held that it lacked sufficient data to find by a preponderance of the evidence that at least two-thirds of the members of the proposed classes were citizens of Oklahoma, and the home state exception to CAFA jurisdiction did not apply.

***Carrigan v. Southeast Alabama Rural Health Associates*, No. 2:17-CV-114-WKW, 2017 WL 4018031 (M.D. Ala. Sept. 12, 2017)**

Chief Judge W. Keith Watkins of the U.S. District Court for the Middle District of Alabama granted the plaintiffs' motion to remand in a class action seeking indeterminate damages suffered as a result of lost medical records. The court found that the defendants failed to meet CAFA's amount-in-controversy requirement because they presented no evidence beyond conclusory allegations that the plaintiffs' claims exceeded $5 million.

Alanis v. Pfizer, Inc.*, No. 1:14-cv-00365-LJO-MJS, 2017 WL 3503409 (E.D. Cal. Aug. 14, 2017), *1453(c) pet. denied

Chief Judge Lawrence J. O'Neill of the U.S. District Court for the Eastern District of California remanded two related cases brought on behalf of women alleging that using Lipitor caused them to suffer from Type II diabetes. After Judge Cormac J. Carney of the U.S. District Court for the Central District of California remanded substantially similar matters in *In re Pfizer*, discussed in the fall 2017 *Class Action Chronicle*, Judge O'Neill issued an order to show cause why the court should not adopt Judge Carney's conclusions and reasoning, and concluded the court lacked jurisdiction under CAFA. The four plaintiffs had filed an amended coordination petition with an existing Joint Council Coordinated Proceeding (JCCP), which was still pending; To date, only 65 plaintiffs have sought to be coordinated in the JCCP. The court held that the amended coordination petition constituted a proposal for joint trial, because the plaintiffs cited potential issues that "would be addressed only through some form of joint trial." However, the court rejected the defendants' argument that more than 100 plaintiffs signaled an intention to join the JCCP through the actions of JCCP counsel or administrative actions in conjunction with the filing of their complaints; in the absence of add-on petitions or some other concrete step to effect joinder, these actions were not "voluntary and affirmative" proposals for a joint trial. The court also rejected the defendants' concerns about the administrative difficulty involved in ascertaining when 100 plaintiffs have joined a coordinated case for trial; the court held that the 30-day removal clock would not start until more than 100 plaintiffs have sought to be added to the JCCP's joint trial group through affirmative, voluntary actions. Moreover, permitting a single plaintiff to propose that his claims be tried jointly with 99 others, without any requirement that each plaintiff join in that proposal, would transform CAFA's mass-action provision "into the sweeping equivalent of a class action but without any of Rule 23's protections allowing unwilling plaintiffs to opt out." The court declined to stay the proceedings pending appeal, because the defendants' argument that litigating in state court while a federal appeal was pending would waste resources was not enough to demonstrate irreparable harm, and the court was unwilling to subject the plaintiffs to additional delay.

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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