Skadden

The Class Action Chronicle

This edition focuses on rulings issued between November 16, 2017, and February 15, 2018.

In this issue, we cover five decisions granting motions to strike/dismiss class claims, seven decisions denying such motions, 15 decisions denying class certification or reversing grants of class certification, 23 decisions granting or upholding class certification, 12 decisions denying motions to remand or reversing remand orders pursuant to the Class Action Fairness Act (CAFA), and eight 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

***Wexler v. AT & T Corp.*, 323 F.R.D. 128 (E.D.N.Y. 2018)**

Judge Frederic Block of the U.S. District Court for the Eastern District of New York granted the defendant's motion to strike the plaintiff's class allegations in a case where the plaintiff alleged that her telephone service provider violated the Telephone Consumer Protection Act. The defendant moved to strike on the ground that the plaintiff was not an adequate representative because her husband previously served as counsel for the plaintiff. After conceding that she would have had an interest in her husband's fee award, the plaintiff argued both that the issue was mooted by her husband's withdrawal as counsel, and that new counsel and the court would adequately safeguard against unreasonable fee requests. The court disagreed. Judge Block first noted that the plaintiff could not "act as a foil to self-dealing by class counsel" because she had an interest in the fees her husband would still seek for his prior work. Nor were current counsel and the court sufficient safeguards, the court held, because (1) class counsel owed duties to the named plaintiff and thus also to her interest in her husband's fees and (2) "court approval does not supplant the need for a conflict-free class representative." The court therefore granted the defendant's motion to strike the class allegations.

Carlisle v. Normand*, No. 16-3767, 2017 WL 6501154 (E.D. La. Dec. 19, 2017), *appeal dismissed

Judge Jane Triche Milazzo of the U.S. District Court for the Eastern District of Louisiana granted the defendant's motion to strike the class allegations pursuant to Rule 23(d)(1)(D) for failing to allege numerosity or common questions of law. The plaintiffs had filed a putative class action against several administrators of the state drug court program, alleging that they had deprived the plaintiffs of due process in a way that led to unlawful incarceration and other harms. The court had already dismissed claims against other defendants in the case, including class claims. Of the remaining claims, one was for malpractice against the attorney working with the drug court. The court, however, explained that "elements of legal malpractice or professional negligence involve questions of law and facts that are unique to each plaintiff." Accordingly, the court struck the class allegations against that defendant.

***Rasnic v. FCA US LLC*, No. 17-2064-KHV, 2017 WL 6406880 (D. Kan. Dec. 15, 2017)**

Judge Kathryn H. Vratil of the U.S. District Court for the District of Kansas granted the defendant's motion to strike nationwide class allegations on behalf of persons who purchased or leased vehicles manufactured by the defendant, which were alleged to have defective dashboard touchscreens. The plaintiffs alleged claims under Kansas consumer protection laws, which the court held do not govern out-of-state transactions and have no extraterritorial effect. The court also held that the plaintiffs' nationwide claim under the Magnuson-Moss Warranty Act, which was based on the defendant's alleged breach of express and implied warranties, relied on state law. The application of different state laws to each plaintiff's claim would create manageability concerns prohibiting certification. The court rejected the plaintiffs' reliance on a general presumption against striking class allegations at the pleadings stage, noting that the U.S. Court of Appeals for the Tenth Circuit had not adopted the presumption and the plaintiffs did not explain how any discovery would remedy the defects in the nationwide allegations. The additional expense of discovery was thus not justified, and the court struck the plaintiffs' nationwide claims set forth in two proposed classes.

Davis v. White*, No. 4:16-cv-18, 2017 WL 6273488 (E.D. Va. Dec. 8, 2017), *appeal pending

Magistrate Judge Lawrence R. Leonard of the U.S. District Court for the Eastern District of Virginia granted the defendant's motion to dismiss the plaintiff's class action claim in a case alleging the defendant violated the Fair Debt Collection Practices Act by sending correspondence to the purported class members that misidentified the creditor and misrepresented the amount of debt due. The court dismissed the class action claim because the plaintiff failed to make a request for class certification in the form of a motion or by alleging facts in the complaint sufficient to make a class certification decision. Accordingly, the court held that the plaintiff did not satisfy his burden of demonstrating numerosity, commonality, typicality or adequacy of representation, and dismissal was appropriate.

***Stanek v. Saint Charles Community Unit School District No. 303*, No. 13-CV-3106, 2017 WL 5971985 (N.D. Ill. Dec. 1, 2017)**

Judge Jorge L. Alonso of the U.S. District Court for the Northern District of Illinois granted the defendants' motion to strike the plaintiffs' class allegations related to the alleged failure of the defendants to provide adequate special education services to individuals at St. Charles High School. The plaintiffs brought claims under the Individuals With Disabilities Education Act, the Rehabilitation Act of 1983 and others. On review, the court found that the *pro se* plaintiffs could not satisfy the threshold requirements of a class action. As an initial matter, *pro se* plaintiffs may not represent other people. In addition, typicality was not satisfied because none of the plaintiffs would be members of the proposed class because neither the plaintiff student nor his co-plaintiff parents would be a student of the district and none were part of the proposed class when they first raised their proposed class claims. Commonality was not satisfied because several individualized assessments were required before concluding the special services were needed: A student must first be identified for evaluation, the local education agency must then conduct a timely evaluation and an individualized education plan must be timely created. Accordingly, the court struck the plaintiffs' class claims.

Decisions Denying Motions to Strike

***Sanchez v. Launch Technical Workforce Solutions, LLC*, No. 1:17-CV-01904-ELR, 2018 WL 942963 (N.D. Ga. Feb. 14, 2018)**

Judge Eleanor L. Ross of the U.S. District Court for the Northern District of Georgia adopted the report and recommendation of Magistrate Judge Alan J. Baverman to deny the defendant's partial motion to dismiss out-of-state class claims. The plaintiff brought this suit on behalf of a putative class alleging violations of the Fair Credit Reporting Act (FCRA). The plaintiff alleged that the defendant "made him a conditional offer of employment, pending the successful completion of a background check; ordered a consumer report in conjunction with the background check; received a consumer report falsely stating that Plaintiff had a criminal record; and, without providing Plaintiff a copy of the report or a written description of his FCRA rights, withdrew the offer of employment." The defendant then filed a partial motion to dismiss the complaint of the members of the plaintiff class that were not Georgia residents, arguing that under *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), the court could not exercise personal jurisdiction over nonresident claims. The plaintiff argued that *Bristol-Myers* does not apply to bar the claims because *Bristol-Myers* concerned a mass action asserting state claims in state court and is therefore inapposite to the federal class action claims asserted in federal court. The court agreed, holding that "due-process concerns do not foreclose its exercise of personal jurisdiction over [the defendant] as to the claims of the resident named plaintiff both on his own behalf and on behalf of the unnamed non-resident plaintiffs." Therefore, the court found that it had jurisdiction over the class action and accepted the magistrate's recommendation to deny the defendant's partial motion to dismiss.

***Wigod v. PNC Bank, N.A.*, No. 17 C 2025, 2018 WL 741464 (N.D. Ill. Feb. 7, 2018)**

Judge Gary Feinerman of the U.S. District Court for the Northern District of Illinois denied the defendant's motion to strike the allegations of a putative class alleging violations of the Equal Credit Opportunity Act as it related to the late receipt of notices of denial of mortgage loan modification applications. On review, the court found that individual issues did not predominate because the defendant's internal data could be used as evidence of when the relevant applications were complete and whether the applicants were not in default. As crafted, the putative class was also not a "fail-safe" class. The fail-safe concern only arises when the "class is defined with explicit reference to the central legal issue in the case." Here, the class definition "turn[ed] on facts in the world, such as whether the applicant's loan was in default and when her application became complete; it d[id] not turn on PNC's liability." Accordingly, the court denied the motion to strike the class allegations.

***Vazquez v. General Motors, LLC*, No. 17-22209-CIV-GAYLES, 2018 WL 447644 (S.D. Fla. Jan. 16, 2018)**

In this class action over General Motors' (GM) Corvette Z06, Judge Darrin P. Gayles of the U.S. District Court for the Southern District of Florida granted in part and denied in part the defendant's motion to dismiss the class action complaint. The plaintiffs described themselves as "track enthusiasts." Each purchased their Corvette Z06 for use both on the road and on specialized race tracks. They claimed that GM had marketed the Z06 for track use by asserting that the car had "faster lap times," "[q]uarter-mile times" and was "developed to push the envelope of performance on the street and the track." However, the plaintiffs claimed that a design flaw in the Z06 precluded it from being track-worthy: namely, that if pushed on the track the car's engine would overheat, which would cause the car to go into a function called "Limp Mode," automatically slowing the car to stop it from overheating. The plaintiffs' vehicles were covered by GM's express limited warranty, which the plaintiffs claimed covered the "Limp Mode" design defect. The court found there was sufficient ambiguity in the warranty language to make dismissal of the claims at this stage premature. However, the court held that the fraudulent concealment claims that sought to recover only economic damages were "clearly barred" by Florida's economic loss rule. Thus, the defendant's motion was granted on that claim. Finally, the court found that the plaintiffs had sufficiently pleaded claims under the Florida Deceptive and Unfair Trade Practices Act and for unjust enrichment.

***DeJesus v. Cigna Corp.*, No. 6:17-cv-1208-Orl-41TBS, 2018 WL 375579 (M.D. Fla. Jan. 11, 2018)**

Magistrate Judge Thomas B. Smith of the U.S. District Court for the Middle District of Florida denied the defendant's motions to strike the plaintiff's class definition and to stay discovery. The plaintiff filed this putative class action alleging that the defendant violated the Telephone Consumer Protection Act by making numerous prerecorded, automated telephone calls to her cellphone. The defendant contended that the class definitions must be stricken because, among other reasons, the named

plaintiff was not typical of the class, the proposed class was "fail safe" and individualized issues would predominate. The court noted that the defendant did not purport to move under Rule 12(f) — which would have been untimely, as 21 days since service had passed — but rather under Rule 23 itself. Reviewing other federal case decisions from Florida, the court held that on a motion to strike pursuant to Rule 23, the Rule 23 factors should be viewed "through the lens of the Rule 12(f) standard for motions to strike." The court then held that the class definitions were not "redundant, immaterial, impertinent, or scandalous" and noted that if they were prejudicial, the court could adjust them after the parties had the chance to develop the record through discovery. Thus, the defendant's motions were denied.

***Scoma Chiropractic, P.A. v. Jackson Hewitt Inc.*, No. 2:17-cv-24-FtM-38CM, 2017 WL 6317180 (M.D. Fla. Dec. 11, 2017)**

In this "junk fax" case, Judge Sheri Polster Chappell of the U.S. District Court for the Middle District of Florida denied the defendants' motions to dismiss. The plaintiff sued the defendants, claiming they violated the Telephone Consumer Protection Act (TCPA) by transmitting unsolicited advertisements to her and the putative class. The defendants had previously filed a motion to dismiss, which the court granted, noting that the complaint failed to allege with specificity which defendant was the "sender" under the TCPA. Addressing the motion at hand, the court noted that the complaint "still contain[ed] allegations directed at 'Defendants' collectively and generally" rather than identifying a specific "sender." However, the plaintiff did include detailed factual assertions of a relationship between the defendants in the amended complaint, which pointed out which of the defendants did the "advertising" on behalf of the others. The court found this was sufficient to raise the possibility of relief "above the speculative level" and therefore denied the defendants' motion to dismiss. Moving to the class allegations, the court addressed one defendant's argument that the class allegations did not comply with the requirements of Rule 8 of the Federal Rules of Civil Procedure because they "merely recite portions of the TCPA" and "allege wrongdoing 'upon information and belief' providing no factual support." The court disagreed, pointing to portions of the amended complaint that contained allegations of years of unauthorized faxes sent to the putative class members. Therefore, the court found that the plaintiff had complied with the court's directives and held that the defendants' motions to dismiss should be denied.

***Progressive Health & Rehab Corp. v. Quinn Medical, Inc.*, 323 F.R.D. 242 (S.D. Ohio 2017)**

Judge Algenon L. Marbley of the U.S. District Court for the Southern District of Ohio granted in part and denied in part a motion to strike class allegations in a putative Telephone Consumer Protection Act "blast faxes" class action. In the complaint, the plaintiff sought to certify a class of all persons who were sent faxes advertising the defendants' business (1) "from whom Defendants did not obtain 'prior express invitation or permission,'" (2) "with whom [they] did not have an established business relationship, and/or [(3)] which did not display a proper opt-out notice." Although the parties (and the court) agreed that this definition was a fail-safe class, the court decided it would be premature to strike the class claims on that basis. Instead, according to the court, the plaintiff should be permitted to take limited discovery to determine if an objective basis exists for defining the class (such as language common to the alleged offending faxes). Similarly, to the court, the defendants' typicality argument was likewise premature, because the plaintiff should first be permitted to take discovery to determine whether faxes received by other class members shared similar content to the faxes the plaintiff received. However, the court agreed that the plaintiff would not be able to certify a class under Rule 23(b)(2) because it sought individualized monetary damages for the class as well as injunctive relief, striking those allegations.

***Mollicone v. Universal Handicraft*, No. 17-21468-Civ-Scola, 2017 WL 5897438 (S.D. Fla. Nov. 28, 2017)**

Judge Robert N. Scola, Jr. of the U.S. District Court for the Southern District of Florida denied the defendants' motions to dismiss several claims, including one class claim. The plaintiffs had filed suit asserting claims against the defendants based on allegedly false and misleading representations with respect to anti-aging properties of cosmetics manufactured, marketed and sold by the defendants. The defendants asserted a variety of reasons the court should dismiss various claims, including failure to state a claim and that "fraud and deceit claims [could not] be maintained as a class action" in Florida. On the class claim, the defendants contended that claims based on fraud and deceit may not be maintained as a class action because individual issues predominate. The court refused to address the merits of the defendants' claim. Rather, the court noted that "[t]he question of class certification is generally not addressed on a motion to dismiss." Indeed, the court elaborated, dismissal based on class allegations would be an extreme remedy. Because the plaintiffs had not yet sought class certification, the court held that the defendants' motion was premature.

Decisions Rejecting/Denying Class Certification

***Luppino v. Mercedes Benz USA,* 718 F. App'x 143 (3d Cir. 2017)**

The U.S. Court of Appeals for the Third Circuit (McKee, Vanaskie and Rendell, JJ.) affirmed the denial of class certification in this class action against a vehicle manufacturer alleging that the wheels of the putative class vehicles were overly susceptible to cracking and claiming damages based on breach of warranty and consumer fraud. The plaintiffs had moved for class certification as to the issue of whether the wheels suffered from a design defect, proposing a class of all persons and entities in the United States — or, alternatively, New Jersey — who purchased or leased a vehicle manufactured by the defendant from 2006 to the present equipped with particular wheels. The district court denied the motion, finding that the plaintiffs failed to satisfy commonality and predominance because "they did not show that the design of the wheel, as opposed to driver use," caused the alleged cracks. Additionally, central to the district court's decision was the plaintiffs' admission that the alleged defect implicated various components of a vehicle's system. The Third Circuit agreed with the district court's conclusion that because the plaintiffs failed to show that these other components had a negligible role in the alleged cracking of the wheels, they could not establish that cracking problems had a uniform cause across different systems. Accordingly, the Third Circuit affirmed the denial of class certification.

***Bruton v. Gerber Products Co.,* No. 12-CV-02412-LHK, 2018 WL 1009257 (N.D. Cal. Feb. 13, 2018)**

Judge Lucy H. Koh of the U.S. District Court for the Northern District of California again declined to certify a class of baby food purchasers allegedly misled by advertising regarding the health benefits and sugar content of certain Gerber products. Judge Koh's initial denial of class certification, discussed in the fall 2014 issue of *The Class Action Chronicle*, was affirmed and reversed in part by the U.S. Court of Appeals for the Ninth Circuit. On remand, Judge Koh held that the plaintiff lacked standing to pursue injunctive relief, precluding certification of a Rule 23(b)(2) class, because Gerber no longer used the allegedly misleading advertising statements. The court further held that the three proposed damages models failed to satisfy Rule 23(b)(3)'s predominance requirement. The full refund model assumed consumers received no benefit from purchasing the product, when in fact they received calories, vitamins and minerals. The price premium model — comparing the price of the identified products to comparable products—was flawed because it did not link the price differences to the allegedly deceptive statements or account for other reasons why products may have different prices. Finally, the court rejected the regression analysis — comparing the sales of the same products before and after the change in the advertising — because the model did not provide a reliable means for comparing products with and without the allegedly deceptive statements. This was due to undisputed differences in printing times, shipping times and inventory needs at retail stores, which meant Gerber would not be able to identify what label was on a consumer's product even if the consumer remembered the exact purchase date. The regression model also failed to control for "potentially problematic" variables that could affect sales, including brand recognition, regional differences, income and seasonality.

***Ventures Edge Legal PLLC v. GoDaddy.com LLC,* No. CV-15-02291-PHX-GMS, 2018 WL 619723 (D. Ariz. Jan. 30, 2018)**

The plaintiff sought to certify a nationwide class of purchasers of the Office 365 Business Premium plan through GoDaddy's website, alleging that GoDaddy failed to disclose that its version of Office 365 contained different functionalities from Microsoft's version, in violation of the Arizona Consumer Fraud Act (ACFA). Judge G. Murray Snow of the U.S. District Court for the District of Arizona refused to certify the class. Individualized questions of reliance predominated because the plaintiff's claim involved separate versions of a product customized for different users with somewhat different functionalities, which meant differences in customers' knowledge and motivations in their purchasing decisions. The plaintiff's proposal to calculate damages based on "consideration paid" failed because it required individualized inquiries into whether each class member relied on the assumption that GoDaddy's version included the functionalities of Microsoft's version of Office 365. The plaintiff's alternative "discount" damages model, subtracting the actual value of the allegedly inferior product from the consideration paid, likewise failed due to variations in the products offered and because that model did not take into account potential additions in value in GoDaddy's simplified design functions or separate functionalities, leading to individualized damages assessments among class members. The court also found the plaintiff was not typical because he purchased

the product based on his prior experience with Microsoft's Office 365 Business Premium. Further, the common questions proffered by the plaintiff — whether GoDaddy's product did not provide certain functionalities of the Microsoft version and whether GoDaddy failed to disclose the alleged lack of functionality — did not resolve the question of whether GoDaddy violated ACFA, which requires a showing of reliance and injury.

***Lindblom v. Santander Consumer USA, Inc.*, No. 15-cv-0990-BAM, 2018 WL 573356 (E.D. Cal. Jan. 26, 2018)**

The plaintiff sought certification of a class of California consumers who paid a convenience fee through Western Union's Speedpay service in connection with their Santander Consumer loans, asserting the consumers' loan agreements did not disclose that Western Union had agreed to return a portion of all Speedpay fees collected to Santander, which Santander Consumer had allegedly unlawfully retained as compensation in violation of the Fair Debt Collection Practices Act and its California counterpart, the Rosenthal Fair Debt Collection Practices Act. Magistrate Judge Barbara A. McAuliffe of the U.S. District Court for the Eastern District of California refused to certify the class on typicality and adequacy grounds. The court held that the named plaintiff's claim was time-barred and did not fall within the class definition of "during the applicable limitations period"; thus, the named plaintiff was not a member of, and could not adequately represent, the class. The court further found that the plaintiff's equitable tolling defense was unique, because members of the class as defined could litigate the merits of their claims without litigating any statute of limitations defense. Finally, the court rejected the plaintiff's proposal to expand the class to include customers outside the class period who previously asserted that the statute of limitations should be equitably tolled, noting that the plaintiff was not expanding the class to include additional consumers seeking to use equitable tolling, but rather, "to certify a class of timely claims plus one individual — Plaintiff," which by definition was not typical.

Jenkins v. State Farm Mutual Automobile Insurance Co.*, No. C15-5508 BHS, 2018 WL 526993 (W.D. Wash. Jan. 24, 2018), *23(f) pet. pending

The plaintiffs sought certification of a class of Washington insureds who were allegedly denied the diminished value of their automobiles after motor vehicle accidents. Judge Benjamin H. Settle of the U.S. District Court for the Western District of Washington refused to certify the class on predominance and superiority grounds, and on typicality grounds as to one of the named plaintiffs. State Farm did not challenge, and the court did not discuss, the numerosity of the proposed class or the adequacy of the representation. The court held that the commonality prong was satisfied where the claims concerned the policies and practices of State Farm, including whether they may have been designed to underpay or avoid paying the diminished value, in violation of Washington consumer protection laws. The court further held that a named plaintiff did not satisfy the typicality requirement because he did not file an underinsured motorist claim and never encountered the policies and processes challenged by other class members. Finally, the court held that the predominance and superiority requirements were not met because each class member's claims required an individual inquiry into both the diminished value of each automobile — which was affected by prior ownership and accident history — and whether class members received any compensation prior to the class action. The court noted certification was not "impossible," because the class might be narrowed to insureds who submitted underinsured motorist claims and did not receive any settlement amount from State Farm, but that it was not "permissible for the Court to re-draft Plaintiffs' proposed class definition or prosecute their claims for them."

***Dvorak v. St. Clair County, Illinois*, No. 14-CV-1119-SMY-RJD, 2018 WL 514326 (S.D. Ill. Jan. 23, 2018)**

Judge Staci M. Yandle of the U.S. District Court for the Southern District of Illinois denied the plaintiffs' motion for class certification related to allegations of a conspiracy to fix St. Clair County, Illinois, real estate tax sales so that owners were required to pay artificially high interest penalties to redeem their properties. Specifically, the plaintiffs alleged that the county collector — in exchange for political contributions — arranged for the relevant auctioneer to recognize defendant purchasers as winning bidders and caused the auctioneer to ignore subsequent lower bids. On review, the putative class did not meet the typicality requirement because the named plaintiffs' claims were subject to a statute of limitations defense. Application of the discovery rule as to when the plaintiffs knew or should have known of their claim suggested that the plaintiffs' claims may be time-barred, but application of the rule may yield a different result for the remainder of the putative class. Predominance was also not satisfied

because the "fact of injury" was not susceptible to common class proof and would require "individualized inquiry" as to whether certain parcels were sold at a higher value than they would have been absent the alleged conspiracy. Accordingly, the court denied the plaintiffs' motion for class certification.

***In re Tropicana Orange Juice Marketing & Sales Practices Litigation*, No. 2:11-07382, 2018 WL 497071 (D.N.J. Jan. 22, 2018)**

Judge William J. Martini of the U.S. District Court for the District of New Jersey denied class certification in this action alleging the mislabeling and misbranding of the defendant's orange juice product. The plaintiffs alleged that the defendant added natural flavoring to its juice in violation of the Food and Drug Administration's standard and falsely marketed its product as "pure, natural and fresh from the grove." The plaintiffs sought to certify a class of purchasers from California, New York, New Jersey and Wisconsin who bought the product from members-only clubs or loyalty-card stores between 2008 and 2017, as well as four state subclasses. The defendant challenged adequacy, arguing that the class was too narrowly defined to people who only purchased its product from members-only or loyalty-card clubs and therefore "jettisoned most of the original class [the named plaintiffs] sought to represent." However, the court held that this did not defeat adequacy because the plaintiffs were entitled to define the class "as broadly or as narrowly as their evidence supports." Nevertheless, the court ultimately denied certification, holding that many individual issues predominated over common issues. For example, with regard to the plaintiffs' unjust enrichment claims, the court found that there would need to be individual inquiries into each plaintiff's reason for purchasing the orange juice in the first place. Additionally, with respect to the remaining claims where individual issues did not predominate, the court held that the plaintiffs had not demonstrated that the proposed class was ascertainable. Although the plaintiffs submitted expert testimony contending that they could create a computer program to reliably identify all class members by collecting various retailer data, the court found that there was no evidence that such retailer data existed. The court also noted that at least one retailer had already stated that no such consumer data existed. For these reasons, certification was denied.

***Branch v. Government Employees Insurance Co.*, 323 F.R.D. 539 (E.D. Va. 2018)**

Judge Robert E. Payne of the U.S. District Court for the Eastern District of Virginia denied the plaintiff's renewed motion to certify a class of plaintiffs alleging the defendant violated the Fair Credit Reporting Act (FCRA) by failing to provide a copy of the consumer report that served as the basis for the defendant's withdrawal of a conditional job offer. The court held that typicality was not satisfied because the alleged FCRA violation did not stem from the defendant's background check process itself, which allows potential employees to cure their "fail" grades, but rather from the plaintiff's individualized experience, in which an employee of the defendant allegedly deviated from the standardized background check process by rescinding the plaintiff's conditional offer of employment before the cure period expired. This distinction rendered the plaintiff's claims atypical. The court also held that predominance was lacking because the question of whether the defendant violated FCRA could not be answered by looking at the defendant's standardized process; rather, it required examining the defendant's conduct with respect to each individual after assigning them "fail" grades based on their background reports. Accordingly, the court denied the plaintiff's renewed motion for class certification.

Sellers v. Rushmore Loan Management Services, LLC*, No. 3:15-cv-1106-J-32PDB, 2017 WL 6344315 (M.D. Fla. Dec. 12, 2017), *reconsideration denied*, No. 3:15-cv-1106-J-32PDB, 2018 WL 340009 (M.D. Fla. Jan. 9, 2018), *23(f) pet. granted

In this consumer credit putative class action, Judge Timothy Corrigan of the U.S. District Court for the Middle District of Florida denied the defendant's motion for reconsideration of the court's summary judgment ruling and denied the plaintiffs' renewed motion for class certification. The plaintiffs in this case claimed that the defendant violated the Fair Debt Collection Practices Act and Florida state law in sending "numerous communications" to the potential class. While the defendant challenged certification on several grounds, the court limited its analysis to the predominance inquiry. The court agreed with the defendant that the case would turn on highly individualized proof such as the plaintiffs' principal residence at the time they received the communications. Therefore, the court refused to certify the class and dismissed the class claims with prejudice.

***In re Hardieplank Fiber Cement Siding Litigation*, No. 12-md-2359, 2018 WL 262826 (D. Minn. Jan. 2, 2018)**

Judge Michael J. Davis of the U.S. District Court for the District of Minnesota denied class certification to a group of consumers alleging violations of multiple states' consumer protection statutes based on the claim that alleged defects in the defendant's siding caused the siding to fail prematurely. After granting the defendant's motion to exclude the plaintiffs' experts' testimony because the methodology was fundamentally flawed, the court addressed the motion for class certification. The purported class failed to satisfy many of the Rule 23 requirements because any common issues of law and fact would be "overwhelmed by a myriad" of individualized fact questions and a variety of state laws with material differences. Commonality was not satisfied because, following the exclusion of the plaintiffs' expert, there was no common proof of a defect in the siding. Predominance was not satisfied because the defendant would have the right to challenge, as to each individual class member, whether they were exposed to an actionable warranty or misrepresentation, whether they had an injury beyond normal wear and tear, and whether they had an injury caused by a defect as opposed to installation errors, third-party coatings or some other cause. Similarly, there was no classwide proof of reliance with respect to the states' consumer protection statutes. Even in states that allow for a presumption of reliance, such a presumption could not be allowed without evidence that the allegedly false representations were uniformly made to all members of the proposed class. Causation, however, was the "key" reason certification was inappropriate, because the plaintiffs' experts' own photographs indicated that installation error was a "major" cause of the deterioration alleged by the plaintiffs. Accordingly, the court denied class certification.

***Andren v. Alere, Inc.*, No. 16cv1255-GPC(AGS), 2017 WL 6509550 (S.D. Cal. Dec. 20, 2017)**

Judge Gonzalo P. Curiel of the U.S. District Court for the Southern District of California denied the plaintiffs' motion to certify a nationwide damages class asserting California consumer protection law claims and six damages subclasses asserting non-California state law claims. The plaintiffs alleged that the defendants failed to disclose in advertising and marketing materials that their electronic blood clotting testing devices were defective. The court found numerosity, commonality, typicality and adequacy satisfied despite the defendants' argument that the plaintiffs were not adequate representatives because they were claim-splitting by only seeking economic damages and disclaiming personal injury damages. The court held that any risk of claim or issue preclusion against unnamed plaintiffs was small because of notice and opt-out procedures, the ability to amend the class definition to exclude personal injury individuals and the court's ability to expressly reserve such claims. Applying the predominance test, the court denied certification of the nationwide class because the plaintiffs failed to provide evidence that marketing and advertising of devices emanated from California to establish significant contact with California to satisfy due process. Further, the court found the other 49 states had an interest in applying their own consumer protection laws to injuries or transactions taking place within their borders. With respect to the subclasses, the defendants argued that various issues, including statute of limitations and the applicability of the learned intermediary doctrine, would present individualized inquiries that would predominate over common questions. The defendants also argued that the plaintiffs failed to address whether their full refund model was consistent with their theories of liability under the various state laws. Because the plaintiffs failed to adequately address these arguments, the court held that the predominance factor was not satisfied.

***Neale v. Volvo Cars of North America, LLC*, No. 10-4407 (JLL), 2017 WL 6055774 (D.N.J. Dec. 6, 2017)**

In this action on behalf of current and former vehicle owners and lessees alleging that the defendant-manufacturers sold vehicles with defective sunroof drainage systems, Chief Judge Jose L. Linares of the U.S. District Court for the District of New Jersey denied certification of five single-state subclasses. The proposed state subclasses consisted of all persons or entities who purchased or leased a class vehicle who still owned or leased that vehicle, or had previously owned or leased that vehicle and could prove that they incurred costs related to the alleged sunroof defect. First, the court found that the state subclasses were not properly defined. The court noted that the proposed class definitions lacked any class period, which "creates issues regarding the used vehicle market, in that new purchases of used Class Vehicles could create a seemingly endless supply of new potential class members."

The court also found it "unclear" whether the members of the proposed classes had to reside in one of the designated states at the time of purchase, because the state of residency was not a component of the class definition. Second, although the court stated that the plaintiffs "need not identify all class members at the certification stage" and need only "show that the class members can be identified," the court nevertheless found that there was no possible way to feasibly ascertain the proposed classes. The court found that the "bulk" of the class membership would likely consist of former owners who must prove the state in which they purchased their vehicle. According to the court, these members may no longer possess the vehicle identification number of their former class vehicle and thus may not be able to feasibly identify the state of purchase. The court also noted that the plaintiffs failed to brief the court on the percentage of class vehicles that may have changed hands in private transactions or how to ascertain those members. Accordingly, the court found that the ascertainability issues made class certification inappropriate.

***Haynes v. Wells Fargo Bank, N.A.*, No. 2:08-CV-00183-RWS-RSP, 2017 WL 5890050 (E.D. Tex. Nov. 29, 2017)**

In a putative class action involving alleged hidden fees by Wells Fargo Bank in connection with bankruptcy proceedings, Judge Robert W. Schroeder III of the U.S. District Court for the Eastern District of Texas adopted the report and recommendation of Magistrate Judge Roy Payne to deny the plaintiff's motion for class certification. The plaintiff sought to certify an injunctive class of individuals who underwent Chapter 13 bankruptcy proceedings and were allegedly required to pay undisclosed fees, and a subclass under the Fair Debt Collection Practices Act (FDCPA) seeking damages for certain of the injunctive class members whose accounts were in default at the time they were acquired by Wells Fargo. Judge Payne recommended that class certification be denied for the injunctive-relief class because it was unlikely that any class members would be subject to future harm. Additionally, the individualized inquiries of each plaintiff's claim prevented satisfaction of the commonality requirement. Moreover, the plaintiff's claims were moot because Wells Fargo had already written off the fees and costs related to his complaint. The court also recommended that class certification be denied for the FDCPA subclass for failing Rule 23's requirements. The subclass shared the same commonality problems as the injunctive class, and inconsistent nationwide application of the FDCPA raised predominance and superiority concerns. Finally, the plaintiff failed to establish the numerosity requirement despite his "imaginative" attempt to define the class in a way that avoided the statute of limitations.

***Ginwright v. Exeter Finance Corp.*, No. TDC-16-0565, 2017 WL 5716756 (D. Md. Nov. 28, 2017)**

Judge Theodore D. Chuang of the U.S. District Court for the District of Maryland denied the plaintiff's motion for class certification in a case alleging that the defendant violated the Telephone Consumer Protection Act (TCPA) by autodialing putative class members without consent. The court held that commonality could not be satisfied because the proposed class definition was so broadly defined as to draw no distinctions between the type of calling system used or whether the class members consented to receive calls. The defendant used two different dialing systems over the relevant time period, requiring resolution of whether the systems qualify as an automated dialing system in violation of the TCPA. Additionally, the issue of whether the defendant's calling class members constituted knowing and willful TCPA violations would depend on whether each individual class member consented or revoked consent to receive telephone calls. Based on these same reasons, the court likewise held that common issues could not predominate over individual issues, particularly because consent or revocation of consent is necessarily an individualized inquiry. Accordingly, the court denied class certification.

Foster v. Green Tree Servicing, LLC*, No. 8:15-cv-1878-T-27MAP, 2017 WL 5508371 (M.D. Fla. Nov. 15, 2017), *appeal dismissed

Judge James D. Whittemore of the U.S. District Court for the Middle District of Florida denied the plaintiffs' motion for class certification. The plaintiffs in this putative class brought suit alleging violation of federal law and Florida state law due to the defendant's alleged attempts to collect a debt while knowing the class members were represented by counsel. The court focused on the ascertainability, commonality and predominance requirements of Rule 23, finding the plaintiffs had failed to satisfy each. With respect to ascertainability, the court held that it would not be administratively feasible to adjudicate this case by class

action because the defendant would be required to conduct a "loan-by-loan" review of over 500 files to determine whether the defendant had actual knowledge of whether the customer was represented by counsel. As to commonality, the court found that the potential class members' claims did not arise from a single or uniform form of communication (*e.g.*, some were by door hangers, others by voicemail or billing statements). Therefore, the "central issue of liability [wa]s ... not susceptible to class wide proof." Finally, when considering predominance, the court found that the same issues that precluded findings of ascertainability and commonality were present; namely, that the plaintiffs' claims would require individualized inquiries. Thus, the court denied the plaintiffs' motion for class certification.

Decisions Permitting/Granting Class Certification

***Venerus v. Avis Budget Car Rental, LLC*, No. 16-16993, 2018 WL 565260 (11th Cir. Jan. 25, 2018) (*per curiam*)**

The U.S. Court of Appeals for the Eleventh Circuit (Black and Hull, JJ., and Restani, U.S. Court of International Trade judge sitting by designation) reversed the trial court's denial of certification in a case alleging that the defendant rental car companies failed to provide certain insurance coverage despite a contractual obligation to do so. The plaintiff alleged that the defendants promised to purchase supplemental liability insurance (SLI) or additional liability insurance (ALI) policies on her behalf and on behalf of others similarly situated but did not fulfill that promise, breaching contracts and violating the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). The district court — citing principles of standing — denied class certification on both claims, determining there was no single form rental contract. The Eleventh Circuit first addressed the standing issue. Both parties and the appellate judges agreed that "the district court conflated Article III standing with the Federal Rule of Civil Procedure 23 requirements for class certification." This was made apparent, the Eleventh Circuit held, by the district court's decision to allow the plaintiff to proceed with her claims on an individual basis. Turning to Rule 23, the circuit judges noted that because "the district court couched its discussion in standing language," it was difficult to tell which Rule 23 requirement or requirements the district court found to be unsatisfied. Making the logical assumption that the lower court meant to discuss the commonality and predominance requirements, the appellate court focused on those issues. The appellate court found that the defendants' breach of contract and FDUTPA claims were "based on allegations that Defendants promised to provide ALI/SLI and failed to do so," and thus, in order to resolve each class member's case, the court must determine whether the defendants breached their contractual duty and violated FDUTPA by failing to purchase the insurance. The court held that "[t]his is the common question" among all class members' claims, satisfying commonality and predominance. Therefore, the court reversed the denial of class certification and remanded for further proceedings.

***Sacerdote v. New York University*, No. 16-cv-6284 (KBF), 2018 WL 840364 (S.D.N.Y. Feb. 13, 2018)**

Judge Katherine B. Forrest of the U.S. District Court for the Southern District of New York granted class certification in a case where the plaintiffs alleged that their employer breached its fiduciary duty in managing their retirement plans in violation of the Employee Retirement Income Security Act. Specifically, the plaintiffs alleged that the defendant included improper funds; allowed service providers to include their own products and services; failed to remove poorly performing funds; and engaged in prohibited transactions. The court first noted that the at least 19,000 plan participants satisfied the numerosity requirement. With respect to commonality, the court identified two common questions: whether the defendant breached its fiduciary duties, resulting in improperly high fees, and whether certain investment options were proper. Typicality was also satisfied, the court held, because each class member's harm was the same and all the claims involved how the defendant managed the plans. The defendants contested adequacy on three grounds: (1) the plaintiffs' proposed flat-fee model would create class conflict, since higher-salaried employees would benefit more than lower-salaried employees; (2) removing the two allegedly imprudent plans would create class conflict because those plans benefit some class members; and (3) the named plaintiffs knew little about the facts of the plans. The judge rejected all three arguments. First, the plan could adopt a proportional fee model that would be fair to all regardless of salary. Second, whether the allegedly improper plans benefited some members went to the merits, and no participant would benefit from a plan that was adjudged imprudent. And, third, although reliant on their counsel for advice, the plaintiffs "have shown the necessary comprehension of their role and willingness to pursue litigation vigorously."

Moving on to the Rule 23(b) requirements, the judge certified the class under 23(b)(1) because the fiduciary duty was allegedly breached as to all plaintiffs; separate adjudications would risk incompatible standards on how to administer the plans; and "the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members" as "the suit involves the presence of property which called for ... management" (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999)). The defendants argued that the U.S. Supreme Court limited Rule 23(b)(1) class actions to those without individual monetary claims. Judge Forrest rejected this as a mischaracterization of Supreme Court precedent, also noting that the damages here would be "incidental" to the requested injunction preventing the breach of the fiduciary duty. The court thus certified the class under Rule 23(b)(1)(A) or, in the alternative, 23(b)(1)(B).

***Nistra v. Reliance Trust Co.*, No. 16 C 4773, 2018 WL 835341 (N.D. Ill. Feb. 13, 2018)**

Judge Gary Feinerman of the U.S. District Court for the Northern District of Illinois granted class certification to a putative class alleging violations of the Employee Retirement Income Security Act. Specifically, the plaintiff alleged that the defendant breached its fiduciary duties to the retirement plan by causing it to borrow money from the underlying employer to purchase the employer's stock at less than fair market value and by acting for the benefit of the employer in connection with the transaction. On review, the court found that the putative class satisfied the requirements of a 23(b)(1)(B) class. Commonality was satisfied because all members' claims arose out of the same transaction. Typicality was satisfied because the plaintiff brought suit on behalf of the plan, sought no individual relief and every plan participant could bring the same claim based on the same conduct. Because the suit was a representative action on behalf of the plan, resolution of the case would affect the interests of all plan beneficiaries, satisfying the requirements of Rule 23(b)(1)(B). Accordingly, the court granted class certification.

Borum v. Brentwood Village, LLC*, No. 16-1723 (RC), 2018 WL 834232 (D.D.C. Feb. 12, 2018), *23(f) pet. denied

Judge Rudolph Contreras of the U.S. District Court for the District of Columbia granted in part and denied in part the plaintiff's motion for certification of a class alleging that the defendants had already displaced some members, and that if the defendants were allowed to proceed with their plans to redevelop a housing complex, more members of the putative class would be displaced from their homes. The plaintiff claimed this would violate the Fair Housing Act and the D.C. Human Rights Act. The plaintiff sought to represent a hybrid class under Rules 23(b)(2) and (b)(3) of "[a]ll households who reside or have resided at Brookland Manor in a three-, four-, or five-bedroom unit with one or more minor child, and (i) have been displaced from a three-, four-, or five-bedroom unit at Brookland Manor since October 1, 2014 ... or (ii) are at risk of being displaced from a three-, four-, or five-bedroom unit at Brookland Manor." The court first addressed whether the plaintiff could represent the putative class members who had already been displaced. Because the plaintiff spent very little time briefing this issue, the court was unable to determine what common issues these members would have with the broader class, and thus held that they could not be included in the class.

Next, the court considered whether the plaintiff could represent a class of individuals who currently lived in the housing complex and were at risk of being displaced. First, the court found no issue with numerosity, as there would be hundreds of class members. Second, with respect to commonality, the court held that "the question of whether this redevelopment will have a disparate impact based on familial status is one such common question." As such, commonality was satisfied. Third, as to typicality, the court found that the lead plaintiff was similarly situated and would have all of the same claims and defenses as the rest of the class. For this reason, coupled with a lack of any conflict of interest, the court also concluded that adequacy was satisfied. Turning to the Rule 23(b)(2) requirements, the court found these were easily satisfied because the plaintiff sought injunctive relief applicable to the entire class. Thus, the court granted class certification under Rule 23(b) but adjusted the class definition to include only "individuals who reside at Brookland Manor in a three-, four-, or five-bedroom unit with one or more minor child, and are at risk of being displaced from a three-, four-, or five-bedroom unit at Brookland Manor as a direct result of the proposed redevelopment."

***Toney v. Quality Resources, Inc.*, 323 F.R.D. 567 (N.D. Ill. 2018)**

Chief Judge Ruben Castillo of the U.S. District Court for the Northern District of Illinois granted the plaintiff's motion for class certification in a case alleging violations of the Telephone Consumer Protection Act (TCPA). The plaintiff alleged that she had purchased slippers online from one company (Stompeez) that, in turn, sold her telephone number to another company, Quality Resources (Quality). According to the plaintiff, Quality then called her in an attempt to market another company's products. The plaintiff alleged that Quality placed thousands of automated calls, resulting in at least 500 complaints between 2008 and 2013. The plaintiff moved to certify a class of individuals who are or were subscribers of cellphone numbers on the class list and whose numbers Quality obtained as a result of their online purchase on Stompeez's website. The defendants first argued that the proposed class was not ascertainable on the grounds that the plaintiff's expert failed to reliably identify the persons subscribed to the unique cellphone numbers that Quality called.

The court disagreed, pointing out that even the defendants' own expert recognized that the use of cell block identifiers and ported number lists (which were employed by the plaintiff's expert) are accepted within the industry to distinguish cellphone numbers from landline numbers. The court also rejected the defendants' argument that the class would encompass a number of class members without Article III standing, relying on pre- and post-*Spokeo* cases for the proposition that loss of time and privacy responding to unsolicited communications are concrete injuries sufficient to establish standing. The court then proceeded to dispose of the defendants' primary argument with respect to predominance — namely, that whether a class member consented to Quality's calls was an "individualized, fact-intensive inquiry." According to the court, the defendants failed to proffer any specific evidence with respect to this affirmative defense under the TCPA. In any event, the court highlighted, the facts related to each class member's interaction with Stompeez's privacy policy and online order form were uniform throughout the class, weighing in favor of a finding that common issues of fact predominated as to consent.

Waldrup v. Countrywide Financial Corp.*, Nos. 2:13-cv-08833-CAS (AGRx), 2:16-cv-04166-CAS (AGRx), 2018 WL 799156 (C.D. Cal. Feb. 6, 2018), *23(f) pet. pending

Judge Christina A. Snyder of the U.S. District Court for the Central District of California certified a nationwide class of home mortgagors bringing Racketeer Influenced and Corrupt Organizations Act (RICO) claims, and a class of Texas residents bringing claims for unjust enrichment, based on an allegedly fraudulent appraisal scheme that charged for appraisals that failed to comply with the Uniform Standards of Professional Appraisal Practice (USPAP). The court rejected the defendants' arguments that individualized issues and answers predominated, concluding that the plaintiffs offered a classwide method of proving uniform USPAP violations based on the allegedly improper relationship between the appraiser and the defendants, and companywide policies and practices. RICO causation was also susceptible to classwide proof, based on evidence that the defendants' appraisal scheme directly caused class members financial injury through fees charged for deficient appraisals. Thus, although commonality and predominance were satisfied for the RICO claims, the court acknowledged that it was a "close question," especially because the underlying USPAP violation was based on a rarely litigated ethical standard, and the plaintiffs would need to prove violations through classwide evidence of the relationship between the defendants and the appraiser, and companywide policies and practices.

Common issues also predominated for the Texas unjust enrichment claims, as the plaintiffs offered a classwide method of proving that every appraisal violated USPAP and fees were uniformly charged to class members. Regarding damages, the court noted that the plaintiffs' full refund model could be an appropriate remedy if the plaintiffs satisfied their burden to show the violations rendered the appraisals worthless to borrowers. Finally, superiority was satisfied, as individual litigation around the small appraisal fees would be unfeasible.

Seaman v. Duke University*, No. 1:15-CV-462, 2018 WL 671239 (M.D.N.C. Feb. 1, 2018), *23(f) pet. denied

Judge Catherine C. Eagles of the U.S. District Court for the Middle District of North Carolina granted the plaintiff's motion to certify a class of faculty members in a case alleging that an agreement between Duke University and the University of North Carolina to forbid lateral moves of faculty between the schools violated antitrust laws and suppressed compensation throughout the defendants' medical schools and health care facilities. The court held that the requirements of Rule 23(a) were not seriously disputed where, *inter alia*, the faculty class was easily ascertainable from the defendants' faculty records. The court also determined that predominance and superiority requirements were satisfied because the issue of antitrust violation was a common question that would be addressed through common proof for all proposed faculty class members. On the other hand, the court held that a proposed class of nonfaculty members could not be maintained because the likelihood of substantial confusion between the faculty and nonfaculty class members, potential for unfairness at trial and the individual issues that would arise with nonfaculty members were all issues that precluded the inclusion of nonfaculty members in the purported class action. Accordingly, the court denied the plaintiff's motion to certify a class of nonfaculty members but granted the motion to certify a class of faculty members.

***Ferris v. Transworld Systems, Inc.*, No. 16 C 3703, 2018 WL 701285 (N.D. Ill. Jan. 31, 2018)**

Judge Samuel Der-Yeghiayan of the U.S. District Court for the Northern District of Illinois granted, in part, the plaintiff's motion for class certification alleging violations of Sections 1692e and 1692g of the Fair Debt Collection Practices Act (FDCPA). Specifically, the plaintiff alleged that defendant Convergent falsely indicated that the creditor of the debt was "Chase" and falsely listed Transworld's address as the address of the original creditor. After determining that the plaintiff had standing, the court found that adequacy was satisfied because even though the named plaintiff was not seeking actual damages, there was no indication that there would be significant putative class members seeking actual damages. In addition, any such class members could opt out of the proposed class. The Section 1692g subclass, however, did not satisfy commonality or typicality because an extensive analysis of communication histories would be required. Accordingly, the court denied the motion to certify this subclass. The remaining Section 1692e class was certified, as predominance was met because the plaintiff alleged a common pattern of conduct by the defendants that violated the FDCPA in the same manner.

Fauley v. Drug Depot, Inc.*, 323 F.R.D. 594 (N.D. Ill. 2018), *23(f) pet. denied

Judge Virginia M. Kendall of the U.S. District Court for the Northern District of Illinois granted the plaintiff's motion for class certification alleging violations of the Telephone Consumer Protection Act (TCPA) related to faxes regarding animal medicine that were not solicited. After denying the defendant's *Daubert* motion, the court found that the Rule 23 prerequisites were satisfied. Numerosity was satisfied because the plaintiff submitted evidence that the defendant transmitted over 78,000 individual fax advertisements and "common sense" showed that at least 40 class members likely existed. Commonality was also satisfied, as the plaintiff alleged standardized conduct in seeking out a third-party mass advertiser to send out the faxed advertisements. Common questions included whether the faxes were advertisements, whether the defendant was a "sender" of the faxes, whether the faxes were unsolicited and whether the defendant willfully or knowingly violated the TCPA. Predominance was likewise satisfied, as liability was the predominant issue, and a class action would achieve economies of time and expense. Accordingly, the court granted class certification.

***Spice v. Blatt, Hasenmiller, Liebsker & Moore LLC*, No. 1:16-CV-366-TLS, 2018 WL 525723 (N.D. Ind. Jan. 24, 2018)**

Chief Judge Theresa Lazar Springmann of the U.S. District Court for the Northern District of Indiana granted the plaintiff's motion to certify a class alleging violations of the Fair Debt Collection Practices Act based on the defendant debt collector's use of an allegedly misleading form debt collection letter. In so holding, the court rejected the defendant's argument that the typicality and predominance requirements were not met because the terms and conditions associated with two of the named plaintiff's relevant bank accounts included arbitration clauses and class action waivers. According to the court, these agreements only pertained to the lending relationship between the plaintiff and her bank and "ha[d] no bearing" on the plaintiff's claims against the debt collector for unfair collection practices. As the court explained, a debt collector is "not an employee, agent, or assignee of a creditor, but rather an independent contractor." Thus, any differences in the agreements reached by the named plaintiff — or any other proposed class member — and the original lenders were "irrelevant" to whether the class action requirements were met with respect to claims arising from a third party's debt collection.

Alderman v. GC Services Limited Partnership*, No. 2:16-CV-14508-ROSENBERG/MAYNARD, 2018 WL 542455 (S.D. Fla. Jan. 18, 2018), *23(f) pet. denied due to untimely filing

Judge Robin L. Rosenberg of the U.S. District Court for the Southern District of Florida granted the plaintiff's motion for certification of a class action alleging that the defendant sent debt collection letters that violated the format required by 15 U.S.C. § 1692g. The plaintiff claimed that the defendant sent debt collection letters to her and to the putative class members, and that the letters incorrectly stated that the plaintiff and members of the putative class had to dispute the validity of the debt in writing, even though Section 1692g(a)(3) does not contain a writing requirement. The plaintiff further claimed the letters were "false, deceptive, or misleading representation." The court found that the Rule 23 factors were easily satisfied. The class would have over 19,000 members, satisfying numerosity. The class received the same letter from the defendant as the named plaintiff, resulting in a common issue for the court to decide (*i.e.*, whether the letter violates Section 1692g). And the court found that the named plaintiff and counsel would adequately represent the class. Therefore, the court held that class certification was proper.

***Smith v. Simm Associates, Inc.*, No. 17-C-769, 2018 WL 389089 (E.D. Wis. Jan. 12, 2018)**

Chief Judge William C. Griesbach 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) by sending form debt collection letters to the plaintiff that failed to identify the current creditor of the debt and falsely implied that Comenity Capital Bank transferred, sold or assigned ownership of the debt to unknown creditors. Numerosity was satisfied because the class includes 2,495 members, and commonality was satisfied because the claims involved form collection letters sent to the class. Typicality was similarly satisfied because the defendant mailed the same allegedly offending form letter that gave rise to each member's claim. Predominance was also satisfied because the significant issue — whether the defendant violated the FDCPA by sending template letters without identifying the current creditor — predominated over any individual questions. The defendant argued that superiority was not satisfied because the plaintiff arbitrarily limited the class definition to those who received the form letter naming Comenity Bank as the original creditor, as opposed to naming those who received a letter from the defendant regardless of the named creditor. However, because there was no evidence that the plaintiff arbitrarily gerrymandered the complaint to file multiple suits based on the same underlying conduct, and because the defendant did not identify any ongoing, related litigation regarding the offending letter, the court found superiority satisfied. Accordingly, the court granted class certification.

***Griffith v. ContextMedia, Inc.*, No. 16 C 2900, 2018 WL 372147 (N.D. Ill. Jan. 11, 2018)**

Judge Elaine E. Bucklo of the U.S. District Court for the Northern District of Illinois granted class certification to a class alleging violations of the Telephone Consumer Protection Act (TCPA) related to the sending of unwanted automated text messages. The plaintiff alleged that after signing up to receive automated text messages related to health tips, she attempted to unsubscribe from the service by replying with the word "STOP" and similar messages, but the text messages continued for many months. The plaintiff successfully identified multiple questions that satisfied commonality, including whether sending the messages identified in the class definition amounted to the revocation of consent and whether the equipment used to send the messages qualified as an "automatic telephone dialing system." Similarly, predominance was satisfied. The defendant argued that because the plaintiff's individual recovery could be significant if she proved willful violations of the TCPA, class treatment was not appropriate. Absent evidence that suggested that all or many of the absent class members had similarly substantial claims, the court refused to deny certification on that ground. Accordingly, the court granted class certification.

Rench v. TD Bank, N.A.*, No. 3:13-cv-00922-SMY-RJD, 2018 WL 264121 (S.D. Ill. Jan. 2, 2018), *23(f) pet. denied

Judge Staci M. Yandle of the U.S. District Court for the Southern District of Illinois granted class certification to a class alleging violations of the federal Truth in Lending Act, the Illinois Prizes and Gift Act and the federal Racketeer Influenced and Corrupt Organizations Act (RICO). Specifically, the plaintiff alleged that a maker of vacuums and air filters, HMI, engaged TD Bank, N.A.'s services to finance consumer purchases of its products. The plaintiff alleged that HMI developed and utilized promotional scratch cards that instructed the recipients to call a winners hotline but were actually designed to induce consumers to allow HMI sales associates into their homes for sales pitches. On review, the court granted class certification to the three subclasses based on the underlying claims. Typicality

was satisfied because the claims were all based on the allegedly deceptive and misleading promotional scratch cards and arose from HMI's alleged violations of the three statutes. Predominance was satisfied for each subclass. For the RICO subclass, the common and relevant question was whether the scratch cards used and distributed by HMI were likely to mislead and defraud reasonable consumers. For the remaining subclasses, the plaintiff pointed to form written materials (the scratch cards) that failed to disclose material facts as required by the statutes. After finding the remaining requirements of Rule 23(b)(3) to be satisfied, the court granted class certification.

Etter v. Allstate Insurance Co.*, No. C 17-00184 WHA, 2017 WL 6594069 (N.D. Cal. Dec. 26, 2017), *23(f) pet. pending

Judge William Alsup of the U.S. District Court for the Northern District of California certified a class of recipients of an unsolicited facsimile advertisement in 2016, asserting a violation of the Telephone Consumer Protection Act. The court held that Rule 23's typicality requirement was satisfied, noting that even though the plaintiff's fax number belonged to a business he co-owns with his wife, the defendants did not explain or offer authority establishing that "the mere possibility that some fax numbers at issue might be associated with multiple recipients defeats typicality at this stage." Commonality and predominance were also satisfied, despite the defendants' argument that individualized issues of consent predominated, because the affirmative defense could be demonstrated by evidence of adequate practices or procedures to obtain consent on a classwide basis. Further, the defendants could prove an "established business relationship" defense without individualized inquiries through business records identifying current and former customers among the alleged fax recipients. Finally, the court rejected the defendants' manageability concerns, because class certification does not require an administratively feasible way to identify class members, and in any event, a reliable method of identifying individual class members might exist even in the absence of detailed fax logs. However, the court refused to certify a class based on a similar 2015 fax because the plaintiff had no proof he actually received the 2015 fax and only realized after discovery he was on the "target list" for recipients of that fax. The court held that the plaintiff's speculation that he may have received the 2015 fax did not overcome the absence of evidence or allegations in the complaint that the defendants successfully transmitted the offending fax to him to establish his standing to pursue a claim based on the 2015 fax.

***Donegan v. Norwood*, No. 16-cv-11178, 2017 WL 6569634 (N.D. Ill. Dec. 21, 2017)**

Judge Robert M. Dow Jr. of the U.S. District Court for the Northern District of Illinois granted class certification, in part, to a class of disabled persons alleging violations under the Americans With Disabilities Act, the Rehabilitation Act and 42 U.S.C. § 1983. The plaintiffs alleged that the defendant, the director of the Illinois Department of Healthcare and Family Services, discriminated between disabled persons aging out of one health care program and those aging out of another program, because persons aging out of the latter program continued to receive in-home nursing services while disabled persons in the former program did not. After altering the class definition to address threshold concerns about the ability to issue a classwide injunction under Rule 23(b)(2) and ascertainability, the court addressed Rule 23(a). Numerosity was satisfied because there was ample evidence that there were 411 children receiving services under the program subject to being aged out and receiving limited care. Commonality was satisfied because, among other things, whether the defendant discriminated against the class when they aged out of one program compared to the other was a question capable of classwide resolution. Typicality was satisfied because the claims arose from the same legal theory — that the defendants illegally discriminated against those in one program by not allowing them to continue to receive medical services after reaching the age of 21, while those in another program continued to receive those services. Adequacy was satisfied because counsel was sufficiently experienced and the named plaintiffs were not subject to any relevant specific defenses as compared to the class. The plaintiffs' other claim — that restricting enrollment to one program put the plaintiffs at serious risk of harm — failed multiple Rule 23 requirements, including commonality, because of the highly individualized nature of the claims. Accordingly, the court certified the class based only on the former theory of liability.

***Dzielak v. Whirlpool Corp.*, No. 2:12-89 (KM)(JBC), 2017 WL 6513347 (D.N.J. Dec. 20, 2017)**

Judge Kevin McNulty of the U.S. District Court for the District of New Jersey granted the plaintiffs' motion for class certification in this action arising from the sale of washing machines that bore Energy Star labels signifying that they met federal standards of water and electrical efficiency. The defendant-manufacturer had been selling the washing machines with the Energy Star

label when, in 2012, the Department of Energy determined that the models did not actually meet its efficiency standards. The plaintiffs sought to certify seven subclasses of purchasers in states where named plaintiffs bought washers, alleging that they paid a premium they attributed to the Energy Star label and had higher water and energy costs than they would have paid had the washers actually met the Energy Star standards. In granting certification, the court first found that numerosity was easily satisfied, as the plaintiffs provided documentation that more than 100,000 units of allegedly mislabeled washers were sold in the seven states during the class period. The court also found that commonality was satisfied because there were "common questions whose resolution would drive the resolution of this litigation," such as "whether the Energy Star mark and advertising material were material to class members' decisions to purchase the machines" and "whether class members paid more in energy and water bills because the washers were mislabeled." Similarly, typicality was met because, according to the court, the claims all arose from the same allegedly wrongful conduct — the mislabeling of the machines. The court then found that adequacy was satisfied because the class counsel was experienced and "pursued this litigation vigorously for several years" and there were "no apparent conflicts of interest between the named plaintiffs and the classes they seek to represent." Finally, the court found that questions of law or fact common to the class predominated over individualized issues as to the defendant-manufacturer. The court acknowledged that some defenses may depend on the plaintiffs' dates of purchase but ultimately found that "[o]nce that issue of fact is decided, it should be feasible to segregate the claims that survive from those that do not." Thus, the court granted class certification for the seven state subclasses against the manufacturer.

West v. California Services Bureau, Inc.*, 323 F.R.D. 295 (N.D. Cal. 2017), *23(f) pet. denied

Judge Yvonne Gonzalez Rogers for the U.S. District Court for the Northern District of California certified a nationwide class of consumers claiming that an accounts receivable management company violated the Telephone Consumer Protection Act (TCPA) by repeatedly calling their cellphones without consent. The court rejected the defendant's argument that individualized issues of consent precluded satisfaction of the commonality and predominance requirements, noting that the plaintiff established that a reverse lookup service could identify wrong numbers and resolve consent issues. Numerosity was established because more than 32 million calls were made, and a projection taken from a random sampling calculated the total class at roughly 63,500 consumers. The court rejected the defendant's argument that one named plaintiff's claims were not typical of the class because her son allegedly gave consent to phone calls to that number, citing deposition testimony establishing that the number dialed was not her son's number, and that he was unauthorized to give consent. Adequacy was satisfied because the named plaintiff was active in the litigation, and the lawyers had extensive experience litigating TCPA claims. Finally, the court held that class manageability concerns did not defeat the superiority of the class action, because the statutory damages under the TCPA claims would not sufficiently compensate individuals for the time and effort required to bring small claims actions against a national corporation. In addition to certifying a Rule 23(b)(3) damages class, the court also certified a Rule 23(b)(2) injunctive relief class because "[i]n the event that plaintiffs are able to demonstrate liability under the TCPA, but ultimately fail to establish classwide damages, the Court may still enter an injunction against defendant."

Feller v. Transamerica Life Insurance Co.*, No. 2:16-cv-01378-CAS-AJW, 2017 WL 6496803 (C.D. Cal. Dec. 11, 2017), *23(f) pet. granted

Judge Christina A. Snyder of the U.S. District Court for the Central District of California certified a nationwide class and two California-resident subclasses in an action for, *inter alia*, breach of contract, injunctive relief, California's Unfair Competition Law and statutory elder abuse after the defendant increased a monthly deduction rate (MDR) on approximately 70,000 life insurance policies. The plaintiffs alleged the defendant increased the MDRs to recoup losses due to low interest rates in violation of a standardized provision prohibiting the defendant from "recover[ing] past losses by changing the monthly deduction rates." The court found numerosity, commonality and typicality satisfied given the number of policies affected, and because every policy contained an identical nonrecoupment provision and the plaintiffs' claims all turned on the defendant's common conduct in increasing the MDRs. The court certified a Rule 23(b)(3) damages class, holding predominance satisfied because the plaintiffs' claims were subject to a common method of proof under an objective test that looks to "reasonable expectations" of the insured, and the defendant did not show that the application of other states' laws was necessary to interpret any alleged ambiguity in the form contracts at issue.

The court also certified an injunctive class under Rule 23(b)(2), finding that if the defendant's conduct amounts to breach or another type of unlawful conduct, it may be appropriate to order injunctive or declaratory relief applicable to the pertinent classes of policyholders. Finally, the court rejected the defendant's argument that the court lacked personal jurisdiction as to the claims asserted by all putative members in the nationwide class and held that the U.S. Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), did not extend from the mass torts context to class actions.

In re Emerson Electric Co. Wet/Dry Vac Marketing & Sales Litigation*, No. 4:12MD2382 HEA, 2017 WL 5971621 (E.D. Mo. Dec. 1, 2017), *23(f) pet. granted

Judge Henry E. Autrey of the U.S. District Court for the Eastern District of Missouri granted class certification to a nationwide class of consumers alleging violations of the Missouri Merchandising Practices Act, breach of express warranty, breach of implied warranty, unjust enrichment and other claims related to an allegedly misleading marketing campaign for the defendant's vacuum. Specifically, the plaintiffs alleged that the vacuum could not attain the advertised horsepower when plugged into a standard household electrical wall outlet. The court first determined that Missouri law would apply to the class because the advertising campaign that originated out of the defendant's headquarters in Missouri caused the alleged injury, even though the purchases occurred across the country. With just one paragraph of analysis on each of the issues of commonality and predominance, the court held that these requirements were satisfied, rejecting the defendant's argument that whether some of the purchasers had bought the vacuum for other reasons could be resolved through the claims process by having class members set forth that they had indeed relied on the representation. The defendant submitted a petition for interlocutory appellate review under Rule 23(f), which was granted by the U.S. Court of Appeals for the Eighth Circuit on March 20, 2018.

***Brickman v. Fitbit, Inc.*, No. 3:15-cv-02077-JD, 2017 WL 5569827 (N.D. Cal. Nov. 20, 2017)**

Judge James Donato of the U.S. District Court for the Northern District of California certified two classes of California and Florida purchasers of Fitbit devices. The gravamen of the lawsuit was that the plaintiffs and class members were deceived into paying more for Fitbit devices supposedly equipped with sleep-tracking functionality when the devices can actually only measure movement and not sleep. The plaintiffs pointed to alleged misrepresentations by Fitbit that the devices could track "hours slept," "times woken up" and "quality of sleep." The plaintiffs sought to certify California and Florida consumer protection claims as well as certain common law claims. Fitbit argued that typicality was lacking due to a "fatal divergence" between the contention in the complaint that the devices use a particular movement-based methodology and the named plaintiffs' deposition testimony that they effectively did not know or care about how the devices worked. This distinction, the court reasoned, had "little substance to it" since the plaintiffs were mere consumers and could not have been expected to include engineering jargon in their depositions. The court also found that the plaintiffs had satisfied the commonality and predominance requirements. With respect to exposure, the court explained that the alleged representations about sleep-tracking functionality were included on each package for every device, essentially allowing for a classwide presumption of exposure. And while the court held that the Florida plaintiff's negligent-misrepresentation claims could not be certified due to individualized questions of reliance, there was no such barrier to the California and Florida consumer protection claims.

Mendez v. Avis Budget Group, Inc.*, No. 11-6537 (JLL), 2017 WL 5513691 (D.N.J. Nov. 16, 2017), *23(f) pet. denied

Chief Judge Jose L. Linares of the U.S. District Court for the District of New Jersey granted class certification in this putative class action seeking damages for all people who rented vehicles from the defendants that were equipped with and charged by an electronic system to pay tolls, known as an "e-Toll." The plaintiffs alleged that they were not informed that the vehicles were equipped with the system when they rented the vehicles, nor that the system would charge more than the actual toll. The plaintiffs asserted contract-based claims and sought a nationwide class of all Avis and Budget customers who paid for the use of "e-Toll" as well as corresponding Florida and New Jersey state subclasses. All three proposed classes were certified. The court found that commonality and predominance were satisfied because the central question and "common factual and legal thread" in the case was whether the class members paid a toll upcharge that was insufficiently disclosed in the rental agreement.

The defendants argued that typicality could not be met because the named plaintiff alleged that no disclosures regarding the e-Toll and upcharges were made to him, whereas the other class members allegedly received inadequate disclosures. The court disagreed, holding that the slight factual difference was not significant enough to prohibit typicality. The defendants then argued that the named plaintiff would be an inadequate representative of the class because he was employed by class counsel and thus may allow settlement on terms less favorable to the interests of the class members. The court again disagreed, noting that such a conflict was "speculative" because no settlement was before the court. Additionally, the court found that the mere employment by class counsel was not enough, on its own, to find the named plaintiff inadequate. Finally, having found that all four requirements of Rule 23(a) were satisfied, the court held that a class action was the superior method of adjudicating the controversy, because the financial loss to most of the class members was "relatively small" and "very few individuals, if any, would have an interest or ability to pursue their own individual case." Despite certifying a nationwide class, the court failed to conduct a choice-of-law analysis or explain how the claims of class members from all 50 states could be resolved fairly in a single proceeding.

Racies v. Quincy Bioscience, LLC*, No. 15-cv-00292-HSG, 2017 WL 6418910 (N.D. Cal. Dec. 15, 2017), *23(f) pet. denied

Judge Haywood S. Gilliam, Jr. of the U.S. District Court for the Northern District of California certified a single-state class of California consumers allegedly misled by false marketing statements about the benefits of Prevagen, a brain health supplement. The court found Rule 23(a) satisfied, rejecting the defendant's argument that the class representative relied on a nonactionable statement that the product was "clinically tested," and that his claims were atypical because he did not take the product as directed. Because the supplement was not marketed for any use other than improving memory and brain function, the court held that those representations would necessarily be a substantial factor in any consumer's decision to purchase the supplement, even if the plaintiff also relied on the "clinically tested" representation. The court also held that common questions and common evidence about the falsity of the defendant's statements predominated pursuant to Rule 23(b)(3), because the plaintiff demonstrated the materiality of the representations and could rely on commonly applicable evidence, including expert opinion, about Prevagen's efficacy. Finally, the superiority requirement was satisfied, despite the defendant's argument that it may be difficult to identify all class members, because a potential difficulty in identifying class members "is not dispositive."

Other Class Action Decisions

***Odle v. Flores*, 705 F. App'x 283 (5th Cir. 2017) (*per curiam*)**

In a 9-5 vote, the U.S. Court of Appeals for the Fifth Circuit denied the defendant's petition for rehearing *en banc* where the central issue was whether, following a Rule 41(a)(1)(A)(ii) stipulated dismissal with prejudice by a named plaintiff in a putative class action in which the class claims had been rejected, a district court had jurisdiction to consider a motion to intervene by absent class members seeking to appeal the earlier denial of class treatment. A panel of the Fifth Circuit had held that the district court indeed had jurisdiction, though the panel declined to opine on whether that intervention was appropriate, leaving that issue for the district court on remand. The denial of *en banc* review provoked a dissent by Judge Edith H. Jones that argued that the panel decision was wrongly decided. The dissent highlighted numerous instances in which the Fifth Circuit and other courts of appeals had rejected intervention by other plaintiffs after a resolution of the case on the merits. A concurrence in the denial, written by Judge James E. Graves, Jr., disagreed with the dissent, pointing out that many of the cases on which the dissent had relied rejected intervention for case-specific, idiosyncratic reasons, and highlighting U.S. Supreme Court precedent standing for the proposition class actions presents a special context in which absent class members must be allowed to intervene to protect their rights to appeal adverse rulings when the class representatives are no longer advancing their interests.

***In re Chinese-Manufactured Drywall Products Liability Litigation*, No. 09-2047, 2017 WL 5971622 (E.D. La. Nov. 28, 2017)**

Judge Eldon E. Fallon of the U.S. District Court for the Eastern District of Louisiana denied the Chinese defendant's motion to dismiss for lack of personal jurisdiction, holding that the U.S. Supreme Court's recent jurisprudence in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), did not affect personal jurisdiction over a Chinese defendant in a certified class action. In so ruling, the court held that mass torts differ from class actions for jurisdictional purposes and that the citizenship of absent class members is not considered for jurisdictional purposes. According to the court, class actions are governed by the certification requirements of Rule 23, and Congress can permit nationwide class actions through its constitutional authority to shape federal court jurisdiction.

Class Action Fairness Act Decisions

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

***Lester v. Exxon Mobil Corp.*, 879 F.3d 582 (5th Cir. 2018)**

A divided panel of the U.S. Court of Appeals for the Fifth Circuit (Owen and Higginson, JJ., Graves, J. (dissenting)) affirmed the district court's denial of the plaintiffs' motion to remand a mass action suit against Exxon Mobil Oil Corporation stemming from the plaintiffs' alleged exposure to radioactive materials. The suit originated in 2002 (pre-CAFA) when over 600 plaintiffs — including Cornelius Bottley — alleged personal injuries and property damage. The claims were divided into "flights," with a maximum of 12 plaintiffs in each group. In 2013, with approximately 500 claims remaining, three plaintiffs brought a wrongful death and survival action seeking damages for Bottley's death. After the state court set a trial date for an eight-plaintiff flight that included Bottley, the wrongful death plaintiffs moved to transfer and consolidate their suit with the Bottley flight for trial. Despite an ambiguity regarding the court's decision to consolidate, Mobil Oil removed the consolidated suits as a mass action under CAFA and the plaintiffs moved to remand on two grounds: first, that the consolidation motion did not give rise to a mass action, and second, that CAFA did not apply since the original action was commenced prior to CAFA's enactment.

As to the first issue, contrary to the plaintiffs' assertions, the court interpreted the plaintiffs' consolidation motion as joining the wrongful death action with all 500-plus remaining claims from the initial suit, as opposed to merely the eight-plaintiff flight — particularly because the same counsel were involved in both matters. The fact that the district court had used flights to coordinate claims for trial was irrelevant for CAFA jurisdiction purposes. On the second issue, the court determined that the consolidated actions were entitled to removal despite the original claim's pre-CAFA filing date and CAFA's explicit nonretroactivity provision. According to the Fifth Circuit, the operative date for CAFA is the date a civil action is commenced. Because the wrongful death action was not commenced until 2013, it was eligible for removal even though it did not become a mass action until consolidation with the pre-CAFA suit.

***Robertson v. Sun Life Financial*, No. 17-2148, 2018 WL 495402 (E.D. La. Jan. 22, 2018)**

Judge Sarah S. Vance of the U.S. District Court for the Eastern District of Louisiana denied the plaintiff's amended motion to remand a putative class action under CAFA's local controversy exception. The suit arose out of an allegedly fraudulent $99,999.99 withdrawal by defendant Matthew Pizzolato from the plaintiff's Sun Life annuity account that, according to the plaintiff, Sun Life negligently failed to police. In the plaintiff's fourth amended complaint, he sought to bring a putative class action on behalf of similarly situated investors asserting claims under the Racketeer Influenced and Corrupt Organizations Act and the Louisiana Racketeering Act. Sun Life removed the case to federal court. After the district court dismissed the plaintiff's racketeering claims, the plaintiff moved to remand for lack of subject matter jurisdiction, arguing that the case fell within CAFA's local controversy exception. The court rejected this argument, holding that the plaintiff failed to establish that Pizzolato, the local defendant, was a defendant from whom significant relief was sought by the class members because he was not a defendant to any classwide claims. The court further found that the plaintiff had abandoned his case against Pizzolato because "Pizzolato was never served with process, never appeared in state court, and never participated in discovery."

***White Knight Diner, LLC v. Arbitration Forums, Inc.*, No. 4:17-CV-02406 JAR, 2018 WL 398401 (E.D. Mo. Jan. 12, 2018)**

Judge John A. Ross of the U.S. District Court for the Eastern District of Missouri denied the plaintiffs' motion to remand a putative class action alleging various forms of misconduct related to the plaintiffs' insurance companies and unnamed third-party tortfeasors, including purportedly unlawful subrogation claims. One of the defendants removed the action under the minimal diversity requirement under CAFA. The plaintiffs did not dispute that the requirements for subject matter jurisdiction under CAFA had been satisfied but argued that the putative class action should be remanded to state court under the local controversy exception. The dispositive issues were whether: (1) two-thirds of the class in the aggregate were Missouri citizens; and (2) AAA, the only local defendant, qualified as a "significant defendant" — two requirements for remanding a case under this exception. With respect to

the first issue, the court reasoned that because the proposed class definition was not specifically limited solely to Missouri citizens, the plaintiffs could not prove that two-thirds of the class were Missouri citizens. According to the court, it was of no moment that the plaintiffs alleged that over 90 percent of the putative class were Missouri residents because, as the U.S. Court of Appeals for the Eighth Circuit has held, the local controversy exception is defined in terms of "citizens" rather than "residents."

In addition, the plaintiffs failed to establish that a local defendant, AAA, was a "significant defendant" from whom relief was being sought — another requirement under the local controversy exception. Specifically, the plaintiffs generically alleged that all of the defendants had engaged in the same conduct and sought the same relief from all of them. Because there was nothing in the complaint distinguishing AAA's conduct from the conduct of the out-of-state defendants — for example, that the number of Missouri citizens insured by AAA is greater than that insured by the other defendants — there was no evidence that AAA was a significant defendant for purposes of the local controversy exception. Accordingly, for both of these reasons, the court held that the local controversy exception did not apply.

***Green v. 3M Co.*, No. 17-2566 (JS)(AYS), 2017 WL 8793382 (E.D.N.Y. Nov. 20, 2017), *report and recommendation adopted by* No. 17-CV-2566(JS)(AYS), 2018 WL 388943 (E.D.N.Y. Jan. 12, 2018)**

Judge Joanna Seybert of the U.S. District Court for the Eastern District of New York adopted the report and recommendation of Magistrate Judge Anne Y. Shields that the court deny the motion to remand an action where the plaintiffs alleged that the defendants exposed them and their property to harmful chemicals. The plaintiffs filed in New York state court, after which the defendants removed the case to federal court, claiming subject matter jurisdiction under CAFA. The plaintiffs then moved to remand based on CAFA's home state exception. Under this exception, the plaintiffs needed to show that, by a preponderance of the evidence, either two-thirds or between one-third and two-thirds of the members of the proposed plaintiff classes were citizens of the state of New York. The plaintiffs asserted that "it is almost a certainty" that more than two-thirds of the class were citizens of New York because 80 percent of the 153 named individuals were in-state residents. However, the plaintiffs also asserted in their complaint that the number of putative class members had "reached the thousands." Therefore, the court held that the plaintiffs had "failed to demonstrate, at this stage of the proceedings, that either two-thirds, or between one-third and two thirds of the members of the proposed Plaintiff classes are citizens of the State of New York," and denied the motion to remand.

***Allred v. Kellogg Co.*, No. 17-cv-1354-AJB-BLM, 2018 WL 332904 (S.D. Cal. Jan. 9, 2018)**

Judge Anthony J. Battaglia of the U.S. District Court for the Southern District of California refused to remand a putative class action of California consumers asserting violations of California's consumer protection laws relating to the packaging, labeling, and advertising of salt-and-vinegar potato crisps. The plaintiffs claimed that CAFA's $5 million amount-in-controversy requirement was not met. While state-specific sales records were unavailable, Kellogg submitted a declaration stating that California sales approximated $13 million, based on population statistics and nationwide gross sales of the product. The plaintiffs challenged the defendant's use of "statistical assumptions," but the court held that a defendant may rely on "a chain of reasoning that includes assumptions" to prove that the amount in controversy exceeds CAFA's threshold if the reasoning and assumptions are "reasonable." The court held that Kellogg's estimations were reasonable and supported by sufficient evidence of nationwide sales figures and population estimations, noting that given the $13 million in sales, "even if Kellogg was off by 50% in their estimations, they would still meet the $5 million threshold in spades." The court also rejected the plaintiffs' contention that Kellogg improperly assumed a full refund in its damages calculation, because the plaintiffs also sought attorney's fees and punitive damages, which, when combined with even significantly reduced damages, would exceed $5 million. The court further rejected the plaintiffs' argument that Kellogg removed the action in bad faith because after removal, Kellogg successfully moved to dismiss the plaintiffs' injunctive relief claims due to lack of Article III standing. According to the court, Kellogg's assertion that the court had subject-matter jurisdiction and that the plaintiffs lacked standing "are legally consistent positions."

***Pattison v. Omnitrition International, Inc.*, No. C17-1454JLR, 2018 WL 324903 (W.D. Wash. Jan. 5, 2018)**

Judge James L. Robart of the U.S. District Court for the Western District of Washington granted the defendants' motion for reconsideration of the court's order remanding the matter to state court. At issue in the motion for reconsideration was whether

the amount in controversy exceeded $5 million, as required to establish jurisdiction under CAFA. In support of their position, the defendants submitted a sworn declaration by an Omnitrition employee responsible for tracking product sales. Specifically, the employee testified that Omnitrition's sales of the product at issue to customers in Washington exceeded $5 million over the class period and Omnitrition stood to lose more than $5 million in projected revenue in just the coming year if the requested equitable relief were granted and the product were removed from the marketplace. The court concluded that the employee's statements, based on her personal knowledge and Omnitrition's business records, constituted sufficient factual evidence to establish the required amount in controversy by a preponderance of the evidence.

Garcia v. Tempoe, LLC*, No. 17-2106 (SDW) (LDW), 2017 WL 6521372 (D.N.J. Nov. 15, 2017), *report and recommendation adopted by* No. 17-2106 (SDW) (LDW), 2017 WL 6514148 (D.N.J. Dec. 19, 2017), *1453(c) pet. denied

Judge Susan D. Wigenton of the U.S. District Court for the District of New Jersey adopted the report and recommendation of Magistrate Judge Leda Dunn Wettre and denied the plaintiffs' motion to remand a putative class action alleging that rent-to-own contracts for appliances and furniture violated New Jersey consumer protection laws. The plaintiffs initiated the action in the Superior Court of New Jersey against both the company that offered the leasing contacts and two local merchants supplying the goods. The leasing company removed the case to federal court pursuant to CAFA, and the plaintiffs argued that CAFA's local controversy exception required remand. According to the plaintiffs, the local merchants were "significant defendants" necessitating the court to decline jurisdiction pursuant to CAFA. In determining whether the local defendants could be considered a significant defendant, the court examined (1) whether significant relief was sought by the class against the local defendants, and (2) whether their alleged conduct formed a significant basis for the claims asserted by the class.

First, the court found that significant relief was not sought by either local defendant. According to the court, the local defendants may be required to pay only a "few thousand dollars in statutory damages," but "[t]he crux of the class action and the important aspects of the relief sought by plaintiffs relate to the nature of the Lease Agreements themselves and may be addressed without consequence to the local defendants." Second, the court found that the local defendants' conduct was not a significant basis for the asserted claims. Rather, the local defendants were essentially "the mechanism" through which the leasing company was able to enter the allegedly unlawful lease agreements. Thus, the claims "[did not] 'rely on' the local defendants' alleged conduct." Accordingly, the court found that the local defendants were not "significant defendants" to the action requiring remand pursuant to CAFA's local controversy exception.

***Romano v. Northrop Grumman Corp.*, No. 16-5760(DRH), 2017 WL 6459458 (E.D.N.Y. Dec. 15, 2017)**

Judge Denis R. Hurley of the U.S. District Court for the Eastern District of New York denied the plaintiffs' motion to remand a putative class action alleging that a weapons manufacturer's waste polluted the soil, affecting the plaintiffs' indoor air quality. The plaintiffs initially sued only the weapons companies, which were citizens of Delaware and Virginia. But after the defendants filed a notice of removal, the plaintiffs amended their complaint to add the town of Oyster Bay, New York, as a defendant. With the addition of the town, the plaintiffs moved to remand under CAFA's mandatory local controversy exception. In response, the defendants argued that CAFA jurisdiction is determined based on the original complaint. The court agreed, citing U.S. Supreme Court precedent that "when a defendant removes a case to federal court based on the presence of a federal claim, an amendment eliminating the original basis for federal jurisdiction generally does not defeat jurisdiction." *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 474 n.6 (2007). The court also found that the addition of the town gave rise to "a strong suggestion of forum shopping" — *i.e.*, that the plaintiffs likely added the town merely to assert the local controversy exception. For both reasons, the court held that the local controversy exception did not apply and that the plaintiffs' remand motion must be denied.

***Jian-Ming Zhao v. RelayRides, Inc.*, No. 17-cv-04099-JCS, 2018 WL 2096854 (N.D. Cal. May 7, 2018)**

Chief Magistrate Judge Joseph C. Spero of the U.S. District Court for the Northern District of California granted the plaintiff's motion to remand a putative class action asserting that defendant RelayRides, an online marketplace that allows owners of vehicles to list those vehicles for rental, violated California

consumer protection and fraud laws when it refused to cover his losses after a renter totaled his car. The defendants had removed the case from California state court under CAFA. The court had previously denied a remand motion without prejudice. *See Jian-Ming Zhao v. RelayRides, Inc.*, No. 17-cv-04099-JCS, 2017 WL 6336082 (N.D. Cal. Dec. 12, 2017).

In this initial order, Judge Spero rejected the plaintiff's arguments that removal was untimely, determining that neither the complaint nor correspondence between the parties indicated the case could be removed, and the defendants only became aware of potential removability through their own research. Similarly, the court found that the defendants had not waived their right to remove by filing a motion to compel arbitration in state court, as they did not yet have reason to know the case might be removable. However, the court found that the defendants had not met their burden to show $5 million in controversy and gave the plaintiff leave to file a renewed remand motion after limited discovery into the amount in controversy. After this discovery, the court found that the defendants had still failed to meet their burden and granted a renewed remand motion. The court determined that the defendants' method for estimating the value of denied claims was "speculative" and therefore insufficiently "reliable." Because the estimate was offered as expert evidence, the court refused to consider it for failure to meet the *Daubert* standard. As an additional, independent reason to reject the defendants' estimate of the amount in controversy, the court held that it included claims that were beyond the scope of the putative class.

***Shelby v. Oak River Insurance Co.*, No. 4:17-cv-0224-DGK, 2017 WL 6026672 (W.D. Mo. Dec. 5, 2017)**

Chief Judge David Gregory Kays of the U.S. District Court for the Western District of Missouri denied the plaintiff's motion to remand the case to the Circuit Court of Jackson County, Missouri, alleging that CAFA's "interests of justice" exception should apply. The suit arose from an attempt to recover on a judgment entered in a separate class action lawsuit. On review, the court found that the plaintiff failed to establish that the interests of justice exception applied, and that even if it did apply, the court should exercise its discretion to decline jurisdiction. After reviewing the six statutory factors underlying the exception, the court noted that on the whole, the factors fairly balanced each other out. However, the court noted that the plaintiff bore the burden to establish that the court should exercise its discretion to remand and the plaintiff failed to do so. In addition, in considering the "totality of the circumstances," the court noted that the plaintiff "attempted to deprive" the defendant of its statutory right to removal by "being less than candid" as to whether the case was a class action. Specifically, the complaint was unclear as to whether it was a class action, and the plaintiff stated in a sworn interrogatory that it was not a class action. But less than 30 days later, in a proposed amended complaint, the plaintiff stated that he was asserting his and the class' claims. The court noted this was "impermissible" and would "not reward" the use of such tactics by granting remand. Accordingly, the motion to remand was denied.

Green v. Skyline Highland Holdings LLC*, No. 4:17-CV-00534 BSM, 2017 WL 6001498 (E.D. Ark. Dec. 4, 2017), *1453(c) pet. denied

Judge Brian S. Miller of the U.S. District Court for the Eastern District of Arkansas denied the plaintiffs' motion to remand a proposed class action brought by residents of four nursing homes against various defendants — including the nursing homes, their parent company, a sister company and various individual defendants — based on the alleged failure to adequately staff the nursing homes. The plaintiff conceded that the threshold requirements for CAFA jurisdiction were satisfied but argued that multiple CAFA exceptions applied. The court disagreed. First, the court held that the local controversy exception did not apply because the plaintiffs failed to demonstrate that there was one Arkansas defendant common to all class members whose conduct formed a "significant basis" for the plaintiffs' claims and from whom "significant relief" was sought. According to the court, the case was actually four separate class actions — one for each nursing home — combined into one, and therefore only three of the defendants were actually common to all class members.

Further, the plaintiffs alleged that those three defendants acted together in creating the allegedly problematic nursing home conditions and therefore sought to hold all of those defendants jointly and severally liable. As a result, the court determined that the plaintiffs had failed to "adequately identif[y] any particular defendant [in Arkansas] whose conduct form[ed] a significant basis for the claims they assert under CAFA." The court also held that the home state exception did not apply either, because one of the primary defendants in the case — the sole member of the nursing homes' parent company — was a New York resident. Finally, the court found that the discretionary remand exception did not apply for the same reason. Accordingly, the plaintiffs' motion to remand was denied.

***JMCB, LLC v. Board of Commerce & Industry*, No. 17-77-JWD-JCW, 2017 WL 6000348 (M.D. La. Dec. 4, 2017)**

Judge John W. deGravelles of the U.S. District Court for the Middle District of Louisiana held that the court had CAFA jurisdiction over the plaintiff's putative class action suit after *sua sponte* ordering the parties to submit briefs regarding subject matter jurisdiction. The plaintiff alleged that a contract between the Louisiana Board of Commerce and Industry and Sabine Pass Liquefaction, LLC (SPL) exempting SPL from *ad valorem* taxes violated the Louisiana Constitution. The plaintiff sought to represent a putative class of all individuals and businesses who were not entitled to the same tax exemption, as well as the government bodies entitled to receive those tax dollars. Despite the plaintiff's argument that CAFA was not intended for this type of case, the court found that all CAFA requirements were satisfied. The plaintiff's petition alleged that "several thousand individuals and businesses, and several applicable governmental bodies" qualified as members of the proposed class, far exceeding the 100-member threshold. Additionally, the parties satisfied the minimal diversity requirement because SPL, a citizen of Delaware and Texas, was diverse from the plaintiff, a citizen of Louisiana. Finally, the tax at issue was worth approximately $1.4 billion, surpassing the $5 million CAFA requirement. Notably, the court rejected the plaintiff's policy arguments, emphasizing that the plain language of the statute applied to "*any* civil action" and that the legislative history indicated an intent to substantially expand federal class action jurisdiction. The court also held that it was immaterial that the only minimally diverse defendant was later dismissed from the suit, because CAFA jurisdiction is determined at the time of removal. The court also considered and rejected other bases for remand, such as the Tax Injunction Act and federalism concerns.

Decisions Granting Motions to Remand/Finding No CAFA Jurisdiction

Jackson v. Home Depot U.S.A., Inc.*, 880 F.3d 165 (4th Cir. 2018), *pet. for certiorari filed

The U.S. Court of Appeals for the Fourth Circuit (Duncan, Niemeyer and Shedd, JJ.) affirmed the district court's decision remanding a putative class action. In this case, Citibank filed a debt collection action against Jackson, alleging that Jackson failed to pay for a water treatment system he purchased using a Citibank-issued credit card. Jackson asserted a counterclaim against Citibank and third-party class action claims against Home Depot and Carolina Water Systems, Inc. (CWS), alleging that Home Depot and CWS engaged in unfair and deceptive business practices by misleading customers about the water systems, and that Citibank was jointly and severally liable because Home Depot "directly sold or assigned the transaction" to Citibank. Home Depot filed a notice of removal pursuant to CAFA. Relying on previous Fourth Circuit precedent, the Court of Appeals affirmed the trial court's holding that CAFA's removal authority does not allow removal of a class action counterclaim asserted against an additional counterdefendant. Although Home Depot argued that it was a defendant — not a counterdefendant or a third-party defendant — in the only live dispute after Citibank voluntarily dismissed its original complaint against Jackson, the court found that at the time of removal, Citibank remained a counterdefendant. Because allowing Home Depot to remove a counterclaim would be inconsistent with prior interpretations of CAFA's removal statute, the trial court's decision to remand was affirmed.

***City of Walker v. Louisiana Through Department of Transportation & Development*, 877 F.3d 563 (5th Cir. 2017)**

A unanimous panel of the U.S. Court of Appeals for the Fifth Circuit (Dennis, Southwick and Higginson, JJ.) affirmed the district court's remand of a putative class action under CAFA's local controversy exception. The plaintiffs filed a putative class action against the state of Louisiana and various private firms that designed and constructed a concrete median barrier as part of a highway widening project, alleging that the barrier diverted the flow of water in a way that flooded the plaintiffs' properties. Because the defendants conceded that all of the local controversy exception requirements, except for the three-year absence of factually similar class actions, had been satisfied, the only issue was whether a particular class action filed within the past three years asserted "the same or similar factual allegations." On *de novo* review, the Fifth Circuit found that the other class action alleged that a different construction project, initiated decades before the concrete median barrier at issue, exacerbated flooding in a different parish. Accordingly, the court held that the other case did not contain factually similar allegations and that the local controversy exception to CAFA jurisdiction applied.

McAllister v. St. Louis Rams, LLC*, Nos. 4:16-CV-172 SNLJ, 4:16-CV-262, 4:16-CV-297, 4:16-CV-189, 2018 WL 827968 (E.D. Mo. Feb. 12, 2018), *23(f) pet. pending

Judge Stephen N. Limbaugh, Jr. of the U.S. District Court for the Eastern District of Missouri remanded this putative class action to the Circuit Court for the City of St. Louis, Missouri, after reconsidering his order denying the motion to remand. The plaintiffs alleged that the defendants misled them regarding the future location of the St. Louis Rams, which caused the plaintiffs to purchase tickets, merchandise and concessions based upon the defendants' allegedly false promises. The initial complaint pleaded a class of all Missouri residents who purchased Rams tickets, merchandise and/or concession from the defendants between April 21, 2010, and January 4, 2016, in the state of Missouri for personal, family or household purposes. The defendants removed the action under CAFA on the ground that there was minimal diversity because the class was defined in terms of Missouri residents rather than citizens. In response, the plaintiffs filed an amended complaint modifying the class to encompass only Missouri citizens in an attempt to destroy any diversity, as well as a motion to remand. The court granted the motion to remand, rejecting the defendants' reliance on two declarations from putative class members who were Missouri residents and made Rams-related purchases in Missouri but who had moved out of state by the time the lawsuit was filed.

The Eighth Circuit reversed, holding that the district court should have considered the declarations before remanding. Upon remand from the Court of Appeals, the district court initially denied the motion to remand, holding that the original (pre-removal) complaint governed the question of removability, which was defined in terms of Missouri residents and therefore included "non-minimally diverse plaintiffs who are Missouri residents but not current Missouri citizens." The plaintiffs subsequently moved for reconsideration, arguing that the court did not consider the local controversy or home state exceptions under CAFA. In support of their motion, the plaintiffs relied on the survey results of a statistics expert who found that nearly 90 percent of the putative class are Missouri residents. While the defendants challenged the reliability of the survey results, Judge Limbaugh explained that the criticisms (if true) would only result in minor changes to the results. Thus, even accepting the defendants' criticisms, the plaintiffs' evidence "easily support[ed] that more than two-thirds of plaintiffs' class comprises Missouri citizens," warranting remand under the local controversy exception.

***Walsh v. Defenders, Inc.*, No. 16-0753 (ES) (SCM), 2018 WL 555690 (D.N.J. Jan. 25, 2018)**

Judge Esther Salas of the U.S. District Court for the District of New Jersey remanded this class action alleging that the defendants "buried" unlawful provisions in their consumer contracts for home-security equipment and monitoring services. Although the action satisfied the requirements for federal jurisdiction pursuant to CAFA, the plaintiffs contended that the local controversy exception applied. The court agreed, finding that new discovery confirmed that 35.3 percent of the entire class had entered into the allegedly unlawful contracts with a local defendant. Although 64.7 percent of the class had entered into contracts with another nonlocal defendant, the court held that the plaintiffs did not need to demonstrate that the claims against the local defendant "predominate over the other defendants"; rather, the plaintiffs needed only to show that the local defendant's conduct was "significant." Put another way, according to the court, its conduct must be "important" or "notable" to the plaintiffs' claims, which was satisfied by the facts of the case.

***Calmes v. BW-PC, LLC*, No. 9:17-CV-80574-ROSENBERG/HOPKINS, 2018 WL 398456 (S.D. Fla. Jan. 12, 2018)**

Judge Robin L. Rosenberg of the U.S. District Court for the Southern District of Florida dismissed the plaintiff's putative class action for lack of subject matter jurisdiction. The plaintiff sought to represent a class of property owners of the Boca West Country Club, asserting that the defendants mismanaged the club by raising fees and dues, improperly selling vacant land and improperly collecting locker rental fees. The court concluded that subject matter jurisdiction was lacking because CAFA's $5 million amount in controversy was not met. Although the plaintiff claimed there were over $8 million in damages, the court concluded that the allegations were implausible because they depended on an asserted lost revenue stream from delayed construction that the plaintiff could not substantiate. The court also concluded that federal-question jurisdiction was lacking notwithstanding the plaintiff's attempt to allege a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO). It noted that it was not even clear "whether Plaintiff has brought this claim under the federal RICO Act or the Florida RICO Act," and in any event, the plaintiff had not pleaded a single plausible predicate act for a federal RICO claim. Thus, the entire case was dismissed.

***New Hampshire v. Purdue Pharma*, No. 17-cv-427-PB, 2018 WL 333824 (D.N.H. Jan. 9, 2018)**

Judge Paul J. Barbadoro of the U.S. District Court for the District of New Hampshire remanded a consumer protection action brought by the state of New Hampshire against a drug company, holding that a *parens patriae* action — an action where the state sues on behalf of its citizens — is not a class action because the state's power to sue was derived from its sovereign power and not its status as a member of a class. Thus, the case could not be removed under CAFA. The court also held that a *parens patriae* action does not become a class action merely because a state seeks injunctive or equitable relief that benefits individual citizens. Finally, New Hampshire's claim was based on a provision of its consumer protection law permitting the New Hampshire attorney general to bring *parens patriae* actions. Thus, the court considered it irrelevant that the same law also permitted individuals to bring class actions.

In re Express Scripts/Anthem ERISA Litigation*, No. 16 Civ. 3399 (ER), 2018 WL 339946 (S.D.N.Y. Jan. 5, 2018), *appeal filed

Judge Edgardo Ramos of the U.S. District Court for the Southern District of New York found that the court lacked jurisdiction over state law claims under CAFA in a putative class action where the plaintiffs alleged that two health care companies inflated prescription drug prices in violation of the Employee Retirement Income Security Act (ERISA), the Racketeer Influenced and Corrupt Organizations Act (RICO), the Affordable Care Act and various state laws. The plaintiffs proposed two subclasses, one under ERISA and one under state laws. The defendants moved to dismiss on various grounds, including for lack of subject matter jurisdiction over the state law claims. In response, the plaintiffs argued that the court had jurisdiction under CAFA. The court disagreed, holding that the plaintiffs could not sustain their burden of establishing jurisdiction because they did not show a "reasonable probability" that the aggregate claims of the state law subclass exceeded $5 million. This was so, the court reasoned, because the plaintiffs failed to quantify their damages, and even if they had, their claims were unlikely to return over $5 million in damages. Therefore, the court dismissed the state law claims for lack of subject matter jurisdiction.

***Ayers v. State Farm Mutual Automobile Insurance Co.*, No. 6:17-cv-1265-Orl-37TBS, 2017 WL 6524001 (M.D. Fla. Dec. 21, 2017)**

Judge Roy B. Dalton, Jr. of the U.S. District Court for the Middle District of Florida severed the plaintiff's individual state law claims from the nationwide class claim and remanded them to state court. The plaintiff filed claims against the defendants over his insurance policy in Florida state court, alleging individual claims for bad faith, fraud and tortious interference as well as a class claim for breach of contract. The defendant removed the case to federal court, and the court issued a show cause order asking the defendants to show why the individual claims should not be remanded "given that they d[id] not appear to be within the Court's supplemental jurisdiction." The court first addressed the defendant's argument that CAFA provided the court with original jurisdiction, rendering Section 1367 inapplicable. This argument, the court held, had "neither weight nor wings." Neither case law nor a plain reading of CAFA and Section 1367 supported the defendant's position. Next, the court considered the defendant's argument that the individual claims satisfied Section 1367(a) because they arose from a common nucleus of operative facts. It quickly dispatched with this argument as well. To prove the individual claims, the court did not need to resolve the insurance policy interpretation issue at the center of the class claim; therefore, supplemental jurisdiction did not extend to the individual claims.

The Class Action Chronicle

Contributors

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.

Practice Leader

John H. Beisner
Partner / Washington, D.C.
202.371.7410
john.beisner@skadden.com

Partners

Lauren E. Aguiar
New York
212.735.2235
lauren.aguiar@skadden.com

Anthony J. Dreyer
New York
212.735.3097
anthony.dreyer@skadden.com

Karen Hoffman Lent
New York
212.735.3276
karen.lent@skadden.com

Jessica D. Miller
Washington, D.C.
202.371.7850
jessica.miller@skadden.com

Jason D. Russell
Los Angeles
213.687.5328
jason.russell@skadden.com

Counsel

Nina R. Rose
Washington, D.C.
202.371.7105
nina.rose@skadden.com

Geoffrey M. Wyatt
Washington, D.C.
202.371.7008
geoffrey.wyatt@skadden.com

Associates

Brian Baggetta
Senior Staff Associate
Washington, D.C.
202.371.7209
brian.baggetta@skadden.com

Joshua P. Bussen
New York
212.735.2938
joshua.bussen@skadden.com

Kelsey M. Castleberry
New York
212.735.3473
kelsey.castleberry@skadden.com

Matthew E. Delgado
Los Angeles
213.687.5556
matthew.delgado@skadden.com

Catherine Fisher
Boston
617.573.4867
catherine.fisher@skadden.com

Tim Grayson
Washington, D.C.
202.371.7523
timothy.grayson@skadden.com

Hillary A. Hamilton
Los Angeles
213.687.5576
hillary.hamilton@skadden.com

Kent T. Hiebel
New York
212.735.2845
kent.hiebel@skadden.com

Vishal Iyer
Houston
713.655.5127
vishal.iyer@skadden.com

Andrew M. Karp
New York
212.735.3407
andrew.karp@skadden.com

Donald R. Munson
New York
212.735.3215
donald.munson@skadden.com

Francisco A. Nagel
Chicago
312.407.0378
pancho.nagel@skadden.com

Kasonni Scales
Los Angeles
213.687.5657
kasonni.scales@skadden.com

Jordan M. Schwartz
Washington, D.C.
202.371.7036
jordan.schwartz@skadden.com

Matthew Stein
Boston
617.573.4892
matthew.stein@skadden.com

Brenna L. Frey
Washington, D.C.
202.371.7176
brenna.frey@skadden.com

Caroline Van Ness
Los Angeles
213.687.5133
caroline.vanness@skadden.com

Legal Assistant

Katrina L. Loffelman
Washington, D.C.
202.371.7484
katrina.loffelman@skadden.com

Four Times Square
New York, NY 10036
212.735.3000