Skadden

The Class Action Chronicle

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

In this issue, we cover three decisions granting motions to strike/dismiss class claims, five decisions denying such motions, 27 decisions denying class certification or reversing grants of class certification, 34 decisions granting or upholding class certification, 11 decisions denying motions to remand or reversing remand orders pursuant to the Class Action Fairness Act (CAFA), and seven decisions granting motions to remand or finding no jurisdiction under CAFA that were issued during the four-month period covered by this edition.

Class Certification Decisions

Decisions Granting/Affirming Motion to Strike or Dismiss

***Walters v. Vitamin Shoppe Industries, Inc.*, No. 3:14-cv-1173-PK, 2018 WL 2424132 (D. Or. May 8, 2018), *report and recommendation adopted*, 2018 WL 2418544 (D. Or. May 29, 2018)**

The plaintiff asserted nationwide class claims for unjust enrichment and fraud and claims for violations of Oregon consumer protection law on behalf of a proposed subclass of Oregon purchasers, alleging the defendant misleadingly labeled its supplements in referring to volume per serving rather than the volume per individual pill, capsule or tablet. Judge Anna J. Brown of the U.S. District Court for the District of Oregon adopted the findings and recommendation of Magistrate Judge Paul Papak and granted the defendant's motion to strike the nationwide class allegations. The motion was not premature because determining variations in state law presented legal issues that could be resolved without discovery, and a motion to strike pursuant to Federal Rule of Civil Procedure 12(f) was "procedurally appropriate." The court further concluded that material variations in state law on fraud and unjust enrichment would produce different outcomes, and thus, under Oregon choice of law statutes, the law of the state of purchase would govern each proposed class member's claim. Rule 23(b)(3)'s predominance requirement could not be satisfied as to the unjust enrichment claim due to differences in state laws, such as the applicable statute of limitations, whether unjust enrichment is a standalone claim or a quasi-contract claim, and the accrual date. Material differences in state law such as the level of scienter necessary to show fraud,

the plaintiff's burden of proof, statute of limitations and whether reliance may be presumed defeated predominance as to the fraud claim. The court's order striking the class allegations was without prejudice, however, to allow the plaintiff to narrow his class definition to include only residents of those states where the law does not materially differ.

***Reedy v. Phillips 66 Co.*, No. H-17-2914, 2018 WL 1413087 (S.D. Tex. Mar. 20, 2018)**

Judge Sim Lake of the U.S. District Court for the Southern District of Texas dismissed nationwide class claims brought on behalf of purchasers of allegedly defective aircraft fuel on the ground that the need to apply the laws of multiple states to the proposed class members' claims made a finding of predominance impossible. The plaintiffs in the case sought to assert claims for strict products liability, negligence, and breach of implied and express warranties on behalf of the nationwide class, and also sought certification of a statewide class of Kansas fuel purchasers alleging consumer fraud. The defendant moved to strike both proposed classes, and the court determined that the motion was properly treated as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). With respect to the proposed nationwide class, the court granted the motion to dismiss in light of the need to apply the law of each proposed class member's home state to resolve his or her claims. While the plaintiffs argued that discovery may reveal that the proposed class members reside in fewer than 50 states — and that those states may have overlapping laws — the court rejected this argument and found that the "burden of applying the products liability and warranty laws of each class member's state defeats predominance and, thus, nationwide class certification." The court, however, refused to dismiss the proposed Kansas-only, consumer-fraud class for lack of factual predominance. In so holding, the court noted that the plaintiffs had not clearly alleged whether their consumer fraud claims were based on an alleged omission or misrepresentation, which would affect the elements they would have to prove at a class trial. The court therefore permitted the plaintiffs to amend their complaint and reallege their consumer fraud claims under Kansas law.

***Taylor v. Denka Performance Elastomer LLC*, No. CV 17-7668, 2018 WL 1010186 (E.D. La. Feb. 22, 2018), 23(f) pet. denied**

Judge Martin L. C. Feldman of the U.S. District Court for the Eastern District of Louisiana denied the plaintiffs' motion to reconsider the court's order denying the motion for extension of time to file a motion for class certification and granted the defendant's motion to strike the plaintiffs' motion for class certification. The plaintiffs alleged that the production of synthetic rubber at the defendant's facility emitted a carcinogen, resulting in a significantly increased risk of cancer. The court found that the plaintiffs missed the deadline to file a motion for class certification, and their request for an extension to file was denied as untimely. The court also rejected the plaintiffs' argument that the filing of an amended notice of removal reset the 91-day clock for filing a class certification motion. Accordingly, the court dismissed the class allegations for failure to timely seek class certification.

Decisions Denying Motions to Strike

***Doe v. Trinity Logistics, Inc.*, No. 17-53-RGA-MPT, 2018 WL 1610514 (D. Del. Apr. 3, 2018), *report and recommendation adopted,* 2018 WL 2684109 (D. Del. June 5, 2018)**

Judge Richard G. Andrews of the U.S. District Court for the District of Delaware adopted the report and recommendation of Chief Magistrate Judge Mary Pat Thynge and denied the defendants' motion to strike class claims under the federal Fair Credit Reporting Act (FCRA). The plaintiff, on behalf of putative class members, alleged that the defendants, a consumer reporting agency and an employer, created and used consumer reports to take adverse employment actions without informing potential employees or providing them with copies of the reports as required by law. In recommending that the motion to strike be denied, the magistrate judge essentially conducted a full class certification analysis under Rule 23. Specifically, she found that the proposed class satisfied the Rule 23(a) requirements, noting that common issues of fact and law — *e.g.*, whether the uniform failure to timely provide a copy of employment reports violates the FCRA — existed and the claims were typical because all putative class members were similarly affected by the defendants' actions. The magistrate judge also indicated that the class satisfied the predominance and superiority requirements of Rule 23(b)(3) because common questions of law and fact, including whether the defendants willfully or negligently failed to provide class members notice before taking an adverse action against them, predominated over individual issues. The magistrate judge also found that the class definition was objective and not conclusory, rejecting the defendants' argument that because the class definition nearly parroted the statute's language, the court would have to conduct individualized inquiries to discern whether each putative class member fit in the class. Accordingly, the court ruled against striking the class claims.

***Butterline v. Bank of New York Mellon Trust Co.*, National Ass'n, No. 15-1429, 2018 WL 1705957 (E.D. Pa. Apr. 6, 2018)**

Judge Juan R. Sánchez of the U.S. District Court for the Eastern District of Pennsylvania denied a motion to strike class claims alleging that the defendant bank failed to give putative class members excess proceeds from foreclosure sales, in violation of state law. The court rejected the defendant's contention that the class was not ascertainable, accepting the plaintiffs' argument that class members could be identified from records of sheriff sales where the bank received excess proceeds. The court also postponed a decision on predominance until after class discovery given the scant amount of attention devoted to predominance in the parties' briefing.

***Casso's Wellness Store & Gym, L.L.C. v. Spectrum Laboratory Products, Inc.*, No. 17-2161, 2018 WL 1377608 (E.D. La. Mar. 19, 2018)**

Judge Kurt D. Engelhardt of the U.S. District Court for the Eastern District of Louisiana denied defendant Spectrum's motion to dismiss and/or strike class allegations (1) for lack of personal jurisdiction under *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017); (2) as inappropriate for class treatment under Rules 23(c)(1)(A) and 23(d)(1)(D); and (3) as unconstitutional under the Fifth Amendment's due process clause. The plaintiff had filed a putative class action, alleging violations of the Telephone Consumer Protection Act (TCPA), as amended by the Junk Fax Prevention Act (JFPA). The plaintiff sought damages and injunctive relief for Spectrum's massive faxing campaign that allegedly failed to comply with mandatory opt-out notice requirements under the TCPA, JFPA and Federal Communications Commission regulations. The plaintiff proposed a class defined as: "All persons and entities that are subscribers of telephone numbers to which within four years of filing of the Complaint, Defendant sent facsimile transmission with content that discusses, describes, promotes products and/or services offered by Defendant, and does not contain the opt-out notice required by [federal law]."

First, the court held that *Bristol-Myers* did not foreclose the court's jurisdiction over non-Louisiana residents because (1) that opinion addressed mass torts, not class actions; (2) unlike a mass action, a plaintiff seeking to represent absent members in a class action is the only one in the complaint, and only his or her claims are relevant to the personal jurisdiction inquiry; (3) the named plaintiff had adequately alleged the court's personal jurisdiction over the defendant; and (4) Spectrum did not dispute the reasonableness of the court's exercise of personal jurisdiction. Second, the court denied without prejudice Spectrum's motion to strike the class allegations for failing to satisfy Rule 23's requirements, reasoning that the motion was premature. Spectrum had not filed its answer, discovery had not commenced and the plaintiff had not yet filed a motion for class certification. Accordingly, the court could not adequately ascertain whether the plaintiff could properly certify a class. Finally, the court rejected Spectrum's due process motion, reasoning that (1) the TCPA is "uniquely well-suited to class resolution"; and (2) other courts had "persuasively rejected" the argument that TCPA class actions violate the Fifth Amendment.

***Sos v. State Farm Mutual Automobile Insurance Co.*, No. 6:17-cv-890-Orl-40KRS, 2018 WL 1866097 (M.D. Fla. Mar. 12, 2018)**

Judge Paul G. Byron of the U.S. District Court for the Middle District of Florida, adopting the report and recommendation of Magistrate Judge Karla R. Spaulding, denied the defendant's motion to strike class allegations. The plaintiff's second amended complaint alleged that the defendant, an insurance company, failed to pay sales tax and regulatory fees in connection with the plaintiff's loss claim, in violation of state law and the insurance policy. The plaintiff sought to bring suit on behalf of both Florida and non-Florida insureds in a nationwide class. The defendant moved to strike on the grounds that the class would be impossible to certify since it would require analysis of the unique insurance policies and laws of all 50 states. Magistrate Judge Spaulding found that the defendant's motion to strike was premature due to the need for evidentiary review before determining the suitability of class certification, since it was not sufficiently clear from the face of the complaint whether class certification was appropriate. Judge Byron agreed and referenced U.S. Court of Appeals for the Eleventh Circuit precedent in which courts have held that striking class allegations on the pleadings alone was premature. Furthermore, while Judge Byron noted that class certification is generally not appropriate where claims must be decided on the laws of multiple states, he declined to consider the actual differences in the states' laws at this stage of the litigation. Accordingly, the court deferred the choice-of-law issue to the class certification stage and denied the defendant's motion to strike.

***MAO-MSO Recovery II, LLC v. Government Employees Insurance Co.*, Nos. PWG-17-711, PWG-17-964, 2018 WL 999920 (D. Md. Feb. 21, 2018)**

Judge Paul W. Grimm of the U.S. District Court for the District of Maryland denied the defendant's motion to dismiss class allegations filed on behalf of two nationwide classes of Medicare Advantage organizations seeking reimbursement for accident-related medical expenses paid to beneficiaries. The defendant argued that both classes were overbroad and that the plaintiffs had failed to assert specific facts in support of certification. The court held it was premature to rule on class certification because the requirements of Rule 23 could be met depending on the outcome of discovery. As such, it denied the defendant's motion to dismiss the class allegations without prejudice to renewal at the point of class certification.

Decisions Rejecting/Denying Class Certification

***Gonzalez v. Corning*, 885 F.3d 186 (3d Cir. 2018), *as amended* (Apr. 4, 2018)**

The U.S. Court of Appeals for the Third Circuit (Hardiman, Chagares and Jordan, JJ.) affirmed the denial of class certification where consumers alleged that the defendant sold defective roof shingles and misrepresented the shingles' expected useful life. In the district court, the plaintiffs moved to certify two classes: (1) a nationwide class to determine the legal standard on when the defendant can use a bankruptcy discharge defense to shield itself from liability; and (2) a class of property owners from Pennsylvania, Illinois, Texas and California (the four-state class) asserting various combinations of state law causes of action. The district court declined to certify either class. The court ruled the nationwide class failed the commonality requirement, finding the only common question was nonjusticiable. The lower court also held that the four-state class could not demonstrate that common issues of law or fact predominated over individual ones and certifying an issue class under Rule 23(c)(4) to decide issues of liability was inappropriate.

The U.S. Court of Appeals for the Third Circuit agreed. On appeal, the plaintiffs first argued that two common issues predominated for the four-state class members: whether the shingles had a common defect and whether the defendant misrepresented their useful life. The defendant countered that these questions did not have common answers because of the wide variety of different shingles, some of which the plaintiffs admitted had no defect. The panel rejected the plaintiffs' argument that all class members shared a common risk of having defective singles because it "equate[d] the existence of a defect with the mere possibility that one might exist." The plaintiffs next argued that the district court improperly assessed the merits of the plaintiffs' claims at the class certification stage. But the panel pointed out that courts could look to merits issues that were intertwined with class certification questions. Finally, the plaintiffs argued that the district court should have certified a liability-only class because resolution of the common liability issues would materially advance the litigation. The panel held that a liability class was inappropriate because the plaintiffs offered no theories of liability common to the class. Accordingly, the Third Circuit affirmed the denial of class certification.

***Cochoit v. Schiff Nutrition International, Inc.*, No. SACV 16-01371-CJC(KESx), 2018 WL 3372751 (C.D. Cal. July 9, 2018)**

Judge Cormac J. Carney of the U.S. District Court for the Central District of California refused to certify a nationwide class and subclass of California purchasers alleging the defendants falsely advertised their "Digestive Advantage" products. In 2012, the plaintiff's attorney, Ronald Marron, negotiated the settlement of a related putative consumer class action against the same defendants, concerning nearly identical claims arising from nearly identical representations, and received $300,000 in attorneys' fees. The settlement agreement included a "notice and cure" provision, in which Marron agreed to notify and give the defendants' counsel 30 days to cure any advertising that they believed breached the settlement agreement until May 3, 2015. Marron did not contact any of the defendants during the cure period but brought this action in 2016 on behalf of the current plaintiff. The court concluded that while it was in the plaintiff and the class' interest to argue that all related advertisements were false, in asserting that argument, Marron would be forced to explain why he allowed a similar advertising scheme to continue and risk admitting a breach of the settlement and a disgorgement of the fees he received, creating a conflict of interest. Moreover, Marron's conduct and involvement in both cases were distractions from the merits of the plaintiff's claims, at the expense of the putative class members and their ability to litigate the merits of their claims. Based on the conflict of interest and Marron's inability to vigorously represent the absent class members, the court held the adequacy requirement was not satisfied and did not address the remaining Rule 23 factors in denying the plaintiff's certification motion.

***In re Seagate Technology LLC*, No. 16-cv-00523-JCS, 2018 WL 3306192 (N.D. Cal. July 5, 2018)**

Chief Magistrate Judge Joseph C. Spero of the U.S. District Court for the Northern District of California declined to certify a nationwide damages class under California consumer protection laws, or eight subclasses under the laws of various states, on claims that Seagate failed to disclose information about the features and reliability of its hard drives. The court held that foreign law should apply based on other states' significant interest in regulating transactions within their borders and denied certification of the nationwide class. Regarding the state-based subclasses, the court noted that although variation of the alleged omissions over time and across products would pose difficulties in defining the subclasses, the evidence presented would not significantly vary across the eight states. However, common issues did not predominate under the plaintiffs' theories of liability. The plaintiffs failed to present a method of showing that suitability of the hard drives for particular configurations was material to consumers, and only a subset of the named plaintiffs stated that they relied on that feature when purchasing. The plaintiffs' other theory focused on Seagate's alleged failure to disclose that hard drives were unreliable and had high failure rates. The court held that the plaintiffs failed to present classwide proof that the failure rate was higher than represented or otherwise actionable; nor did the plaintiffs present a plan for addressing variations across time, product modifications and intended uses. As a result, the court held that common issues did not predominate and denied the motion without prejudice to moving to certify narrower, or more precisely defined, classes.

C*areer Counseling, Inc. v. Amsterdam Printing & Litho, Inc.*, No. 3:15-cv-05061-JMC, 2018 WL 3241178 (D.S.C. July 3, 2018)

Judge J. Michelle Childs of the U.S. District Court for the District of South Carolina denied without prejudice the plaintiff's amended motion for class certification in this Telephone Consumer Protection Act (TCPA) "junk fax" case because the proposed class was not sufficiently ascertainable. To determine prospective class members who were successfully sent faxes in violation of the TCPA, the plaintiff proposed an administrative system in which a list of targeted fax numbers was cross-referenced with a list of those numbers that were removed or for which delivery of the fax failed. The court determined that this method would require the court to look at each number individually, thus imposing a significant administrative burden on ascertaining the class. Therefore, the court denied class certification.

***Perisic v. Ashley Furniture Industries, Inc.*, No. 8:16-cv-3255-T-17MAP, 2018 WL 3391359 (M.D. Fla. June 27, 2018)**

The plaintiff sought certification of a class of Florida consumers who purchased DuraBlend® products from Ashley Furniture Industries (AFI), asserting the consumers were fraudulently led to believe the products were similar in quality to real leather items. The plaintiff filed claims under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) and for unjust enrichment. Magistrate Judge Mark Pizzo of the U.S. District Court for the Middle District of Florida refused to certify the class on ascertainability, typicality, commonality and predominance grounds. Specifically, Judge Pizzo held that the plaintiff failed to satisfy the ascertainability element because the evidence failed to demonstrate a systematic or uniform marketing scheme, requiring an examination of each potential class member's circumstances to determine whether the class member was deceived in violation of FDUTPA. Additionally, unlike the other proposed class members, the plaintiff — who had a family of six people and five cats — relied on specific statements by a salesperson regarding the durability of the furniture. The plaintiff also had not been exposed to the hangtags, marketing products or labels of AFI that she alleged to be deceptive. Therefore, the judge found that the plaintiff's experience was not typical of the class. The judge further found that the commonality element was not satisfied because class members had differing exposures to the allegedly deceptive representations, noting that the five class members who submitted declarations all had unique experiences. Finally, the judge found that the plaintiff failed to meet the predominance requirement because FDUTPA and unjust enrichment claims against AFI turned on unique facts. Because common questions of fact or law did not predominate, the court held that a class action was not superior to other methods of adjudication. Accordingly, the court held Rule 23(b)(3)'s requirements were not met and recommended that the court deny class certification.

***Rosenberg v. CCS Commercial, LLC*, No. C17-476 MJP, 2018 WL 3105988 (W.D. Wash. June 25, 2018)**

The plaintiff alleged that the defendant collection service, employed by the co-defendant insurance company to collect payments from drivers involved in accidents with their insureds, sent debt collection-type notices identified as "subrogation claims" to class members in violation of the Washington Consumer Protection Act (CPA). Judge Marsha J. Pechman of the U.S. District Court for the Western District of Washington

denied the plaintiff's motion for certification. The court held commonality and predominance were not satisfied because CCS employed a series of communications, including letters and phone scripts with varying responses, which meant the determination of whether, when and how an individual member was deceived would require case-by-case analyses. The court rejected as "outdated" the defendant's objections as to adequacy because the plaintiff's attorney was underwriting the lawsuit, but it held that typicality and adequacy were also not satisfied, because the plaintiff consulted a class action attorney prior to receiving any notice from CCS, volunteered to pay the requested amount (despite the fact that she contested liability) and then sued the other driver for all her losses except the money she paid to CCS. The court held that these facts "seriously call[] into question whether she was deceived at all ... or was compelled by some circumstance other than liability to remit the requested sum," and noted it had "never seen a clearer case of 'subject to unique defenses.'" As to predominance, the court held many of the defendants' vagueness objections could be solved through rewording of the class definition, but individual issues predominated as to the motivation of class members who paid CCS, because an inquiry into the circumstances of every class member's case was required to ascertain whether he/she acknowledged fault in his/her particular accident, which would render the defendants immune from CPA/unjust enrichment liability.

Victorino v. FCA US LLC*, No. 16cv1617-GPC(JLB), 2018 WL 2967062 (S.D. Cal. June 13, 2018), *23(f) pet. pending

Judge Gonzalo P. Curiel of the U.S. District Court for the Southern District of California denied a motion for class certification in an action alleging that several model years of Dodge Dart vehicles contained a transmission defect and asserting California breach of warranty and consumer protection claims. Regarding the proposed nationwide implied warranty class, because the federal implied warranty claim was based solely on California law, the court found the plaintiff failed to address — and therefore meet his initial burden — that California law actually applied to the nationwide class and that such application would not violate due process. For the proposed California implied warranty class, the court first noted that there is a district court split on whether a plaintiff seeking to certify a California implied warranty class must demonstrate, with evidence, an inherent defect that is "substantially certain to result in malfunction during the useful life of the product." The court held that such showing is not necessary, because the court should avoid determinations on the merits at the class certification stage. Nonetheless, the court found that the class definition, which included used vehicles, was overbroad because California's implied warranty law does not apply to used vehicles. The court declined to modify the class definition because the plaintiff failed to demonstrate that his damages model met the Rule 23(b)(3) predominance requirement, as it required an individualized assessment of the "difference in the value represented and the value actually received" of the transmission components. Additionally, the court denied the plaintiff's motion to certify an injunctive relief class under Rule 23(b)(2) to remedy the clutch defect because the alleged common injury was the overpayment of the purchase price of the vehicles, and thus monetary damages were the appropriate form of relief.

***Bohlke v. Green Star Capital Solutions, LLC*, No. 17-CV-81379-MIDDLEBROOKS, 2018 WL 3413030 (S.D. Fla. June 7, 2018)**

Judge Donald M. Middlebrooks of the U.S. District Court for the Southern District of Florida denied the plaintiff's motion for class certification alleging violations of the Telephone Consumer Protection Act. Specifically, the plaintiff sought to certify two classes: (1) a class of plaintiffs who received automatic telephone dialing system solicitation calls from the defendant without consent; and (2) a class of plaintiffs who received certain calls from the defendant despite being on the National Do Not Call Registry. The court held that there was insufficient evidence to make a determination on the Rule 23 requirements for class certification. While the plaintiff alleged that the proposed class included thousands of members, he did not provide supporting evidence; the only support for his allegation consisted of declarations from his counsel and an expert who had not reviewed any discovery. Because the plaintiff could not provide sufficient evidence, the court denied the motion for class certification.

***Greene v. Mizuho Bank, Ltd.*, No. 14 C 1437, 2018 WL 2735112 (N.D. Ill. June 7, 2018)**

Judge Gary Feinerman of the U.S. District Court for the Northern District of Illinois denied class certification to plaintiffs seeking to hold the defendants liable for financial losses arising from the failure of the Mt. Gox bitcoin exchange. The plaintiffs brought claims of tortious interference with contract, unjust enrichment and fraudulent concealment related to the defendant bank's continued acceptance of international inbound wire

transfers from Mt. Gox customers when it had stopped processing all outbound wire transfer requests for Mt. Gox customers. Put differently, the "gist of the claims" was that the bank's decision to stop processing outbound wire transfers created a "trap" for investors based in the United States. On review, the court found that the named plaintiff failed to show that his claims were typical of the proposed class or that he was an adequate representative of the proposed class. With respect to adequacy, the court found that the named plaintiff was subject to arguable defenses not applicable to the class as a whole. At his deposition, the named plaintiff indicated that he would have found a way to invest in bitcoin on the exchange even if he had known the bank had stopped processing outbound wire transfers, and if he had withdrawn his investment, he would have done so in bitcoin. This testimony "severely undermined" his ability to prove injury from the bank's conduct, as he "admitted that he did not perceive his money to be trapped at all." In addition, the named plaintiff's claims were not typical of the proposed class because the bank had offered the plaintiff an opportunity to cancel his wire transfer and recoup his funds. That opportunity was not available to members of the proposed class. Accordingly, the court denied class certification.

***Williamson v. S.A. Gear Co.*, No. 15-CV-365-SMY-DGW, 2018 WL 2735593 (S.D. Ill. June 7, 2018)**

Judge Staci M. Yandle of the U.S. District Court for the Southern District of Illinois denied class certification to plaintiffs alleging violations of state law express-and-implied warranty claims, the Illinois Consumer Fraud Act, common law fraud claims, strict liability claims and unjust enrichment. The plaintiffs alleged that the defendants sold a car part falsely claiming that it met Chrysler/Dodge/original equipment manufacturer specifications and that it was suitable for use in a particular Chrysler engine. Judge Yandle held that commonality was satisfied because "a single common question is sufficient," and whether the part's packaging was false or misleading was relevant to the claims and was capable of classwide resolution. Typicality, however, was not satisfied because the plaintiffs failed to demonstrate that their claims arose out of the same event or course of conduct as all putative class members' claims. Here, the plaintiffs did not identify a significant or meaningful number of complaints about the alleged defect or other evidence demonstrating any other consumer's belief that the part was defective or that representations about the part were misleading. Instead, the plaintiffs relied on three complaints, none of which mentioned the particular issue the named plaintiffs believed was defective, the O-ring. Finally, the proposed class failed the adequacy requirement because the record suggested that few, if any, potential class members shared the named plaintiffs' issues with the part. Accordingly, the court denied class certification.

***Teggerdine v. Speedway, LLC*, No. 8:16-cv-03280-T-27TGW, 2018 WL 2451248 (M.D. Fla. May 31, 2018)**

Judge James Whittemore of the U.S. District Court for the Middle District of Florida declined to certify a class of retail gasoline purchasers alleging that the defendants were negligent by implementing a payment processing program that placed authorization holds on their accounts. The court held that the plaintiff failed to satisfy the predominance and superiority requirements, explaining that because the plaintiff's claims sounded in negligence — a claim that varies among the 21 states in which the relevant transactions occurred — individual issues regarding liability for negligence predominate. Furthermore, managing the litigation of the various state law negligence claims was not the superior method of litigation. Accordingly, the court denied the plaintiff's motion for class certification.

***Arthur v. United Industries Corp.*, No. 2:17-cv-06983-CAS(SKx), 2018 WL 2276636 (C.D. Cal. May 17, 2018)**

Judge Christina A. Snyder of the U.S. District Court for the Central District of California denied the plaintiff's motion to certify a nationwide class asserting California consumer protection law claims. The plaintiff alleged that the defendant misrepresented that each bottle of concentrate herbicide could be diluted to make a specified number of gallons. The court held that although numerosity was satisfied, the plaintiff and the proposed class members had suffered different alleged injuries. The plaintiff testified that he mixed the concentrate based on his own calculation and that the resulting solution did not perform as expected. By contrast, the class members allegedly mixed the concentrate according to the instructions and received less spray than advertised. The plaintiff also testified that he had failed to read the mixing instructions on the packaging. Thus, commonality, typicality and adequacy were not satisfied. The plaintiff also failed to satisfy the Rule 23(b) predominance requirements.

He did not offer a classwide method of proving that the labeling constituted an actionable misrepresentation and failed to demonstrate reliance, as he had not read the packaging. His failure to read the label also meant he could not establish that material misrepresentations were made to the class members through common proof. The court declined to consider predominance of damages or superiority and adequacy in light of the other Rule 23 shortcomings. The court also refused to certify a class for injunctive relief, as the court had previously dismissed the plaintiff's claim for injunctive relief as pre-empted by the Federal Insecticide, Fungicide and Rodenticide Act.

Davidson v. Apple, Inc.*, No. 16-CV-04942-LHK, 2018 WL 2325426 (N.D. Cal. May 8, 2018), *23(f) pet. voluntarily dismissed

Judge Lucy H. Koh of the U.S. District Court for the Northern District of California declined to certify a class of iPhone 6 and iPhone 6 Plus purchasers asserting claims under various state consumer protection laws for alleged failure to disclose touchscreen defects. The court held that while Rule 23(a) was satisfied, Rule 23(b) was not. The court held that statements on the iPhone box were sufficient to demonstrate "uniform" prepurchase exposure and rejected Apple's argument that individual inquiries were required as to other causes for touchscreen malfunction or whether class members encountered the defect, because proof of manifestation is not a prerequisite to certification, and individual factors affecting performance did not affect the ultimate common question — whether the iPhones were sold with a defective touchscreen. However, the plaintiffs' damages model — surveying customers to determine the value of various attributes and surmise the "negative" economic value of a generic "defect" — was fatally flawed because it assumed the touchscreen defect will manifest in all iPhones when it only manifests in 5.6 percent of the iPhone 6 Plus, less for the iPhone 6. Because damages models must measure only those damages attributable to the plaintiffs' theory of liability, the model should have assumed a roughly 5.6 percent or less chance that consumers would experience the defect. The model also did not specify that the "defect" affected only the touchscreen and assumed the defect would render the iPhone inoperable, although none of the named plaintiffs experienced inoperability. The inadequate damages model thus did not satisfy Rule 23(b)(3)'s predominance requirement. The court also refused to certify a Rule 23(c)(4) issues class as to the existence and knowledge of a defect, duty to disclose and other liability issues because adjudication of those issues would not advance resolution, given the inability to prove damages on a classwide basis.

***Proctor v. District of Columbia*, 310 F. Supp. 3d 107 (D.D.C. 2018)**

Judge Trevor N. McFadden of the U.S. District Court for the District of Columbia denied certification in this civil rights case alleging that the District of Columbia destroyed the property of homeless residents in violation of the Fourth Amendment during "encampment cleanups." The putative class included all homeless persons who reside in public spaces that are subject to district, rather than federal, government oversight and have been or will be subject to encampment cleanups by the district. After denying the plaintiffs' motion for a preliminary injunction, the court also denied the motion for class certification. It held that the plaintiffs had not adequately shown the class was sufficiently numerous. Though Census data showed about 900 homeless persons in the district, the plaintiffs could not define how many of them lived on federal property and therefore were subject to federal authority; nor could they show how many had been or will be subject to encampment cleanups. As such, the court found that the plaintiffs had not met their burden under Rule 23(a)(1) and denied class certification.

***Campbell v. National Railroad Passenger Corp.*, 311 F. Supp. 3d 281 (D.D.C. 2018)**

Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia denied class certification in this employment discrimination class action against Amtrak. As an initial matter, the court denied certification because all of the putative classes and subclasses were fail-safe classes, consisting by their terms of those employees who had suffered discrimination. Therefore, if the plaintiffs failed to prove discrimination on the merits, the classes would consist of no members and the defendant would be denied any preclusive effect. The court further concluded that even a properly pleaded class could not satisfy the class certification requirements because the plaintiffs alleged a patchwork of individual acts of discrimination by various supervisors and other employees, rather than a single common policy of discrimination. For this reason, the case could not provide common answers, and commonality was therefore not satisfied.

Herron v. Best Buy Stores, LP*, No. 2:12-cv-02103-TLN-CKD, 2018 WL 1960659 (E.D. Cal. Apr. 26, 2018), *23(f) pet. granted

Judge Troy L. Nunley of the U.S. District Court for the Eastern District of California denied the plaintiff's amended motion for certification of a class of California laptop purchasers alleging violations of California consumer protection laws based on purported misrepresentations about battery life. The court

previously refused to certify a class, as discussed in the summer 2016 issue of *The Class Action Chronicle*, because the plaintiff's damages model was not tied to his theory of liability. Noting the plaintiff must provide evidence of a damages model that could determine the price premium attributable to the defendant's use of the allegedly misleading battery-life representations, the court held that instead, the plaintiff only introduced evidence that an increase in battery life equals an increase in price by calculating "the difference in value of one alleged misrepresented hour of battery life against another alleged misrepresented hour of battery life." This failed to explain how the difference in the relative prices of various mislabeled laptops is helpful in determining whether a price premium is associated with the allegedly deceptive labels. The court rejected the plaintiff's reply argument that the correct way to measure restitution damages is the difference between what consumers were promised and what they actually received, because under a restitution theory, consumers are entitled not to what they were promised but rather, to the difference between the price they paid and the true market price of the laptops they received. Because the plaintiff provided no restitution model demonstrating that a change in the defendant's labeling would cause a change in market price, the damages model was not tied to his theory of liability and did not demonstrate a classwide basis for calculating damages as required under Rule 23(b)(3).

***Andren v. Alere, Inc.*, No. 16cv1255-GPC(AGS), 2018 WL 1920179 (S.D. Cal. Apr. 24, 2018)**

Judge Gonzalo P. Curiel of the U.S. District Court for the Southern District of California denied the plaintiffs' motion for reconsideration of the court's previous order denying class certification of six state subclasses, discussed in the spring 2018 issue of *The Class Action Chronicle*. The plaintiffs alleged deceptive and misleading advertising and marketing of the defendants' electronic blood-clotting testing devices. Recognizing that an order denying class certification may be altered or amended before final judgment, the court considered the plaintiffs' motion under Rule 23 and not the parameters of a motion for reconsideration. The plaintiffs argued that newly discovered facts demonstrated that predominance was satisfied with respect to the learned intermediary doctrine, statute of limitations and damages. Specifically, the plaintiffs argued that common issues predominated with respect to the learned intermediary doctrine because the defendants failed to warn any physicians about the devices, and the issue was therefore subject to common proof. Rejecting this argument, the court noted that the learned intermediary doctrine requires more than demonstrating a failure to warn; it also requires demonstrating proximate cause, leading to individual inquiries into each doctor's experience with the product. The court also held that the plaintiffs failed to demonstrate that each of the six subclass state's consumer protection statutes provide for a full refund recovery. Further, the court found that while the plaintiffs may be entitled to tolling of the statute of limitations under equitable tolling and/or the discovery rule, they had not sufficiently demonstrated its application to the six subclass states and whether these exceptions would allowing tolling for each of the potential class members, some of whom may have had earlier notice of issues with the testing devices.

Craft v. South Carolina State Plastering, LLC*, No. 9:15-cv-5080-PMD, 2018 WL 1993863 (D.S.C. Apr. 16, 2018), *23(f) pet. pending

Judge Patrick Michael Duffy of the U.S. District Court for the District of South Carolina denied class certification in this putative class action alleging construction defects related to the stucco applied to homes. The court held that the predominance inquiry was fatal to the plaintiffs' class certification motion because individualized inquiries into liability and damages would require the destructive evaluation of each house. The court also explained that because the application of the defendant's statute of limitations affirmative defenses would vary depending on facts particular to each plaintiff's case, class certification was erroneous. Moreover, the court found that management difficulties counseled against a finding of superiority, and establishing subclasses and mini-trials would further cause issues. Finally, the court discounted certification of similar cases in South Carolina state court, noting that the South Carolina Rules of Civil Procedure took a more expansive view of class action availability than the federal rules. Accordingly, the court declined to certify the putative class.

***Theodore D'Apuzzo, P.A. v. United States*, No. 16-62769-Civ-Scola, 2018 WL 2688760 (S.D. Fla. Apr. 12, 2018)**

Judge Robert N. Scola, Jr. of the U.S. District Court for the Southern District of Florida denied the plaintiff's motion for class certification alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and illegal exaction. The claims arose in connection with the E-Government Act that provides for access to judicial "written opinions" on the Public Access to Court Electronic Records (PACER) database.

According to the PACER Fee Schedule, users are not charged for accessing judicial opinions. The plaintiff sought to certify a class of PACER users who were allegedly charged for that access. Although the court held that the plaintiff met the Rule 23(a) requirements, it determined that the case was not suitable as a class action because it failed to satisfy the predominance and superiority requirements under Rule 23(b). Specifically, there was insufficient guidance with respect to the definition of a "written opinion" and whether the E-Government Act, or merely the PACER Fee Schedule, mandated free access to such opinions. Moreover, the authoring judge of each document has the responsibility to determine whether it qualifies as a "written opinion." Therefore, the court concluded that the plaintiff's claims were not subject to determination by generalized proof but would instead require individualized inquiry to determine which documents they paid for and whether those documents were "written opinions." Due to the difficulties in managing the proposed class, the court found that the plaintiff could not satisfy the predominance and superiority requirements and denied class certification.

Gorss Motels, Inc. v. Safemark Systems, LP*, No. 6:16-cv-01638-Orl-31DCI, 2018 WL 1635645 (M.D. Fla. Apr. 5, 2018), *23(f) pet. granted

Judge Gregory Presnell of the U.S. District Court for the Middle District of Florida denied class certification in connection with the plaintiffs' Telephone Consumer Protection Act (TCPA) claims. Defendant Wyndham Hotel Group (WHG), one of the world's largest hotel franchise companies, entered into franchise agreements with the named plaintiffs. WHG developed an approved supplier program by which it identified and approved third-party suppliers and service providers, and recommended such suppliers to its franchisees. The plaintiffs received two faxes containing such approved supplier information — one in 2013 and one in 2015 — and sought to certify two classes, one for each fax that the defendant sent promoting its hotel safety products purportedly in violation of the TCPA. The court held that the predominance requirement could not be satisfied because determining whether putative class members consented to receiving the faxes would require a series of individual factual determinations. Specifically, because the plaintiffs entered into franchise agreements by which they agreed the franchisor could offer assistance with purchasing items and provided their fax information to their respective franchisors several times during the course of their franchise relationships, the court concluded that the consent issue would require individualized analysis of each class member's franchise agreements and business dealings with the defendant. Because the court would need to engage in an individualized inquiry to determine which recipients had consented to the faxes, the court held that common issues failed to predominate and denied class certification. The plaintiffs recently filed an appeal to the U.S. Court of Appeals for the Eleventh Circuit.

Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010 (C.D. Cal. Mar. 20, 2018), *23(f) pet. denied

Judge Virginia A. Phillips of the U.S. District Court for the Central District of California denied the plaintiffs' motion to certify a nationwide damages class asserting California consumer protection law claims based on the plaintiffs' purchase of beverages with four on-label statements alleged to be misleading. The court held that the plaintiffs failed to satisfy Rule 23(b)(3) because there were significant individualized issues relating to proof of materiality of the statements, and the plaintiffs' damages model was deficient. The court held that to show materiality under the statutes at issue, the plaintiffs must demonstrate that the statements were a factor in consumers' purchasing decision. However, the admissible portions of the plaintiffs' expert reports principally addressed how consumers understood the statements at issue but not how the challenged statements impacted their purchasing decisions. Thus, the plaintiffs failed to meet their burden to show that whether a reasonable consumer would consider any of the statements material presented a common question. Regarding damages, the court held that the plaintiffs failed to present a model that could determine the price premium attributable to the defendants' use of the challenged statements. The only admissible evidence addressed damages associated with one of the four statements, and that model was inadequate for several reasons. Most critically, the survey evidence supporting the damages claim suffered from "focalism bias" because the survey failed to include attributes deemed important by consumers, thereby artificially inflating the importance of the limited attributes presented in the survey.

***Loughlin v. Amerisave Mortgage Corp.*, No. 1:14-CV-03497-LMM-LTW, 2018 WL 1887292 (N.D. Ga. Mar. 19, 2018)**

Judge Leigh Martin May of the U.S. District Court for the Northern District of Georgia adopted the report and recommendation of Magistrate Judge Linda T. Walker and denied the plaintiffs' motion for class certification. The plaintiffs sought to certify two classes in connection with an alleged kickback scheme in violation of the Real Estate Settlement Procedures

Act (RESPA) in which the defendant required customers to use a certain appraisal management company that shared profits with the defendant. One proposed class consisted of customers who did not receive notice of the affiliated business relationship, and the second consisted of customers who received a defective notice. RESPA does not apply to loans being used for a commercial purpose. The court held that the plaintiffs' classes were not ascertainable because the plaintiffs offered no feasible method by which they could determine which loans were provided for owner-occupied residential mortgages and not for any business, commercial or agricultural purposes. Because the defendant did not track how customers spent their loan proceeds and the plaintiffs did not address how to determine whether each putative class member's loan involved a "cash-out" option that was used for business purposes (and thus outside the scope of RESPA), the court concluded that the proposed classes were not ascertainable. Similarly, the court found that the classes could not satisfy the predominance requirement because individualized inquiries predominated over common questions, including whether: a class member received a loan covered by RESPA, the defendant actually referred the class member to the appraisal company, cash-out proceeds were used for a business purpose and damages were offset from reimbursed appraisal fees.

***Long v. Nationstar Mortgage LLC*, No. 2:15-cv-01202, 2018 WL 1247479 (S.D. W. Va. Mar. 9, 2018)**

Chief Judge Thomas E. Johnston of the U.S. District Court for the Southern District of West Virginia denied certification of a putative statewide class in this case alleging illegal debt collection. The named plaintiff had been a class member in a previous suit making similar allegations against the same defendant and had not opted out of the settlement. The court first granted summary judgment on several of the plaintiff's claims, finding that they were based on conduct that was included within the initial settlement and therefore claim-precluded. The court ruled that one claim survived summary judgment because a reasonable jury could find that it was premised on actions that post-dated the original settlement. The court then denied class certification on the surviving claim, finding that commonality, typicality and adequacy were not met under Rule 23(a). First, it found classwide proceedings could not demonstrate common answers because the defendant serviced each class member's loan individually. Second, the court found that the plaintiff was not typical of the class or an adequate representative because proving the named plaintiff's claim would not advance the claims of class members whose claims predated the settlement, and a genuine issue of material fact remained as to whether the plaintiff was even part of the purported class. Therefore, the court denied class certification.

***Bridge v. Credit One Financial*, 294 F. Supp. 3d 1019 (D. Nev. 2018)**

Judge Lloyd D. George of the U.S. District Court for the District of Nevada declined to certify a putative class action alleging violations of the Telephone Consumer Protection Act and various state consumer laws. The plaintiff alleged that after he called the defendant's automatic operator service on behalf of his mother on his telephone, the defendant called his number without his consent more than 100 times. Numerosity and adequacy were met, as the defendant only argued that the proposed class size was "unprecedented" in the large number of potential class members. The court identified two questions that would generate common answers, namely whether debt collection calls constituted nonemergency calls and whether the defendant acted negligently or knowingly and willfully toward the class. But the court noted that whether the defendant used an automated telephone dialing system was not a common question due to differences in vendors and equipment used, which would vary as to individual class members and calls. Typicality was not met, as the plaintiff had called Credit One in connection with his mother's account, and account holders have agreed that Credit One can contact them at telephone numbers used by the account holder to contact Credit One. Finally, the court held that the Rule 23(b)(3) requirements were not met, highlighting individualized issues of consent and the difficulty in both managing the class action and identifying the class members.

Ward v. Apple Inc.*, No. 12-cv-05404-YGR, 2018 WL 934544 (N.D. Cal. Feb. 16, 2018), *23(f) pet. granted

Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California refused to certify a class of iPhone consumers purportedly injured by exclusivity agreements between Apple and AT&T, which locked class members into renewing AT&T service or else losing the cellular capabilities of their iPhones. Apple did not dispute that the plaintiffs satisfied the threshold requirements of Rule 23(a) or the superiority requirement of Rule 23(b)(3) but argued that the class definition was overbroad and that the plaintiffs had not established predominance. The plaintiffs' expert offered theories of impact and damages based on a preliminary review of certain data collected and techniques employed by a different expert in a separate litigation involving Apple, which he claimed he could apply in the instant case "to reliably assess the existence and amount of damages to the Class members without the need for individual inquiry." The court concluded that the expert's declaration "lack[ed] any data-driven analysis" and that this failure to provide "properly analyzed, reliable *evidence* that a common method of proof exists to prove impact on a class-wide basis" or any semblance of a "functioning model that is tailored to market facts in the case

at hand" was fatal to the plaintiffs' certification motion under Rule 23(b)(3). Because the plaintiffs' deficiency with respect to antitrust injury was dispositive as to predominance, the court declined to address the scope of the proposed class definition.

***Usry v. Equity Experts.org, LLC*, No. 1:16-cv-010, 2018 WL 934897 (S.D. Ga. Feb. 16, 2018)**

Chief Judge J. Randal Hall of the U.S. District Court for the Southern District of Georgia denied the plaintiffs' motion for class certification alleging violations of the Fair Debt Collection Practices Act (FDCPA) and Georgia usury law in connection with excessive homeowners' association late fees. The defendant was hired to collect unpaid homeowners' fees for a subdivision and sought to charge various service fees to homeowners who were delinquent on their payments. The plaintiffs moved to certify a class consisting of all persons to whom the defendant "sent collection letters asserting claims for delinquent assessments, interest, and fees in violation of the FDCPA and the Georgia usury statute." The court held that because the class membership could only be ascertained by a determination of the merits of the case — whether there was a "violation of the FDCPA and the Georgia usury statute" — the class was an impermissible "fail-safe" class. Furthermore, the court held that the plaintiffs' proposed subclasses also failed because the classes were impermissibly defined in terms of the ultimate question of liability.

Huu Nguyen v. Nissan North America, Inc.*, No. 16-CV-05591-LHK, 2018 WL 1831857 (N.D. Cal. Apr. 9, 2018), *23(f) pet. granted

Judge Lucy H. Koh of the U.S. District Court for the Northern District of California denied certification of a class of consumers alleging the defendant deceptively sold vehicles with defective transmissions. The court found that predominance under Rule 23(b)(3) was not satisfied because the plaintiff failed to provide a damages model susceptible to classwide proof. The plaintiff proposed a "benefit of the bargain" damages model, based on the liability theory that the class overpaid for the vehicles as a result of the undisclosed, defective transmission. The model proposed damages equivalent to the cost to replace the allegedly defective transmission, allegedly representing the difference between the value of the vehicle as represented by Nissan and the value received. The court found this model "problematic," as it would only reflect the value differential if all class members deemed the defective part completely valueless. Instead, the court noted that class members could have derived additional value from the part by selling it, repurposing it or driving with it before replacing it. Indeed, the evidence showed that the plaintiff drove using the purportedly defective transmission for several thousand miles before replacement. Thus, under the proposed model, the class members would have received the full benefit of the bargain in addition to the monetary value of the defective part, which was an improper measure of damages. Questions of individual damages would thus overwhelm questions common to the class. The court also declined to certify a class under Rule 23(c)(4), as proceeding with a classwide liability determination would not address the need for individualized proof of damages.

Decisions Permitting/Granting Class Certification

***Belcher v. Ocwen Loan Servicing, LLC*, No. 8:16-cv-690-T-23AEP, 2018 WL 1701963 (M.D. Fla. Mar. 9, 2018), *report and recommendation adopted in part*, 2018 WL 1701964 (M.D. Fla. Apr. 2, 2018), *appeal denied*, No. 18-90011, 2018 WL 3198552 (11th Cir. June 29, 2018) (per curiam); *Ocwen Loan Servicing, LLC v. Belcher*, No. 18-90011, 2018 WL 3198552 (11th Cir. June 29, 2018) (*per curiam*)**

The U.S. Court of Appeals for the Eleventh Circuit (Rosenbaum, Jordan and Pryor, JJ.) denied the defendant's motion for leave to appeal the district court's order granting class certification. The plaintiff alleged that the defendant regularly sent collections requests to consumers threatening to foreclose their homes or charge loan fees. Because the consumers were involved in the defendant's affordable loan program, the plaintiff contended that these communications violated the Fair Debt Collection Practices Act (FDCPA) and the Florida Consumer Collection Practices Act (FCCPA). For the FDCPA claim, the plaintiff sought to certify a class of consumers who received foreclosure and increased fee collection communications from the defendant while participating in the defendant's affordable loan program, and also a subclass consisting of Florida consumers for the FCCPA claim.

At the district court level, Magistrate Judge Anthony Porcelli of the U.S. District Court for the Middle District of Florida recommended that the motion for class certification be granted. Regarding the ascertainability requirement, Judge Porcelli, noting a circuit split, applied the Eleventh Circuit's stringent "administratively feasible" standard and found that the plaintiff's proposed class and subclass were not administratively feasible because they would require individualized inquiries to determine whether the defendant actually threatened foreclosure or incurrence of fees through oral communications. Instead, Judge Porcelli narrowed the class definition to plaintiffs that received written delinquency notices. Because the class members could self-identify to receiving a letter, the modified definition was ascertainable. Judge Porcelli found that the self-identification process and the existing business records of the defendant would allow the court to determine which class members acquired debt for a person, family or household purpose, as required by the FDCPA and FCCPA.

The decision also turned on the Rule 23(b)(3) predominance requirement. The defendant argued that individual questions would predominate over common questions because each class member's unique communications with the defendant would have affected the class members' understanding of the affordable loan program and whether they were actually deceived by the delinquency notices. However, Judge Porcelli found that the objective "least sophisticated consumer" test would apply to determine whether a customer perceived a delinquency notice as threatening foreclosure and therefore not require individualized inquiry. The rest of the FDCPA and FCCPA claims could be determined by generalized proof. As a result, Judge Porcelli recommended that the class be certified, and Judge Steven Merryday adopted the recommendation.

The Eleventh Circuit denied the defendant's motion for leave to appeal the district court's order granting class certification pursuant to Rule 23(f). First, the judges considered the importance of legal questions in the case. Namely, the defendant asked the court to decide the standard for ascertainability and to clarify whether FDCPA or FCCPA claims can satisfy the predominance requirement under Rule 23(b)(3). Despite acknowledging the circuit split on the ascertainability issue, the judges concluded that solving the issue would have no consequence on the case since the "administratively feasible" standard is the most stringent and the plaintiff's class would also pass muster under alternative standards. The judges felt that consideration of this issue was more appropriate for a typical appeal process, not immediate interlocutory review. Additionally, the judges refused to determine a universal predominance standard for FDCPA and FCCPA cases because this inquiry requires case-by-case analysis. Second, the judges considered whether there was "substantial weakness" in the district court's decision. Although the defendant argued that individualized inquiries would be required to identify class members and determine the purpose of the loan in contravention of the Rule 23 requirements, the Eleventh Circuit was satisfied with the district court's reliance on self-identification. Most importantly, the judges noted that the decision to certify the class was not the "death knell" for either party since the decision did not end the case. With the class certification stage being early in the litigation, the judges acknowledged that the record was largely incomplete. Without any impending events necessitating the need for immediate review, the judges held that interlocutory appeal was inappropriate here and denied the defendant's Rule 23(f) motion.

***Bradach v. Pharmavite, LLC*, Nos. 16-56598, 17-55064, 2018 WL 2250508 (9th Cir. May 17, 2018)**

The U.S. Court of Appeals for the Ninth Circuit (Bea and Murguia, JJ., and Keeley, district judge sitting by designation) reversed the lower court's refusal to certify a class of purchasers of dietary supplements in reliance on the statement "Helps Maintain a Healthy Heart," which allegedly violated California consumer protection laws. First, the panel concluded that the plaintiff's state law claims were not pre-empted by the Federal Food, Drug, and Cosmetic Act (FDCA) because the "heart health" representation the plaintiff was challenging was a "structure/function" claim about the product's benefits. Thus, the lower court's finding that the plaintiff did not satisfy Rule 23's typicality requirement because his claims were pre-empted was in error. The panel further rejected the district court's conclusion that the proposed classes did not satisfy Rule 23's ascertainability, commonality, predominance and superiority requirements because it would be difficult to determine whether the putative class members viewed the statement as a disease prevention claim, which is pre-empted by the FDCA, or a structure/function claim, which is not. The panel observed that under California law, class members in certain consumer protection class actions are not required to prove individual reliance on allegedly misleading statements, but rather, whether members of the public are likely to be deceived. Thus, the district court's conclusion that it would need to inquire into the motives of each individual class member was premised on an error of law. The panel remanded to the district court to reconsider the class allegations.

Flynn v. FCA US LLC*, No. 15-cv-0855-MJR-DGW, 2018 WL 3303267 (S.D. Ill. July 5, 2018), *23(f) pet. denied

Chief Judge Michael J. Reagan of the U.S. District Court for the Southern District of Illinois granted class certification, in part, to plaintiffs claiming the breach of implied warranties related to purchases of 2013-2015 Chrysler vehicles. More specifically, the plaintiffs alleged that the defendants designed and installed an "infotainment system" that is vulnerable to hackers seeking to take remote control of the affected vehicles and that unremedied vulnerabilities could allow hackers to access critical and noncritical vehicle systems. After dismissing a number of claims on summary judgment, the court analyzed the remaining claims under Rule 23. Both the nationwide and state classes satisfied the requirements of Rule 23(a). The "low hurdle" of commonality

was satisfied, as the claims all rested on the same basic allegations of the defendants' actions leading up to and following the production of vehicles with the infotainment system. Typicality was also satisfied, as the claims arose from the same practice or course of conduct. The nationwide class, however, did not satisfy predominance because of the differences in state laws that underlay the Magnuson-Moss Warranty Act claims. State laws differed, for example, on requirements for privity and the definition of merchantability. However, the proposed state classes satisfied predominance, as there appeared to be "no difference" among class members with respect to proving merchantability and the defectiveness of the vehicles. Accordingly, the court granted class certification to the state classes alleging claims of the breach of implied warranties.

***Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018)**

Judge James E. Boasberg of the U.S. District Court for the District of Columbia preliminarily certified a class of asylum seekers for the purpose of adjudicating their motion for a preliminary injunction. The plaintiffs argued that the Department of Homeland Security (DHS) had adopted a de facto categorical policy of denying asylum seekers parole while their adjudication was pending, and that this policy contravened internal DHS regulations in violation of the Administrative Procedure Act. First, the court noted that the class certification inquiry was less demanding where, as here, the plaintiffs sought only preliminary certification. Next, the court concluded that all members of the putative class had standing, noting that the defendants' objection that not all asylum seekers had been injured by the challenged policy ignored the fact that the class was expressly limited to those who had been. The court also concluded that a common question of law and fact united the class members' claims where the plaintiffs challenged a common policy rather than a series of individualized determinations by various field offices. The court further rejected a defense argument that differing motives could defeat commonality because the court did not need to find a common intention in order to certify the class where the plaintiffs alleged violation of a common policy. Finally, the court concluded that the putative class was sufficiently cohesive to be certified to seek injunctive relief under Rule 23(b)(2) for largely the same reasons that it had found the prerequisites of Rule 23(a) to be met.

Bassett v. Credit Management Services, Inc.*, No. 8:17CV69, 2018 WL 3159791 (D. Neb. June 28, 2018), *23(f) pet. denied

Judge Joseph F. Bataillon of the U.S. District Court for the District of Nebraska granted class certification to a proposed class alleging violations of the Fair Debt Collection Practices Act and the Nebraska Consumer Protection Act. Specifically, the plaintiff alleged that the defendant miscast its causes of action in county court cases to obtain attorney fees, wrongfully sought and obtained fees for in-house counsel, and wrongfully collected and kept prejudgment interest and attorneys' fees as undisclosed collection fees related to county court collection complaints. On review, the court granted certification to this Rule 23(b)(3) class. The class could be ascertained by review of the defendant's records and court records for the short period of time. Commonality was satisfied, as the court concluded that the "core of the plaintiff's suit [wa]s based on common facts and law." The court had already determined on summary judgment that the defendant violated the statutes in miscasting its complaint and obtaining attorney fees. The named plaintiff's complaint was typical of the class, as the plaintiff alleged that the defendant utilized the "same form complaint." Questions of law and facts common to the class members on liability also predominated over any questions that affected individual members, principally damages. Accordingly, the court granted class certification.

Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, No. 17-cv-00564 NC, 2018 WL 3126385 (N.D. Cal. June 26, 2018), *23(f) pet. denied

Magistrate Judge Nathanael Cousins of the U.S. District Court for the Northern District of California granted the plaintiffs' motion to certify a class of California consumers who purchased Canada Dry ginger ale products marketed with a "Made From Real Ginger" claim, alleging violations of California consumer protection statutes because the products contained only a ginger derivative. The court held that the plaintiffs were sufficiently typical of the class, rejecting the defendants' argument that one of the named plaintiffs could not show she was misled because it was not clear from her deposition testimony that she ever noticed the "Real Ginger" claim and that she believed the product had ginger root in it even before the claim. The court gave the named plaintiff the benefit of the doubt on this issue, both because she remembered a commercial with the "Real Ginger" claim that

made her think the product contained ginger root, and because she never specifically testified that she always believed the product contained ginger root. The court also held that Rule 23(b)(3) was satisfied. Individual issues did not predominate because a consumer perception survey showed that 78.5 percent of respondents believed that "Made From Real Ginger" meant the product contained ginger root. The court cited the defendants' own internal marketing documents as support that the representation was material to a reasonable consumer, because those documents showed that a quarter of consumers listed the "Real Ginger" claim as one of the top five reasons they bought the product.

***Reyes v. BCA Financial Services, Inc.*, No. 16-24077-CIV-GOODMAN, 2018 WL 3145807 (S.D. Fla. June 26, 2018)**

Magistrate Judge Jonathan Goodman of the U.S. District Court for the Southern District of Florida granted in part and denied in part the plaintiff's motion for class certification in connection with the defendant's alleged violation of the Telephone Consumer Protection Act (TCPA), which prohibits the use of automatic telephone dialing systems and artificial voice to call a person's cellphone without consent. The defendant, a debt collector for health care companies, utilized "predictive dialer" and "interactive voice response" (IVR) technologies to contact debtors. According to the plaintiff, the defendant dialed wrong numbers using these technologies, in violation of the TCPA. The court held that the requirements of Rule 23 were satisfied. The court first held that the class was ascertainable and administratively feasible. In support of its motion for class certification, the plaintiff offered an expert, a managing director of a litigation support and data analysis management company who previously acted as a project director for a number of class action administrations. The expert opined that it was feasible to match telephone numbers with the proper class members using the defendant's telephone records. In response, the defendant sought to introduce its own rebuttal expert to challenge the plaintiff's methodology and moved to strike the expert's opinion. The court concluded that the plaintiff's expert was reliable, largely because numerous district courts had relied on her opinions in the past, and that ascertainability was therefore satisfied. Second, the court held that predominance was satisfied, rejecting the defendant's arguments that whether an intended caller gave consent, whether a called number belonged to a cellphone and to the name of the subscriber on the telephone account would all require individualized proof. Third, the court found that a class action was the superior method of adjudicating the plaintiff's claims, noting that TCPA claims are well-suited for class treatment. Finally, the court rejected the defendant's argument that the proposed class was defined as an impermissible fail-safe class.

As an initial matter, the court noted that the U.S. Court of Appeals for the Eleventh Circuit has not addressed whether a fail-safe class could be certified, and there was a split of authority among the circuit courts. Additionally, the court also held that the class definition did not clearly and neatly fit into the fail-safe class doctrine as to warrant denial of class certification. The court did amend the class definition by excluding class members who received IVR calls, since the plaintiff failed to allege that the defendant called her using this technology. After limiting the class definition, the court granted the plaintiff's motion for class certification.

Greene v. Sears Protection Co.*, No. 15-CV-2546, 2018 WL 3104300 (N.D. Ill. June 25, 2018), *23(f) pet. denied

Judge Jorge L. Alonso of the U.S. District Court for the Northern District of Illinois granted class certification, in part, to plaintiffs alleging that they entered into and paid for appliance-service agreements with the defendants that did not actually cover their products. The plaintiffs alleged that the defendants breached their agreements, were unjustly enriched and engaged in a deceptive business practice by selling "repair or replace" agreements to the plaintiffs even though the defendants had no intention of repairing or replacing the appliances covered by the agreements. The plaintiffs sought to certify a nationwide class on the breach of contract and unjust enrichment claims as well as a Pennsylvania class under that state's Unfair Trade Practices and Consumer Protection Law. On review, the court first rejected the defendants' request to exclude the plaintiffs' expert's damages opinion, finding that the expert — in contrast to the defendants' argument — sufficiently accounted for Sears' provision of repairs and was not speculative. The court then granted the motion for class certification, after limiting the temporal component of the proposed class definitions to comport with the relevant statutes of limitations governing the breach-of-contract claims. The court found that commonality was satisfied because the claims were predicated "on alleged conduct that was uniform as to all class members" — *i.e.*, that Sears sold policies for products that it did not have any intention of covering. Predominance was also satisfied for the nationwide class even though the defendants

asserted that they had no uniform coverage position because the plaintiffs also submitted evidence supporting their position that the defendants engaged in standardized conduct. In other words, the court rejected the defendants' chief contention that coverage determinations are fact-intensive and individual, thereby defeating predominance. The court also disagreed with the defendants' argument that predominance could not be met as to the Pennsylvania consumer protection claims based on the statute's justifiable reliance element. According to the court, the reliance element could be proven on a classwide basis based on class members' mere purchase of the agreements at issue. Accordingly, the court granted class certification.

***Karpilovsky v. All Web Leads, Inc.*, No. 17 C 1307, 2018 WL 3108884 (N.D. Ill. June 25, 2018)**

Judge Harry D. Leinenweber of the U.S. District Court for the Northern District of Illinois granted the plaintiffs' motion for class certification alleging violations of the Telephone Consumer Protection Act (TCPA). The plaintiffs alleged that the defendant marketer operated a website claiming to offer insurance quotes, and that the plaintiffs filled out a quote request and included their cellphone numbers. The webpage included a "Submit" button, and the TCPA-required disclosure appeared in fine print below that button. The plaintiffs alleged that by clicking "Submit," they did not consent to the disclosure. The court held that predominance was satisfied because the key question in the case was whether the proposed class members consented by submitting their information on the defendant's website. Accordingly, the court granted class certification.

Boyle v. Progressive Specialty Insurance Co.*, No. 09-5515, 2018 WL 2770166 (E.D. Pa. June 7, 2018), *23(f) pet. denied

Judge Timothy J. Savage of the U.S. District Court for the Eastern District of Pennsylvania certified a class of drivers alleging that the defendant automobile insurer failed to discount its premiums for vehicles with anti-theft devices, in violation of state law. The court held that commonality was satisfied because common legal issues existed, including whether state law applies only if insureds request the discount and whether the discount applies to passive anti-theft devices. The court held that typicality was satisfied because the plaintiff and putative class members alike did not receive an insurance discount for anti-theft devices. Adequacy was similarly satisfied, the court held, because the plaintiff's interests aligned with the class members' interests, and counsel had adequate experience handling class actions. The court then held that the class met the predominance and superiority requirements of Rule 23(b)(3). As to predominance, the court held that resolving individualized inquiries would not be difficult on a classwide basis, rejecting the defendant's argument that determining which anti-theft devices the state law covered and which vehicles had them were individualized inquiries that defeated class certification. The court also held that superiority was satisfied because litigation costs would discourage individuals from bringing suit. Finally, as to ascertainability, the defendant reiterated that the court would have to independently evaluate whether each driver's anti-theft device qualified for a discount. The court disagreed, noting that the court could simply compare the defendant's database of customers with the plaintiff's chart of qualifying vehicles. Moreover, the criteria to identify class members was objective. Accordingly, the court granted the motion for class certification.

***Lester v. Pay Car Mining, Inc.*, No. 5:17-cv-00740, 2018 WL 2728033 (S.D. W. Va. June 6, 2018); T*readway v. Bluestone Coal Corp.*, No. 5:16-cv-12149, 2018 WL 1158256 (S.D. W. Va. Mar. 5, 2018)**

In both *Treadway* and *Lester*, Judge Irene C. Berger of the U.S. District Court for the Southern District of West Virginia granted the plaintiffs' motions to certify a class of putative individuals alleging that they had been laid off from their coal mine jobs without the notice required by the Worker Adjustment and Retraining Notification (WARN) Act. The court first determined that the plaintiffs had statutory standing to sue under the WARN Act. It then determined that each of the requirements of Rule 23(a) were satisfied, as was Rule 23(b)(3). First, the court held that the class definition was not overly broad and only included those putative class members who were laid off within an aggregated 90-day period, rejecting the defendants' contention that the definition was not precise or a fail-safe class. Next, the court held that commonality was satisfied because all proposed class members were laid off from the same mines within the same time frame, and all complained that the termination did not comply with the WARN Act. Similarly, the court determined that because the plaintiffs and putative class members were employed by a single employer on a single site of employment and have standing under the WARN Act, typicality and adequacy of representation were satisfied. Lastly, the court held that the central question regarding all of the plaintiffs and putative class members is simply the defendants' liability pursuant to the WARN Act, and because that question is common to all class members, the proposed class was sufficiently cohesive to satisfy the predominance requirement. Accordingly, the court certified the classes in both *Treadway* and *Lester*.

***Lavigne v. First Community Bancshares, Inc.*, No. 1:15-cv-00934-WJ/LF, 2018 WL 2694457 (D.N.M. June 5, 2018)**

Chief Judge William P. Johnson of the U.S. District Court for the District of New Mexico granted the plaintiff's motion for class certification in an action alleging violations of the Telephone Consumer Protection Act. The plaintiff, who was not a customer of the defendants' bank, alleged that she received repeated auto-dialed phone calls in reference to an overdrafted bank account, despite telling the defendants that they had the wrong person and being placed on a "Bad/Wrong Number" list. The plaintiff sought to certify a class of noncustomers who called the defendants to tell them they were calling the wrong number and were placed on the "Bad/Wrong Number" list but who were subsequently called again by the defendants and again coded as "Bad/Wrong Number." The court found that the proposed class satisfied Rule 23. Due to the "narrowly tailored" class definition, the court rejected the defendants' argument that there would be individualized issues of consent. The court held that the defendants' own records, such as the "Bad/Wrong Number" list and deposit agreements, would provide common answers to legal and factual questions related to consent issues for all class members, and the plaintiff's proposed method to "weed out" existing customers in reliance on these records and on class member affidavits was workable.

Healthy Futures of Texas v. Department of Health & Human Services*, No. 1:18-cv-992 (KBJ), 2018 WL 2463074 (D.D.C. June 1, 2018), *appeal pending

Judge Ketanji Brown Jackson of the U.S. District Court for the District of Columbia certified a class of teen pregnancy prevention providers (TPPP) who alleged that the Department of Health and Human Services (HHS) acted arbitrarily and capriciously in revoking their grants. Because several TPPPs had already brought individual actions against HHS, these providers were expressly excluded from the class definition. The plaintiff sought solely injunctive relief and therefore moved for certification under Rule 23(b)(2). HHS did not argue that the requirements of Rule 23(a) or 23(b)(2) were not met, and the court determined that the plaintiff had shown the relevant factors. HHS primarily argued that by excluding certain TPPPs, the class definition provided for an impermissible opt-out mechanism, not authorized for 23(b)(2) classes. The court rejected this argument, reasoning that the class definition and opt-out mechanisms were entirely different and it made no sense to require the plaintiff to include within the class those TPPPs that had already received the requested relief. Therefore, the court found the class appropriate for certification under Rule 23(b)(2).

***Carney v. Goldman*, No. 15-00260-BRM-DEA, 2018 WL 2441766 (D.N.J. May 30, 2018)**

Judge Brian Martinotti of the U.S. District Court for the District of New Jersey certified a class alleging that the defendant, an attorney retained to collect on student loan debts, violated the Fair Debt Collection Practices Act (FDCPA) when he sought collection costs from the plaintiffs before they were incurred. The court first held that the plaintiffs' class definition was ascertainable because it identified a particular group, time frame and harm, and could ascertain class membership based on objective criteria — a straightforward examination of the defendant's business records to find those individuals who meet the class definition. The court next held that the plaintiffs satisfied the four prerequisite requirements of Rule 23(a). With respect to commonality, the court held that the defendant's attempt to collect collection costs from all class members created common questions of law and fact. The court likewise held that typicality was satisfied because the plaintiffs' claims arose from the same course of conduct that gave rise to the claims of all other class members and were based on the same legal theory. The court held that adequacy of representation was satisfied because based upon deposition testimony, the plaintiffs possessed the minimal degree of knowledge required of class representatives. The court also held that the plaintiffs did not have interests antagonistic to those of the class, rejecting the defendant's argument that one plaintiff merely brought suit for institutional reform due to strong interests in student loan reform. Finally, the court held that the class satisfied the predominance requirement, reasoning that whether the challenged letters contravened the FDCPA was the central issue in the case. Accordingly, the court granted the plaintiff's motion to certify the class.

Fosbrink v. Area Wide Protective, Inc.*, 325 F.R.D. 474 (M.D. Fla. 2018), *23(f) pet. granted*; *appeal subsequently dismissed

Judge James Moody, Jr. of the U.S. District Court for the Middle District of Florida granted in part and denied in part the plaintiff's motion for class certification alleging various background check violations under the Fair Credit Reporting Act in connection with the plaintiff's job application to work for the defendant. Specifically, the plaintiff sought to certify two national classes: the "Background Check Class" — consisting of job applicants for whom the defendant obtained consumer reports without a statutory basis — and the "Adverse Action Class" — consisting of employees against whom the defendant took adverse action in reliance on their consumer reports without providing statutorily required notice. The court held that the Adverse Action Class failed to meet the ascertainability requirement because

identifying potential class members would require the court to make individual determinations about whether the defendant's adverse action was based on the consumer reports and whether any class members had proper notice. Accordingly, the Adverse Action Class could not be certified. By contrast, the court held that the Background Check Class was ascertainable because the defendant had lists of individuals who had received similar forms. The court also held that both commonality and typicality were satisfied because the class members were provided similar notice forms that the defendant relied on to obtain background checks, and all class members' claims were nearly identical. Furthermore, the court found that predominance was satisfied by limiting the Background Check Class to those plaintiffs whose claims arose within the previous two years, thereby avoiding individualized inquiry into statute of limitation issues.

***Johnson v. Enhanced Recovery Co.*, 325 F.R.D. 608 (N.D. Ind. 2018)**

Judge Philip P. Simon of the U.S. District Court for the Northern District of Indiana granted class certification to plaintiffs alleging violations of the Fair Debt Collection Practices Act (FDCPA) related to allegedly false or misleading dunning letters. The plaintiff alleged that the letter was confusing and misleading because it "falsely represented or implied that payment of a proffered settlement would avoid credit reporting when in fact [the plaintiff's] debt had already been reported to a credit bureau prior to the deadline for a settlement payment." On review, the court found that the proposed class satisfied the requirements of Rule 23. Commonality was satisfied because the "same form letter" was sent to these 40,000 debtors and involved a common question as to whether the letters were false or misleading under the FDCPA. The defendant argued that commonality was not satisfied because materiality and reliance were not provable on a classwide basis. However, the court indicated that these requirements are analyzed using an "objective 'unsophisticated consumer' standard." Finally, the defendant argued that the plaintiff lacked standing, but the court held that an intangible injury — receiving inaccurate information about one's finances — sufficed.

Wheeler v. Midland Funding LLC*, No. 15 C 11152, 2018 WL 1920254 (N.D. Ill. Apr. 24, 2018), *23(f) pet. denied

Judge Virginia M. Kendall of the U.S. District Court for the Northern District of Illinois certified a class alleging violations of the Fair Debt Collection Practices Act (FDCPA). The plaintiff alleged that the defendants engaged in a common practice of offering class members a settlement or discount from its debt management web portal but excluded relevant information regarding the time-barred status of the debt that was misleading or caused confusion. The court held that the proposed class met the requirements of a Rule 23(b)(3) class. Commonality was satisfied because the plaintiff alleged a common course of conduct that led to common factual and legal issues, including whether the defendants withheld relevant information about time-barred debts from class members who accessed their website and whether this practice violated the FDCPA. Typicality was also satisfied because the claims arose from the same practice or course of conduct, and the underlying legal theory was also the same — alleged violations of the FDCPA for misleading or false representations. Predominance was also satisfied because it was the "communication (or lack thereof) that holds the allegations of [the named plaintiff] and the putative class members together." After determining that the proposed class definition was sufficiently ascertainable, the court certified the proposed class under Rule 23(b)(3).

Vogt v. State Farm Life Insurance Co.*, No. 2:16-cv-04170-NKL, 2018 WL 1955425 (W.D. Mo. Apr. 20, 2018), *23(f) pet. denied

Judge Nanette K. Laughrey of the U.S. District Court for the Western District of Missouri certified a class alleging breach of contract and conversion and bringing a related claim for declaratory judgment relating to costs of insurance deducted from the plaintiff's universal life insurance policies. More specifically, the plaintiff alleged that the defendant insurance company was permitted to make deductions from the policies for costs of insurance as provided for in the underlying policies, but the plaintiff alleged that the defendant used nonauthorized factors to determine those costs. On review, the court held that commonality was satisfied because the plaintiff's claims all turned on an interpretation of the underlying policy, which was a "standard form contract to which each putative class member was a party." The claims also turned on the insurer's determination of the cost of insurance rates, which was uniform. The defendant argued that commonality was not satisfied because, in light of expert testimony, some class members were not injured. However, the court determined that those individuals may be excluded from the class. Predominance was similarly satisfied, as the terms of the policy were the same for all class members. The defendant argued that statute of limitations defenses may require individualized determinations, but the defendant admitted that some assumptions underlying the costs of insurance were not disclosed to policyholders and presented no evidence to suggest that any of the claims were time-barred.

In re Facebook Biometric Information Privacy Litigation*, No. 3:15-cv-03747-JD, 2018 WL 1794295 (N.D. Cal. Apr. 16, 2018), *23(f) pet. granted

Judge James Donato of the U.S. District Court for the Northern District of California certified a class of Facebook users claiming that Facebook improperly collected and stored their biometric data in violation of the Illinois Biometric Information Privacy Act (BIPA), in connection with its program that scans and identifies people in photographs. The court rejected the plaintiffs' proposed class of all Illinois Facebook users who appeared in an uploaded picture as too broad, since uploading did not necessarily result in the collection of biometric data, but it certified an alternative proposed class of Illinois Facebook users for whom Facebook created and stored a face template. Facebook did not challenge numerosity; adequacy and typicality were "readily satisfied," as the named plaintiffs had an adequate understanding of the case based on their privacy concerns, and their interests were aligned with the class. Commonality and predominance were also satisfied based on common questions, including whether Facebook collected biometric identifiers under BIPA and whether Facebook gave users prior notice and obtained their consent. The court rejected Facebook's argument that whether a class member is "aggrieved" under BIPA in order to have standing would require individualized proof. Instead, the court held that the Illinois statute did not require any actual injury beyond an invasion of privacy. In rejecting Facebook's challenge to the application of the statute because its servers are outside of Illinois, the court held that the case was "deeply rooted in Illinois," as all class members were located in-state and BIPA was applied to the use of Facebook mainly in Illinois. Finally, superiority was satisfied, as members could be easily identified based on Facebook's data on residency and IP addresses, and the statutory damages were too minimal to incentivize individual plaintiffs, given the high costs of e-discovery and Facebook's willingness to litigate.

***Clark v. Duke University*, No. 1:16-CV-1044, 2018 WL 1801946 (M.D.N.C. Apr. 13, 2018)**

Judge Catherine C. Eagles of the U.S. District Court for the Middle District of North Carolina certified a class of Duke University employees alleging breach of fiduciary duty on the part of those responsible for managing their Employee Retirement Income Security Act plan. In particular, the plaintiffs contended that the plan invested in imprudent funds and that they were overcharged for bookkeeping. First, the court determined that the named plaintiffs had Article III standing even though no named plaintiff had invested in the bulk of the allegedly imprudent fund options. Second, the court determined that commonality and typicality were met under Rule 23(a), rejecting the defendants' arguments that individual statute of limitations issues defeated commonality. Third, the court rejected the argument that the named plaintiffs were not adequate representatives of the class because some proposed class members may have profited from the investments that the named plaintiffs alleged to be imprudent. According to the court, the defendants had not identified any proposed class members that fell within this category and, in any event, class members have no legally recognizable interest in being part of a plan that is run in a way that breaches fiduciary duties. Finally, the court held that certification was appropriate under Rule 23(b)(1) because individual adjudications would risk incompatible standards of conduct, rejecting the defendants' contention that the request for monetary relief prevented 23(b)(1) certification.

***S.R., by & through Rosenbauer v. Pennsylvania Department of Human Services*, 325 F.R.D. 103 (M.D. Pa. 2018)**

Judge John E. Jones III of the U.S. District Court for the Middle District of Pennsylvania certified a class of plaintiffs alleging that the Pennsylvania Department of Human Services (DHS) failed to provide appropriate services to dependent children with mental health disabilities in violation of federal law. The court held that commonality was satisfied because the main question of whether DHS provides a sufficient array of services is a common question of fact for both the named plaintiffs and the putative class members, rejecting the defendants' argument that classwide resolution was impossible due to the individualized nature of service decisions for the children. Furthermore, because the plaintiffs sought injunctive relief from systematic deficiencies rather than individualized damages, the court would not need to consider the placement of each individual class member and whether that placement was appropriate. As for adequacy, the court summarily dismissed as irrelevant the defendant's argument that the named plaintiffs differed from the putative plaintiffs in age, county of residence and status as juvenile delinquents. The court then held that the class could be certified for injunctive relief under Rule 23(b)(2), rejecting the defendants' argument that classwide injunctive relief would displace the judgment of the local professionals who worked with the individual plaintiffs because the plaintiffs sought statewide systemic change rather than specific relief related to each class member. The court, therefore, granted the plaintiffs' motion to certify the class.

Zyda v. Four Seasons Hotels & Resorts Four Seasons Holdings Inc.*, No. 16-00591 LEK, 2018 WL 1528159 (D. Haw. Mar. 28, 2018), *23(f) pet. denied

After successfully defeating the plaintiff's motion to remand the action to state court, as discussed in the summer 2017 and fall 2017 issues of *The Class Action Chronicle*, the defendants sought to decertify the class certified by the state court. The plaintiff asserted claims for, *inter alia*, unfair methods of competition and unfair or deceptive acts or practices because the defendants allegedly induced the plaintiff and others to purchase homes in a resort community by promising that family members and guests could enjoy certain club facilities without additional guest fees, but later discouraged use of those facilities by increasing the Daily Resort Guest Fees (DRGFs) in 2016. Judge Leslie E. Kobayashi of the U.S. District Court for the District of Hawaii refused to decertify the class, holding that the state court's certification order remained in effect and that even if state courts had less demanding certification requirements, the defendants were protected because a Rule 23 decertification motion may be brought at any time. The court held that common factual questions existed regarding the representations made to class members before they purchased their homes and whether the 2016 DRGFs constituted unfair or deceptive methods or practices, and allegations of oral misrepresentations did not defeat commonality because the class alleged deceptive published marketing materials. Adequacy was not undermined by eight class members who intervened in the action who preferred that the allegedly unlawful practice continue because the plaintiff could represent their interests. Finally, the court held that predominance and superiority were satisfied under Rule 23(b)(3). According to the court, any variations in the marketing materials to which class members were exposed could potentially be addressed through subclasses. In addition, any differences in how often class members were subject to fees only implicated individualized damage calculations and therefore were not enough to defeat class certification.

***In re Korean Ramen Antitrust Litigation*, No. 13-cv-04115-WHO, 2018 WL 1456618 (N.D. Cal. Mar. 23, 2018)**

Judge William H. Orrick of the U.S. District Court for the Northern District of California refused to decertify a nationwide class of indirect purchaser plaintiffs (IPPs) based on the Ninth Circuit's ruling in *In re Hyundai & Kia Fuel Economy Litigation*, 881 F.3d 679 (9th Cir. 2018). The court noted that in deciding whether to certify a nationwide class under California's Cartwright Act, it considered the distinction between states that allow IPPs to pursue price-fixing claims and those that do not, and only certified the class to include residents of jurisdictions permitting price-fixing claims. As for the other states, it was "too much of a stretch to employ California law as an end run around the limitations those states have elected to impose on standing." The defendants argued that in light of *In re Hyundai*, the plaintiffs failed to meet their burden on class certification to demonstrate the laws of the affected states do not vary in material ways precluding a finding that common legal issues predominate. The court disagreed, noting its resolution of the choice-of-law question — that the Cartwright Act applied to the certified class claims because of a lack of material conflicts and California's predominant interests — did not concern the application of multiple states' laws, raising a predominance question that must be addressed and satisfied by the plaintiffs. Because *In re Hyundai* did not change the burden as to the narrower, choice-of-laws question, and the defendants did not identify any other subsequent developments in the evidence or the law to justify revisiting class certification on its merits, decertification was not required.

***Magallon v. Vital Recovery Services, LLC*, No. 16cv02971 JAH-BLM, 2018 WL 1336291 (S.D. Cal. Mar. 14, 2018)**

The plaintiff sought certification of two classes of California consumers alleging violations of the federal Fair Debt Collection Practices Act (FDCPA) and the California Rosenthal Fair Debt Collection Practices Act (Rosenthal FDCPA) arising from debt collection notices. Judge John A. Houston of the U.S. District Court for the Southern District of California certified one class of recipients of notices that failed to clearly state the amount of the debt and another class of recipients of notices that failed to disclose that the debt was subject to daily accruing interest. The defendant argued the plaintiff did not meet Rule 23(a) or 23(b)(3) because the entire class was potentially subject to arbitration, but the defendant's evidence in support consisted of unsigned borrower agreements, and the defendant's declarant did not have knowledge of the facts surrounding any class member's participation in the agreements or the applicability of the agreements to their accounts. Numerosity, typicality and commonality were met because all members received the same notice, raising the common legal question of whether or not the notice violates the FDCPA and Rosenthal FDCPA, and class counsel's delay in seeking to extend the deadline to move

to amend by two months to permit ongoing investigation did not make class counsel inadequate. The court refused to certify a Rule 23(b)(2) injunctive relief class or a "hybrid" class because the plaintiff sought statutory damages in addition to declaratory and injunctive relief. However, the court held that Rule 23(b)(3) was satisfied because whether the debt was a consumer debt covered by the FDCPA is "easily determined by a single yes or no question" based on the defendant's records and did not predominate over the primary question of whether the notice violated the FDCPA and the Rosenthal FDCPA.

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 1299553 (E.D. Mo. Mar. 13, 2018), *23(f) pet. pending

Judge Stephen N. Limbaugh, Jr. of the U.S. District Court for the Eastern District of Missouri granted class certification, in part, to plaintiffs claiming damages related to the St. Louis Rams football team's 2016 decision to move the team to a new stadium in California and the resulting effects on their personal seat licenses (PSL) that were required in order to purchase season tickets. The court disagreed with the defendants' contention that the class was not ascertainable because of the lack of data around the identification of PSL holders at the end of the 2015 season. The data system used by the defendants "sufficiently identifie[d]" the class members and provided a mechanism to provide them with notice. With predominance, the court held that, while individual issues existed, including with respect to some affirmative defenses, common questions predominated for the breach of contract claims. The court also noted that when there are issues common to the class that predominate, the action may be proper even if damages must be tried separately. The court subsequently granted a motion to amend the class definition in part in order to more accurately reflect the terms of the contracts at issue.

***Grimes v. Evergreen Recreational Vehicles, LLC*, No. 3:16-CV-472-JD, 2018 WL 1257237 (N.D. Ind. Mar. 12, 2018)**

Judge Jon E. DeGuilio of the U.S. District Court for the Northern District of Indiana granted class certification to plaintiffs alleging violations of the Worker Adjustment and Retraining Notification (WARN) Act following the permanent closure of two of the defendants' facilities in Indiana. The WARN Act requires that certain employers provide 60 days' notice to employees before engaging in a "plant closing or mass layoff at a single site of employment." Here, the plaintiffs alleged that the defendants failed to provide this written notice, and the plaintiffs sought the respective back pay and benefits allowed under the statute. On review, the court held that the proposed class satisfied the requirements of Rule 23(b)(3). Numerosity was satisfied because approximately 270 workers were terminated as a result of the facilities' closure. Commonality was satisfied because the "very nature" of the WARN Act litigation "indicates the presence of a single large employment event that took place in June 2016 without adequate notice." Typicality was also satisfied, since the proposed class members suffered the same type of injury, and, as evidenced by the defendants' WARN Act letter, the defendants considered the shutdown to be a single employment event. The fact that the named plaintiff worked remotely did not render his claims atypical of the proposed class. Predominance was also satisfied, according to the court, because many of the elements of the WARN Act claims are susceptible to resolution on a classwide basis: whether the three defendants constitute a "single employer"; whether the employer was subject to the WARN Act; whether the closure constituted a "mass layoff" or "plant closing" under the statute; and, if required, whether the employer provided adequate notice.

***Fisher v. MJ Christensen Jewelers, LLC*, No. 2:15-cv-00358-RFB-NJK, 2018 WL 1175215 (D. Nev. Mar. 6, 2018)**

Judge Richard F. Boulware of the U.S. District Court for the District of Nevada certified a nationwide class and Nevada subclass of individuals alleging the defendants violated the Telephone Consumer Protection Act in utilizing an auto-dialer that contacted class members without express consent. Noting that class members were easily ascertained through spreadsheets provided by the defendants that identified specific individuals and telephone numbers, the court accepted a class definition limitation proposed by the plaintiff to calls made on a single day regarding advertisements about a trade show. The defendants challenged commonality on the basis that some of the potential members may have consented to receiving calls, but the court held that the proposed one-day limitation resolved most of the consent issues, and that circuit precedent suggested that some consent issues did not defeat the commonality factor. The court rejected the defendants' claim that the named plaintiff was not typical because he only received telephone calls on his cellphone, holding that there was no difference in this case between telephone calls received via cellphone and via landline. Although the plaintiff had pleaded guilty to a robbery charge, adequacy was satisfied because his criminal history did not implicate fraud or dishonesty, and the plaintiff had completed probation.

***Coles v. StateServ Medical of Florida, LLC*, No. 8:17-cv-829-T-17-AEP, 2018 WL 1181645 (M.D. Fla. Mar. 5, 2018)**

Magistrate Judge Anthony Porcelli of the U.S. District Court for the Middle District of Florida granted the plaintiff's unopposed motion for class certification. The plaintiff brought this putative class action under the Fair Credit Reporting Act (FCRA) alleging that the defendants failed to satisfy the disclosure requirements by not providing the plaintiff with a separate document notifying the plaintiff that they planned to obtain a consumer report while performing the background check. The court held that the class was adequately defined and clearly ascertainable because the class was limited to a set number of individuals who were provided insufficient authorization forms from the defendants during the relevant time period. Next, the court analyzed the Rule 23(a) class certification requirements. The court found sufficient commonality, since all class members' claims focused on the same issue: whether the defendants willfully violated the FCRA when they provided applicants the authorization forms. Typicality was established because the plaintiff's and class members' claims arose from the same conduct and the same factual and legal bases. Further, the court found no conflicts to undermine class counsel's adequacy. Finally, the court held that both the predominance and superiority requirements were met because the common issues of whether the defendants' forms willfully violated the notice and authorization provisions of the FCRA could be decided uniformly for all class members, making it inefficient for the class members to file separate claims. Accordingly, the court granted the plaintiff's motion for class certification.

***Bonny v. Benchmark Brands, Inc.*, No. 1:16-cv-3150-WSD, 2018 WL 1089338 (N.D. Ga. Feb. 27, 2018)**

Judge William S. Duffey, Jr. of the U.S. District Court for the Northern District of Georgia granted class certification for a class of plaintiffs who were fired without warning in violation of the Worker Adjustment and Retraining Notification (WARN) Act. The claims arose when the defendant, a shoe company, announced that it was ceasing all operations and closing all facilities, without prior notice to the employees. Under Rule 23, the court concluded that the proposed class was easily identifiable because human resources kept updated employee records at the time of termination. The court also held that both the commonality and typicality requirements were satisfied because the primary issue — whether the termination violated the WARN Act — was common to all class members and the named plaintiffs were former employees fired in the same manner as the rest of the class. Finally, the court concluded that a class action was the superior method to adjudicate the plaintiffs' claims, since all the class members were treated identically by the defendant and it would be uneconomical for the class members to bring individual suits. Accordingly, the court granted the plaintiffs' motion for class certification and ultimately entered a default judgment in favor of the class.

***Rodriguez v. Experian Information Solutions, Inc.*, No. C15-01224-RAJ, 2018 WL 1014606 (W.D. Wash. Feb. 22, 2018)**

Judge Richard A. Jones of the U.S. District Court for the Western District of Washington certified a nationwide class of consumers alleging violations of the Fair Credit Reporting Act (FCRA) in impermissibly using consumer credit reports as part of the collection process on judgments stemming from unpaid parking tickets. The court rejected the defendant's argument that determining whether each ticket is a credit transaction would require individual inquiries into the circumstances of each ticket, because common questions existed, such as whether the defendant's policy of pulling credit reports when collecting unpaid parking ticket judgments willfully violated the FCRA. The plaintiff's practice of filing at least four other lawsuits against collection agencies did not render him inadequate without a showing of a conflict of interest between the plaintiff and other class members. The court refused to certify a Rule 23(b)(2) injunctive relief class because the defendant no longer sought credit reports to aid in collecting parking violation-related debts, but it held that the central issues in the FCRA claim — whether the defendant's conduct violated the FCRA and whether that conduct was willful — predominated over individualized issues for purposes of Rule 23(b)(3). The court also held that identification of class members was largely already completed by the defendant and that the defendant's easily searchable electronic records would provide relevant information on actual damages. The court rejected the defendant's claim that individualized determinations must be made regarding potential *res judicata* or collateral estoppel defenses because "[i]f such a determination was an impediment to class certification, then very few classes would ever be certified." Finally, the court held that class certification was superior to numerous individual FCRA actions, given the maximum statutory damages per violation of $1,000.

***Practice Management Support Services, Inc. v. Cirque du Soleil,* Inc., 301 F. Supp. 3d 840 (N.D. Ill. 2018)**

Judge Thomas M. Durkin of the U.S. District Court for the Northern District of Illinois granted class certification to a plaintiff alleging violations of the Telephone Consumer Protection Act (TCPA) related to the receipt of unsolicited fax advertisements from theatrical groups that failed to provide sufficient instruction about how to opt out of the advertisements. Commonality was satisfied in light of the sole claim brought by the plaintiff — violation of the TCPA — and the numerous key common questions, including whether the faxes were solicited and advertisements and whether the faxes contained adequate opt-out notices. Typicality was also satisfied, as the named plaintiff's claim arose from the same practice or course of conduct as other putative class members — namely, the "defendants' alleged practice of using a single fax broadcaster (ProFax) to send, at the direction of the same defendant employees, unsolicited faxes bearing the Cirque du Soleil trade name to promote shows during a discrete period of time." The defendants argued that superiority was not satisfied because of the absence of evidence to identify to whom the faxes were sent. (The relevant fax invoices did not contain the information.) The court noted, however, that this issue — going to manageability — is "almost never a bar to class certification," and the defendants could not rely on such problems arising from their own failure to keep records to define the contours of the class. Due to concerns about personal jurisdiction, the court limited the class definition to individuals in Illinois, and the court otherwise granted class certification.

On August 2, 2018, Judge Durkin granted the defendants' motion for decertification in light of the U.S. Supreme Court's decision in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), which resolved a circuit split regarding the application of the equitable tolling doctrine set forth in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), to untimely successive class actions. The *China Agritech* Court held "that *American Pipe* does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action." 138 S. Ct. at 1806. Relying on *China Agritech*, the defendants moved to decertify the class, arguing that Practice Management's class claims in this third successive class action were untimely. Judge Durkin agreed, reasoning that Practice Management did not file the case within the applicable four-year statute of limitations set forth in 28 U.S.C. § 1658; hence, the claims were untimely unless a tolling doctrine applies. And because the plaintiff could not rely on *American Pipe* tolling — *i.e.*, that an earlier filed class action tolled the running of the statute of limitations for a successive class action — there was no basis for tolling. As a result, the class claims were clearly stale, warranting decertification.

***In re TD Bank, N.A. Debit Card Overdraft Fee Litigation*, 325 F.R.D. 136 (D.S.C. 2018)**

Judge Bruce H. Hendricks of the U.S. District Court for the District of South Carolina granted in part and denied in part the motion for class certification in this case alleging improper bank fees. First, the plaintiffs alleged various common law and violations of consumer protection statutes based on the allegation that the defendant breached its own form contract when it assessed overdraft fees against customers before their checking accounts were actually overdrawn (the available balance theory). Second, the plaintiffs alleged that the defendant systematically violated federal law by failing to comply with mandatory opt-in requirements imposed by Regulation E (the Reg E theory) prior to assessing overdraft fees on one-time debit card and automated teller machine transactions. The court held that class certification was appropriate for claims pertaining to the available balance theory. The court first determined that because the plaintiffs alleged a single companywide policy and a single companywide form contract, the commonality, typicality and predominance requirements were met. The court also found that a class action represented a superior means of resolving the case in light of the de minimis recovery for individual class members. Next, the court held that class certification was not appropriate for claims pertaining to actual damages under the Reg E theory because recovery would require highly individualized showings of detrimental reliance.

However, the court found that class certification would be appropriate for claims pertaining to statutory damages under the Reg E theory because statutory damages only required that plaintiffs prove a technical violation of the substantive provisions of the Reg E statute or its implementing regulations and need not prove that individual plaintiffs suffered any resulting harm, thereby presenting no obstacles for the commonality, typicality, and predominance requirements. But the court also found that the statutory damages Reg E class was defined as an impermissible fail-safe class and thus required redrafting of the class definition before class certification was proper. Next, the court acknowledged that although there are numerous causes of action and multiple theories of liability across a variety of states, the creation of 26 subclasses to address variations in the applicable law would render the case manageable as a class action. As a result, the variations of law documented in state surveys would not materially affect the fair and efficient adjudication of the case.

***Makaron v. Enagic USA, Inc.*, 324 F.R.D. 228 (C.D. Cal. 2018)**

Judge Dean D. Pregerson of the U.S. District Court for the Central District of California certified a nationwide class of individuals claiming that Enagic — a company marketing water filtration and ionization systems through a network of distributors — violated the Telephone Consumer Protection Act (TCPA) by contacting them with a 22-minute prerecorded message and with subsequent calls from affiliated individuals. The court rejected the defendant's argument that numerosity was not met, because the plaintiff identified hundreds of thousands of phone calls made by third-party dialing systems on behalf of a small number of the defendant's distributors. Commonality and predominance were satisfied because the predominant question was whether the defendant was vicariously liable for auto-dialed calls made by its distributors. The court rejected the defendant's argument that individualized issues of consent predominated because the defendant provided no evidence of such issues or demonstrated any consent mechanism that might require individualized determinations. The court also held that the typicality and adequacy requirements were satisfied, reasoning that the fact that the named plaintiff could not recall or did not know certain details — mostly concerning the defendant's internal business practices — in his deposition testimony did not establish that these requirements were not met. The court also held that "hybrid" certification under Rule 23(b)(2) and (b)(3) was proper, because although the plaintiff was seeking monetary relief, he also sought an injunction to prevent the defendant from using its distributors to violate the TCPA.

***O'Dell v. National Recovery Agency*, 291 F. Supp. 3d 687 (E.D. Pa. 2018)**

Judge Edward G. Smith of the U.S. District Court for the Eastern District of Pennsylvania certified a class alleging that the defendant, a credit reporting agency, falsely reported delinquency dates in violation of the Fair Debt Collection Practices Act (FDCPA). The court held that commonality was satisfied because: (1) whether the defendant reported inaccurate dates was a common question of fact; (2) whether the inaccurate reporting violated the FDCPA was a common question of law; and (3) answering the common question of law would resolve all class members' claims. As to typicality and adequacy, the court held that the pursuit of statutory damages would result in similar awards, and because the named plaintiff was only pursuing class claims, her efforts to maximize her own recovery would likewise maximize the class members' recovery. The court found predominance for the same reasons it found typicality, commonality and adequacy: The named plaintiff and class members shared common legal, factual and damages issues, and resolving issues of proof would not be difficult. Lastly, the court found that a class action was the superior method of litigation. The court rejected the defendant's argument that the class members would get more of the defendant's assets in individual suits, responding that this concern only applied where the defendant's net worth was negative and that dissatisfied plaintiffs had the choice of opting out of the class in pursuit of a larger individual award. The court also explained that superiority was satisfied because the individual class members would not likely pursue the small claims at issue individually. Accordingly, the court granted the named plaintiff's motion for class certification.

Class Action Fairness Act Decisions

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

***Nichols v. Chesapeake Operating*, LLC, 718 F. App'x 736 (10th Cir. 2018), *petition for cert. docketed*, No. 18-168**

The U.S. Court of Appeals for the Tenth Circuit (Lucero, Baldock and Bacharach, JJ.) affirmed the denial of remand of a class action brought by Oklahoma residents claiming underpayment or nonpayment of royalties in Oklahoma natural gas wells. As discussed in the winter 2017 issue of *The Class Action Chronicle*, the district court held that the plaintiff failed to demonstrate the applicability of CAFA's home-state exception, which requires a district court to decline jurisdiction if two-thirds or more of the class and the primary defendants are citizens of the state in which the action was originally filed. The Tenth Circuit rejected the plaintiff's contention that a rebuttable presumption of citizenship arose from his allegation that the proposed class members are Oklahoma residents, because an individual's residence is not equivalent to his domicile, and domicile is relevant for determining citizenship. The court then described the plaintiff's "significant effort" to establish citizenship, including employing a statistician to draw conclusions about the citizenship of class members based on a representative random sample. However, the Tenth Circuit noted "the need for this evidence was of Nichols' own making: he chose to define the class in terms of residence rather than citizenship" and thus "saddled himself with an evidentiary burden," which he tried to "meet through admittedly imperfect evidence." The sample was flawed because it failed to properly account for trusts and deceased individuals, and information for some of the members in the plaintiff's skip-trace reports was inconsistent with Oklahoma citizenship. The plaintiff did not dispute these problems or otherwise explain how its statistician's "evidentiary extrapolation remains statistically viable." Thus, the Tenth Circuit affirmed the district court's conclusion that the plaintiff failed to establish that CAFA's home-state exception applied by a preponderance of the evidence.

***Winn v. Mondelez International, Inc.*, No. 17-cv-02524-HSG, 2018 WL 3151774 (N.D. Cal. June 28, 2018)**

The plaintiff sought remand of a class action on behalf of California purchasers of Ginger Snaps, alleging various breach of warranty and California consumer protection claims due to allegedly misleading advertising of the product as healthy when it contained partially hydrogenated oil. Judge Haywood S. Gilliam, Jr. of the U.S. District Court for the Northern District of California denied the motion. The court held it had jurisdiction under CAFA because minimal diversity was met, there were more than 100 members in the class, and notwithstanding the plaintiff's prayer for relief for less than $5 million in damages and express disclaimer of all relief that would subject her action to CAFA jurisdiction, the defendant showed potential damages could exceed the jurisdictional amount. The plaintiff argued that CAFA's "local controversy" exception applied because the class was only brought on behalf of California consumers injured in California. Noting that the exception is narrow and applies only to controversies that are "truly local," the court disregarded the plaintiff's efforts to make the controversy "local only in the trivial and almost tautological sense that the definition of the putative class and the legal bases of the asserted claims make it so." Because the plaintiff alleged the Ginger Snaps were sold nationwide, the principal injuries alleged were not limited to California and the "local controversy" exception was not applicable. Thus, the motion to remand was denied.

***Stern v. RMG Sunset, Inc.*, No. 17-CV-1646 JLS (NLS), 2018 WL 2296787 (S.D. Cal. May 21, 2018)**

Judge Janis L. Sammartino of the U.S. District Court for the Southern District of California denied the plaintiff's motion to remand a putative class action alleging that the defendants violated California consumer protection statutes and unjust enrichment law by charging an undisclosed service charge of 4.9 percent on any food and drink purchased at the defendants' restaurants. The court held that CAFA's $5 million amount-in-controversy requirement was met because (1) the plaintiff sought restitution, and the total service charge collected by the defendants during the class period exceeded $2 million; (2) the plaintiff sought punitive damages, and courts consider a 1-1 ratio of punitive to compensatory damages in determining the amount-in-controversy; and (3) the plaintiff requested attorneys' fees, which were measured at the U.S. Court of Appeals for the Ninth Circuit's benchmark of 25 percent of the common fund that the plaintiff would create if he prevailed on his claims. Additionally, because the complaint also alleged that the plaintiff and class members would not have eaten at the defendants' restaurants had they known of the service charge, the court also calculated restitution as the full purchase price of the entire meal, putting the amount-in-controversy well over $5 million. The minimum diversity requirement was also met. Although the complaint limited the class definition to California customers, the plaintiff, in a self-described "oversight," inadvertently expanded the class definition in his motion for class certification filed in state court prior to removal to include "all" persons who paid the surcharge. The court followed the rule that district courts are required to determine citizenship "as of the date of service" by the plaintiff of a motion "indicating the existence of Federal jurisdiction."

***Hands on Chiropractic PL v. Progressive Select Insurance Co.*, No. 6:18-cv-192-Orl-37DCI, 2018 WL 1998961 (M.D. Fla. Apr. 12, 2018), *report and recommendation adopted*, 2018 WL 1992192 (M.D. Fla. Apr. 27, 2018)**

Judge Roy B. Dalton, Jr. of the U.S. District Court for the Middle District of Florida adopted the report and recommendation of Magistrate Judge Daniel C. Irick and denied the plaintiff's motion for remand in an insurance dispute in which the plaintiff alleged that the defendant insurance company failed to pay the putative class members the proper percentage of submitted charges in violation of Florida state law and their insurance policies. At issue was whether the plaintiff's claims met the $5 million amount-in-controversy requirement for CAFA jurisdiction. The defendant filed an affidavit detailing the amount-in-controversy calculation, asserting that, according to a data analyst, the putative class included over 500,000 bills, 1,000 unique billing providers and 60,000 claims — adding up to a face value of over $50 million. The plaintiff failed to rebut the calculations. Accordingly, the magistrate judge found that the defendant carried its burden of establishing by a preponderance of the evidence that the CAFA amount-in-controversy requirement was satisfied and recommended that the court deny the plaintiff's motion for remand.

***Boyle v. Toyota Financial Services*, No. 2:17-cv-10730-ES-SCM, 2018 WL 1904289 (D.N.J. Mar. 29, 2018), *report and recommendation adopted*, 2018 WL 1904199 (D.N.J. Apr. 20, 2018)**

Judge Esther Salas of the U.S. District Court for the District of New Jersey adopted the report and recommendation of Magistrate Judge Steven C. Mannion and denied a motion to remand a putative class action where the defendant, an auto financing company, allegedly charged consumers to access personal goods from repossessed vehicles. After the defendant filed a notice of removal claiming federal jurisdiction under CAFA, the plaintiff moved for remand. The plaintiff argued that (1) the defendant's removal petition was void because it failed to serve co-defendants and get their consent and (2) the suit did not meet CAFA's $5 million amount-in-controversy requirement. The court disagreed on both fronts. The court first held that the removing defendant did not need to serve co-defendants or seek their consent for removal because they were not adverse parties and, under CAFA, any defendant may remove the entire case without approval from any other defendant. The court was also satisfied that the potential damages, as explained in the defendant's declaration, exceeded $5 million. Accordingly, the court found subject matter jurisdiction and denied the motion to remand.

***Allred v. Frito-Lay North America, Inc.*, No. 17-CV-1345 JLS (BGS), 2018 WL 1725535 (S.D. Cal. Apr. 10, 2018)**

The plaintiffs sought remand of a class action on behalf of California consumers of Salt & Vinegar Flavored Potato Chips manufactured and sold by the defendants, alleging various warranty and California consumer protection law claims based on the product labels. Judge Janis L. Sammartino of the U.S. District Court for the Southern District of California denied remand. The court held CAFA's minimal diversity and class size requirements were met, because the class purportedly included "tens of thousands" of members. While the complaint did not state a specific amount requested, the court concluded the defendants met their burden to show CAFA's $5 million amount-in-controversy requirement was met, based on Frito-Lay's gross and net revenues from California sales of the Salt & Vinegar chips exceeding $5 million annually in 2014, 2015 and 2016. The court rejected the plaintiffs' argument that they did not intend to seek a full refund for each product purchased, only the price premium paid due to the defendants' alleged failure to disclose that the chips contained artificial flavoring ingredients, because the complaint stated that the plaintiffs sought "disgorgement and restitution of all monies from the sale of the Product" and "suffered loss in an amount equal to the amounts they paid for the Product."

***Scherrer v. Foremost Insurance Co. of Grand Rapids Michigan*, No. 4:17-cv-00855-JAR, 2018 WL 1508904 (E.D. Mo. Mar. 27, 2018)**

Judge John A. Ross of the U.S. District Court for the Eastern District of Missouri denied the plaintiff's motion to remand in a case alleging that the defendant insurance company improperly failed to honor the terms of its insurance contract with respect to the calculation of replacement value for damaged homes. The thrust of the putative class action was that the defendant improperly reduced replacement value based on an inflated depreciation of labor and materials. After the case was filed, the defendant removed the case to federal court under CAFA, alleging that the $5 million threshold was likely met and citing a total of $15.5 million in controversy. The court ordered limited discovery on the issue. As to compensatory damages, the defendant calculated an average per-claim amount of labor depreciation from recorded claims and then multiplied that average by the total class members. This sum for compensatory damages alone yielded $5.6 million. The plaintiff argued that the defendant's method needed to be more precise and that rather than calculating a single average depreciation amount for all claims, the plaintiff calculated four such amounts: one each for paid and nonpaid claims from two data systems used by the defendant. The court acknowledged that the plaintiff's calculations were "more specific and therefore may better approximate 'the value of the claim of each person who falls within the definition'" of the proposed class, but the court noted that "the Eighth Circuit has permitted computational methods even more general" than the defendant's. The court could not say that the plaintiff had established to a legal certainty that the CAFA claim is for less than $5 million. Accordingly, the court denied the plaintiff's motion to remand.

***Fradella v. Coca-Cola Co.*, No. 17-9622, 2018 WL 1150899 (E.D. La. Mar. 2, 2018)**

Judge Susie Morgan of the U.S. District Court for the Eastern District of Louisiana denied the plaintiff's motion to remand a putative class action under CAFA's local controversy exception. The plaintiff brought a prospective class action on behalf of all Louisiana residents who purchased Gold Peak Tea from September 2016 to September 2017, alleging that consumers were adversely affected by contaminated Gold Peak Tea products. The defendants removed the case to federal court. The plaintiff amended the complaint to add a nondiverse party as a defendant, then sought to remand the case to state court based on the addition of the nondiverse defendant. The court denied the motion to remand, finding that CAFA jurisdiction was established and the local controversy exception was not met. The defendants were

able to satisfy their burden of proving by a preponderance of the evidence that CAFA's *prima facie* elements were met because the sheer number of bottles sold in the state (over 26 million) exceeded the $5 million threshold. The court also held that the local controversy exception was not met because in the U.S. Court of Appeals for the Fifth Circuit, the application of the local controversy exception depends on the pleadings at the time the class action is removed, not on an amended complaint filed after removal. Because CAFA jurisdiction existed at the time of removal, post-removal amendments to the complaint did not affect the jurisdictional analysis.

***Beckman v. Wal-Mart Stores, Inc.*, No. 17-cv-02249-BAS-BLM, 2018 WL 1089985 (S.D. Cal. Feb. 26, 2018)**

Judge Cynthia Bashant of the U.S. District Court for the Southern District of California denied remand of a class action on behalf of consumers bringing warranty and California consumer protection claims. After the plaintiff amended its complaint to correct erroneously named defendant entities, the plaintiff claimed removal was untimely because the initial complaint sent exclusively to Wal-Mart in June 2017 triggered the 30-day removal period, or alternatively, the period was triggered when counsel mailed the first amended complaint to Wal-Mart's counsel in September 2017. The court agreed with the defendants that the clock governing Section 1446(b)(1) removal did not begin to run until proper service occurred on the last defendants on October 4, 2017. The court further found removal was timely under CAFA even if the clock started to run before October 4, 2017, because under CAFA, a defendant who has not lost the right to remove may still do so if the removal is filed within 30 days after the defendant ascertains that the case is removable by means of its own research or outside sources. While neither party disputed that CAFA's minimal diversity and potential class size requirements were met, the court agreed with the defendants that the first amended complaint did not clearly state the amount in controversy. Once served, the defendants conducted their own inquiry into whether the amount in controversy exceeded $5 million before seeking removal based on the sales volume of the disputed product using their own records. Thus, the defendants' removal was timely.

***McAteer v. DCH Regional Medical Center*, No. 2:17-cv-00859-MHH, 2018 WL 1089873 (N.D. Ala. Feb. 26, 2018)**

Judge Madeline H. Haikala of the U.S. District Court for the Northern District of Alabama denied the defendants' motion to dismiss the plaintiff's class action suit alleging various state contract claims and violations of the Alabama Deceptive Trade Practices Act. The court first held that the local controversy exception was not applicable because the plaintiff had recently filed class actions regarding the defendants' billing practices, relying on CAFA's unambiguous definition of a class action. The court also analyzed the applicability of the home-state exception to CAFA jurisdiction. Because at least two-thirds of the class members were citizens of Alabama, the state in which the action was originally filed, and the DCH defendants were also citizens of Alabama, the applicability of the home-state exception revolved around whether defendant Avectus, a non-Alabama citizen, was a "primary" defendant. The court was unable to determine from the face of the complaint if Avectus was a primary defendant, largely because the plaintiff referred to the defendants collectively and did not specify which defendant engaged in particular conduct. Due to the lack of clarity in the complaint, the court instructed the parties to engage in jurisdictional discovery to determine whether Avectus was a primary defendant. Accordingly, the court delayed ruling on the home-state exception until additional evidence was available.

***Alexander v. Pipeline Productions, Inc.*, No. 1:16-cv-00005-KGB, 2018 WL 3045179 (E.D. Ark. Feb. 15, 2018)**

Judge Kristine G. Baker of the U.S. District Court for the Eastern District of Arkansas denied the plaintiffs' motion to remand the putative class action case to state court. The plaintiffs alleged breach of contract and unjust enrichment related to the cancelation of a 2015 music festival. The defendants removed this action based on CAFA, asserting an amount in controversy in excess of $5 million. The defendants calculated this amount by multiplying the alleged median price of the tickets available by the 15,000 expected daily attendees as indicated in the plaintiffs' class action complaint. The plaintiffs argued that the defendants inflated the amount in controversy, claiming that ticket reports within the defendant's own possession belied the notion that more than $5 million was at stake. The court disagreed. First, the court

rejected the plaintiffs' stipulation that the class would not seek damages in excess of $5 million because the plaintiffs are unable to bind members of a proposed class before the class is certified. Second, the court found that the defendants had met their burden based on the face of the complaint. Even if the defendants were incorrect in their compensatory damages calculation, the plaintiffs also requested punitive damages and attorneys' fees, which may be considered in determining the amount in controversy. In Arkansas, plaintiffs may recover four to six times the amount of potential compensatory damages (alleged by the plaintiffs to be $1 million), and 40 percent is a reasonable estimate for attorneys' fees at this point in the litigation. These figures aggregate to more than $5 million, and the plaintiffs failed to establish to a legal certainty that the amount in controversy was below that amount. Accordingly, the court denied the motion to remand.

Decisions Granting Motions to Remand/Finding No CAFA Jurisdiction

***Walsh v. Defenders, Inc.*, 894 F.3d 583 (3d Cir. 2018)**

The U.S. Court of Appeals for the Third Circuit (Chagares, Bibas and Greenberg, JJ.) affirmed remand of a putative class action where the defendants allegedly added improper cancellation fee provisions to their home security equipment and service contracts in violation of state law. The district court granted the plaintiff's motion to remand the case under CAFA's local controversy exception, finding that the in-state defendant's conduct formed a significant basis for the class claims and that the class sought significant relief from the local defendant. The Third Circuit agreed, rejecting the local defendant's argument that it was a nominal party because it had transferred its assets and liabilities to an out-of-state defendant. The court noted that the transfer did not discharge the class members' claims against the local defendant because they did not consent to the transfer and discharge. Next, the court found that the class sought significant relief from the local defendant, noting that the plaintiff sought statutory, declaratory, injunctive and monetary relief. The court finally held that the local defendant's conduct formed a significant basis of the claims because it entered into contracts with over a third of the class. The Third Circuit therefore held that CAFA's local controversy exception applied and affirmed remand.

***In re Lipitor, No. 18-01725-CJC(JPRx)*, 2018 WL 2150942 (C.D. Cal. May 10, 2018)**

The defendant, a pharmaceutical company, sought to remove 156 lawsuits by more than 4,300 plaintiffs alleging use of the drug Lipitor caused them to suffer from Type II diabetes. The defendant had previously unsuccessfully sought to remove the lawsuits to federal court pursuant to CAFA's "mass action" provision, as discussed in the fall 2017 issue of *The Class Action Chronicle*, but argued that new developments since remand justified removal under that provision. Judge Cormac J. Carney of the U.S. District Court for the Central District of California granted the plaintiffs' remand motion. After remand, the cases were assigned to a large number of state court judges. Citing logistical problems caused by these individual assignments, Judge Debre Katz Weintraub, the supervising judge of the Los Angeles Superior Court, entered a "Request" under California Code of Civil Procedure Section 404.4 that 62 of these actions be added to the state court Lipitor coordinated proceeding. The Lipitor coordination judge, Judge Carolyn B. Kuhl, then asked the parties to respond to the Request, prompting the plaintiffs to identify 81 additional cases that were not included in that request. Judge Kuhl then granted Judge Weintraub's Request and *sua sponte* added 88 cases to the coordinated proceeding. The defendant then removed, contending that the state court orders resulted in a proposal for a joint trial, triggering CAFA "mass action" removal. Judge Carney held a state court's *sua sponte* order cannot "propose" a joint trial, and the court did not contemplate a joint trial. According to the ruling, the plaintiffs had repeatedly clarified their intent to avoid any action that could be construed as a proposal for a joint trial, and the state court judge expressed "deep skepticism" that the cases could be jointly tried. Judge Carney concluded that "it defies common sense to suggest" that the state court was proposing a joint trial, and in any event, there was no "voluntary and affirmative act" by the plaintiffs, which the court found was required to trigger CAFA's mass action provision.

***Santino v. Apple Inc.*, No. 18-cv-02486-EJD, 2018 WL 2091491 (N.D. Cal. May 7, 2018)**

Judge Edward J. Davila of the U.S. District Court for the Northern District of California granted remand of a class action of California consumers alleging California state law claims arising from "intentional and purposeful degradation of speed" through software updates to Apple's iPhone 6s and iPhone 6s Plus models. The court held that CAFA's minimal diversity

requirement — that at least one member of the class of plaintiffs must be a citizen of a different state than one defendant — was not satisfied. Because Apple is a citizen of California and the sole defendant, it was required to show at least one member of the plaintiffs' proposed classes is a non-California citizen. Apple focused on the proposed class definition of "all California residents," because the law permits residence in one state but citizenship in another. However, the court held that the natural reading of another allegation — that the plaintiffs, class members and the defendant "are all citizens of California" — was that all members of the classes, including the plaintiffs, are citizens of California. The court further rejected Apple's reliance on authority "to override the clear statement in [p]laintiffs' complaint" because the cases cited did not involve an explicit allegation regarding class members' citizenship. The court also noted that the remand motion clarified that all class members are California citizens, alleging causes of action based on California law, which, while not dispositive, further supported the plaintiffs' interpretation. Because the fairest reading of the complaint restricted class membership to California citizens, the court refused to exercise CAFA jurisdiction and remanded the action.

Waters v. Kohl's Department Stores, Inc.*, No. 2:18-CV-00328-ODW-AFM, 2018 WL 1664968 (C.D. Cal. Apr. 4, 2018), *1453(c) pet. denied

Judge Otis D. Wright II of the U.S. District Court for the Central District of California granted the plaintiffs' motion to remand their California consumer class action arising from a customer rewards program where customers earn "Kohl's Cash" to spend at Kohl's stores. The court previously remanded the action after holding that the defendants failed to establish the amount-in-controversy exceeded CAFA's $5 million minimum, discussed in the fall 2017 issue of *The Class Action Chronicle*. In its second attempt at removal, Kohl's argued that the continued accrual of putative damages and its analysis of internal sales data constituted a change in circumstances entitling it to successive removal. The court noted successive removal is permitted if new facts put the defendants in a different position compared to where they stood during the first removal. The court held that continued accrual of punitive damages did not put Kohl's in a new position compared to where it was a year ago, because the plaintiffs did not allege any new facts or theories affecting the amount-in-controversy. The court further found that Kohl's could have analyzed its sales data in the first removal, and that whether or not Kohl's previously tracked or calculated the average percent discount needed to calculate the amount in controversy was irrelevant since the information was uniquely within Kohl's records. The court, however, did not award attorneys' fees and costs to the plaintiffs since "[s]uccessive removal cases from this circuit illustrate that the line between mere new evidence and a truly new factual basis can be blurry."

Kendrick v. Xerox State & Local Solutions, Inc.*, No. 18-cv-00213-RS, 2018 WL 1605104 (N.D. Cal. Apr. 3, 2018), *1453(c) pet. pending

The plaintiffs sought remand of a class action asserting state law claims arising from toll collection on Bay Area bridges and alleged disclosure of consumers' personally identifiable information (PII). Judge Richard Seeborg of the U.S. District Court for the Northern District of California granted the remand motion. The court held defendant Conduent's amount-in-controversy calculations were erroneously based on a class definition asserted in an earlier related case, rather than the complaint's definition confining the class to members who had their PII provided to third parties. But because the plaintiffs offered no evidentiary support suggesting fewer class members, Conduent was entitled to assume class membership consists of at least 100,000 individuals with statutory damages of $2,500 per class member, well over CAFA's $5 million threshold.

While the plaintiffs sought significant relief from two in-state defendants for injuries incurred in California, and 70 percent of the traffic on the affected bridges would be comprised of California citizen motorists, the court held CAFA's "local controversy" exception did not apply because one of the named plaintiffs brought a similar class action against the defendants based on toll collection procedures on Bay Area bridges within the previous three years. The "home-state controversy" exception was inapplicable because non-California defendant Conduent was sued directly for providing PII to unauthorized entities and for privacy violations, and was the only defendant named in the California consumer protection claims. Nevertheless, the court remanded the putative class action under 28 U.S.C. § 1332(d)(5), which precludes CAFA jurisdiction where the primary defendants are state actors. As the court recognized, two of the defendants were government agencies. While the third defendant was technically a private corporation, the plaintiffs argued that it was acting under the color of state law in assessing, collecting, and adjudicating tolls and penalties, warranting remand under Section 1332(d)(5). According to the court, the defendants failed to address the issue of state action "in any depth." And as the parties claiming CAFA jurisdiction, the onus was on the defendants to refute the plaintiffs' contention. The court therefore granted the motion to remand.

***W.B. v. Raleigh Heart Clinic, Inc.*, No. 5:18-cv-00100 et al., 2018 WL 1611600 (S.D. W. Va. Apr. 2, 2018)**

Judge Irene C. Berger of the U.S. District Court for the Southern District of West Virginia remanded a series of cases to state court that had been removed under the CAFA mass action provisions. The plaintiffs brought 125 individual suits in state court against a doctor, a clinic and a pharmaceutical distributor alleging that they were injected with certain radiopharmaceuticals in a manner that permitted the spread of blood-borne diseases, which caused them to contract hepatitis B or hepatitis C. Before removal, the cases had been consolidated in state court for discovery purposes, and the plaintiffs moved to refer them to the West Virginia Mass Litigation Panel (MLP). After the pharmaceutical distributor defendant removed, the court granted the plaintiffs' motion to remand. The court determined that the cases were not proposed to be tried jointly, as required for mass action removal under CAFA, but rather that the referral to the MLP would only allow a unified plan of discovery, unified pretrial management and implantation of a trial methodology. As such, the federal court remanded the cases without reaching the plaintiffs' other arguments.

***Doyle v. Southwest Airlines, Inc.*, No. 17-11767 (JMV) (MF), 2018 WL 1128775 (D.N.J. Mar. 1, 2018)**

Judge John Michael Vazquez of the U.S. District Court for the District of New Jersey *sua sponte* dismissed class claims that the defendant airline failed to inform flyers of its new policy on flight cancellation refunds, resulting in customers losing the value of their flight. The plaintiff commenced the putative class action in federal court and sought to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. While the court granted that request, it dismissed the complaint for lack of subject matter jurisdiction because the plaintiff failed to allege any facts in support of the amount in controversy as to the individual claims, and it dismissed the class claims for failure to identify an adequate class representative. Of most relevance here, the court held that the plaintiff could not satisfy the requirements for class certification due to a lack of adequate representation. The plaintiff alleged that, despite filing the complaint *pro se*, he would fairly and adequately represent the interests of the class. He also alleged that he was licensed to practice law in New York state and that he would retain counsel with class action experience. The court was unpersuaded for several reasons. First, even though the plaintiff had enough legal knowledge to serve as a class representative, his *pro se* status made him inadequate. Second, emphasizing that "a class representative's adequacy is inextricably linked with the adequacy of the counsel," the court noted that the plaintiff had no class action experience and provided no information about the qualifications of potentially retained counsel. Third, although the plaintiff's interests aligned with those of putative class members, that fact alone did not support a finding of adequate representation. Fourth, the plaintiff could not finance the litigation because he was proceeding *in forma pauperis*. Accordingly, the court dismissed the class claims but did so without prejudice because the allegations were not necessarily futile.

Other CAFA Decisions

***D.E. 10 v. Tumino's Towing, Inc.*, No. 2:18-cv-3165 (JMV) (SCM), 2018 WL 3141836 (D.N.J. June 26, 2018)**

Magistrate Judge Steven C. Mannion of the U.S. District Court for the District of New Jersey ordered jurisdictional discovery to determine whether CAFA's home-state exception applied where the defendant towing company allegedly towed class members' vehicles without their consent and charged improper fees in violation of state law. On the plaintiff's motion to remand, the court first rejected the plaintiff's argument that CAFA's home-state exception necessarily applied because (1) the defendant resided in New Jersey and (2) over two-thirds of the class members likely resided in New Jersey, since their vehicles were towed there. The court noted that this information was insufficient to determine the class members' domicile. The court, however, granted the plaintiff's alternative request for jurisdictional discovery, noting that doing so is proper where domicile is unclear and that the defendant had access to this information.

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.

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