The Class Action Chronicle

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Summer 2014

This is the fourth edition of *The Class Action Chronicle*, a quarterly publication that provides an analysis of recent class action trends, along with a summary of class certification and Class Action Fairness Act rulings issued during each quarter. Our publication is designed to keep both practitioners and clients up to date on class action developments in antitrust, mass torts/products liability, consumer fraud and other areas of law.

The Summer 2014 edition focuses on rulings issued between February 16, 2014, and May 15, 2014, and begins with a short article regarding offers of judgment in the context of class actions.

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AVOIDING CLASS CERTIFICATION THROUGH AN OFFER OF JUDGMENT

At least in some circuits, offers of judgment have traditionally afforded defendants an escape hatch from class litigation in federal court. Shortly after a suit was filed, a defendant could moot the individual plaintiff's claim and extinguish the putative class by offering the plaintiff all of the individual relief he or she sought in an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure. Even if the plaintiff declined the offer, the court would dismiss the case on the ground that the offer to make the plaintiff whole eliminated the controversy between the parties, depriving the court of jurisdiction. As one court explained, such an offer "eliminates a legal dispute upon which federal jurisdiction can be based," because "[y]ou cannot persist in suing after you've won." *Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999).

Courts have applied wildly different approaches to the offer of judgment issue in this context. Among other things, they have disagreed over what the offer must contain: literally everything the plaintiff asked for, even the legally implausible demands, according to some courts, *see, e.g., Scott v. Westlake Servs. LLC*, 740 F.3d 1124 (7th Cir. 2014); or something less than that, according to others, *see, e.g., Keim v. ADF MidAtlantic, LLC*, No. 12-80577, 2013 WL 3717737, at *8 (S.D. Fla. July 15, 2013) (plaintiff could not claim that complete relief was not offered on the basis of the vagueness of his own allegations regarding the number of statutory violations). In addition, some courts have allowed a putative class action to continue even when the original named plaintiff's claims are mooted by an offer of judgment where a substitute representative can be found, *see, e.g., Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011), while others have rejected that approach, *see, e.g., Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011).

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But one point that was relatively settled until recently was that an offer of judgment that undeniably offered the plaintiff all the relief he sought would moot his case whether the plaintiff accepted it or not. That is no longer the case in the wake of the U.S. Supreme Court's split decision last Term in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013).

Genesis Healthcare involved a collective action under the Fair Labor Standards Act. The district court dismissed the case for lack of subject-matter jurisdiction after the defendant tendered a Rule 68 offer that fully satisfied the named plaintiff's claims, concluding that both the individual claims and the collective action claims were rendered moot by the offer. *Id.* at 1524. The U.S. Court of Appeals for the Third Circuit reversed. Although the court of appeals agreed that the named plaintiff's claims were moot, the court held that the collective action was not. *Id.* at 1524-25. The U.S. Supreme Court disagreed. In reaching its decision, however, the Court simply assumed — without deciding — that the Rule 68 offer mooted the plaintiff's individual claims, concluding that the issue had not been preserved. *Id.* at 1529. The majority's opinion then focused on whether the plaintiff's action "remained justiciable based on the collective-action allegations in her complaint" and concluded that it did not. *Id.* at 1528-29.

In a vigorous four-justice dissent, Justice Elena Kagan criticized the Court for proceeding to resolve "an imaginary question" rather than "correcting the Third Circuit's view that an unaccepted settlement offer mooted [the plaintiff]'s claim." *Id.* at 1532, 1537 (Kagan, J., dissenting). The dissent characterized the Third Circuit's resolution of this issue as "wrong, wrong, and wrong again." *Id.* at 1533. Relying on both basic principles of contract law as well as the plain language of Rule 68, Justice Kagan asserted that "an unaccepted offer of judgment cannot moot a case." *Id.* According to the Justice, "[a]n unaccepted settlement offer – like any unaccepted contract offer – is a legal nullity, with no operative effect," *id.*, and "[a]s every first-year law student learns, the recipient's rejection of an offer leaves the matter as if no offer had ever been made." *Id.* at 1533-34 (internal quotation marks and citation omitted). Justice Kagan then explained that "[n]othing in Rule 68 alters that basic principle; to the contrary, that rule specifies that 'an unaccepted offer is considered withdraw.'" *Id.* at 1534 (quoting Fed. R. Civ. P. 68(b)). She thus advised the Third Circuit to "[r]ethink [its] mootness-by-unaccepted-offer theory" and warned the other courts of appeals, "Don't try this at home." *Id.*

Shortly thereafter, the U.S. Court of Appeals for the Ninth Circuit took Justice Kagan's advice to heart. In *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948, 954-55 (9th Cir. 2013), the Ninth Circuit — after quoting extensively from the *Genesis Healthcare* dissent and expressing its conviction that "Justice Kagan has articulated the correct approach" — held that "an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot." *Id.* The court concluded that its holding was "consistent with the language, structure and purposes of Rule 68 and with fundamental principles governing mootness." *Id.* at 955. Other courts have also accepted this approach, *see, e.g., Church v. Accretive Health, Inc.*, No. 14-0057-WS-B, 2014 WL 1623787 (S.D. Ala. Apr. 24, 2014) (summarized on page 7); *Yaakov v. ACT, Inc.*, No. 12-40088-TSH, 2013 WL 6596720 (D. Mass. Dec. 16, 2013), *pet. for interlocutory review filed*, and the question is pending before still other courts, *see, e.g., Keim v. ADF Midatlantic LLC*, No. 13-13619 (11th Cir.) (appeal pending). By contrast, some courts have declined to follow Justice Kagan's approach, citing prior circuit precedent. *See, e.g., Hanover Grove Consumer Hous. Coop. v. Berkadia Commercial Mortg., LLC*, No. 13-13553, 2014 U.S. Dist. LEXIS 11918, at *15, *17 n.3 (E.D. Mich. Jan. 31, 2014) ("[a]lthough the Court sees Justice Kagan's dissent in Genesis Healthcare as the right decision, it is limited with binding Sixth Circuit precedent"; "[b]ecause defendant's Rule 68 Offer of Judgment covered all of plaintiff's individually requested relief, the claims effectively became moot"); *Bank v. Spark Energy Holdings LLC*, No. 4:11-CV-4082, 2013 WL 5724507, at *2 (S.D. Tex. Oct. 18, 2013) (noting that the U.S. Supreme Court declined to resolve the issue in *Genesis Healthcare*; "[t]hus this Court will continue to follow Fifth Circuit precedent").

The upshot is that the viability of using an offer of judgment to attempt to moot a class action depends more than ever before on the venue. As the ripples from Justice Kagan's dissent have been quick to make their way through the lower courts, it may not be long before the U.S. Supreme Court returns to the question left open in *Genesis Healthcare* and brings some much needed clarity in this area. Until that happens, practitioners will likely find that they can in fact "try this at home" in at least some circuits.

CLASS CERTIFICATION DECISIONS

Decisions Granting Motions to Strike

***Sauter v. CVS Pharmacy, Inc.*, No. 2:13-cv-846, 2014 WL 1814076 (S.D. Ohio May 7, 2014).**

In a lawsuit alleging that CVS violated the Telephone Consumer Protection Act (TCPA), Judge James L. Graham of the U.S. District Court for the Southern District of Ohio granted CVS's motion to strike the class allegations. The plaintiff proposed a class of individuals who received calls even though they did not provide prior consent. Because the TCPA prohibits using automated dialers to call cell phones without the phone owner's express consent, the court held that the class definition was impermissibly "fail-safe": the only members of the class (and thus the only individuals bound by a judgment) would be those individuals who could establish a TCPA violation. The court gave the plaintiff leave to file an amended complaint with revised class definitions.

***Alqaq v. CitiMortgage, Inc.*, No. 13 C 5130, 2014 WL 1689685 (N.D. Ill. Apr. 29, 2014).**

Judge William T. Hart of the U.S. District Court for the Northern District of Illinois granted the defendant's motion to strike class allegations in a putative class action against a group of mortgagees for making threats to dispossess the class members' homes and for dispossessing their homes before court orders had awarded possession. The court held that "resolution of the issues in this case will require individual inquiry into each purported class member's circumstances," such as "What harm occurred? Was the property entered? Were locks changed? Did such conduct occur prior to the mortgagee obtaining possession and/or the property being vacated? Who committed the acts?" Accordingly, questions of law and fact common to the class members would not predominate over questions affecting individual members.

***Monteleone v. Auto Club Group Memberselect Ins. Co.*, No. 13-CV-12716, 2014 WL 1652219 (E.D. Mich. Apr. 23, 2014).**

Judge George Caram Steeh of the U.S. District Court for the Eastern District of Michigan granted in part the defendants' motion to deny class certification, which was in essence a motion to strike that was filed jointly with a motion to dismiss. The plaintiffs sued their insurer and another defendant after their basement flooded and the insurer declined to pay the full extent of the claim. The plaintiffs' central theory was that the defendants had adopted an unlawful policy of denying claims of water damage whether legitimate or not. The plaintiffs asserted the existence of two putative classes of policyholders: individuals who made water-related property damage claims and received less than $10,000 (the "property damage" class); and a "premium" class of individuals who allegedly overpaid for homeowners' insurance (because the defendants allegedly conflated the coverage available for water damage caused by overflows with the more limited coverage for similar damage caused by backups). The court granted the motion to deny class treatment of the "property damage" class, explaining that the individual question of whether coverage existed for each policyholder would predominate over any common questions, even if the plaintiffs could prove the alleged uniform policy of denying coverage. The defendants' motion to deny certification of the overpaid-premium claims, however, was denied without prejudice because their argument was based on an affidavit that created a factual dispute (about whether the defendants in fact conflate the types of coverage).

***Trunzo v. CitiMortgage*, No. 2:11-cv-01124, 2014 WL 1317577 (W.D. Pa. Mar. 31, 2014).**

Judge Mark R. Hornak of the U.S. District Court for the Western District of Pennsylvania granted in part and denied in part mortgagees' motions to strike class in a putative class action challenging the collection of payments due under the plaintiffs' mortgage and associated note. The court granted defendant Citi's motion to strike, finding that the plaintiffs could not proceed with a Rule 23(b)(2) class because their amended complaint did not seek injunctive or declaratory relief, and they could not proceed with a Rule 23(b)(3) class because individualized issues of causation regarding each putative class member's loan would predominate over common issues. The court declined to strike the class allegations asserted against the other two defendants, rejecting their arguments that unique defenses made the named plaintiffs atypical and that the class was overbroad. According to the court, these arguments were more properly asserted at the class certification stage and not on the pleadings.

***Ryan v. Jersey Mike's Franchise Systems*, No. 13-CV-1427-BEN (WVG), 2014 WL 1292930 (S.D. Cal. Mar. 28, 2014).**

Judge Roger T. Benitez of the U.S. District Court for the Southern District of California granted the defendants' "motion to deny class certification" — which was similar in form to a motion to strike in that it was filed before class discovery was completed and before the deadline for the plaintiff's motion for class certification. The plaintiff alleged violations of the Telephone Consumer Protection Act and

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California statutory law and sought class certification of a nationwide class of all persons "who were sent one or more unauthorized text message advertisements" by the defendants. However, the plaintiff did not conclusively assert whether he had provided his phone number to the defendants, thereby giving them consent. Because the question of consent was critical to the plaintiff's federal and state law claims, the court deemed the plaintiff to be atypical of the class and concluded that "class action treatment [was] inappropriate" pursuant to Rule 23(a).

***Buonomo v. Optimum Outcomes, Inc.*, No. 13-cv-5274, 2014 WL 1013841 (N.D. Ill. Mar. 17, 2014).**

Judge Amy J. St. Eve of the U.S. District Court for the Northern District of Illinois granted in part and denied in part the defendant's motion to strike class allegations in a case alleging that the defendant made unauthorized calls to class members' cell phones in violation of the Telephone Consumer Protection Act. The court first held that the plaintiff's proposed class was overbroad because it included individuals, like the plaintiff, who received "wrong party" calls on their cell phones – *i.e.*, calls trying to reach the debtor who had previously been assigned to that cell phone number — as well as actual debtors. Accordingly, the court held that the plaintiff would be required to amend his proposed class definition to a narrower, "wrong party" class. As to the defendant's challenges based on ascertainability, commonality and predominance, the court held that such attacks were premature and that the plaintiff must have the opportunity to conduct discovery before the court determined whether the claims were susceptible to generalized proof.

***Wolfkiel v. Intersections Insurance Services Inc.*, No. 13 C 7133, 2014 WL 866979 (N.D. Ill. Mar. 5, 2014).**

Judge James B. Zagel of the U.S. District Court for the Northern District of Illinois granted in part and denied in part the defendant's motion to strike class allegations in a case alleging that the defendant made unsolicited marketing phone calls in violation of the Telephone Consumer Protection Act. The plaintiffs brought claims on behalf of two classes: (i) individuals who received marketing calls from the defendant who expressly revoked consent (the Revocation Class) and (ii) individuals who received marketing phone calls from the defendant who never consented (the No-Consent Class). The court held that the Revocation Class failed to satisfy Rule 23(b)'s predominance requirement because determining whether class members had revoked consent would require individual inquiries. But the court did not find a similar problem with the No-Consent Class, focusing on the allegation that all of the putative class members purchased a product from one seller and then allegedly received calls from another seller about an entirely different product, making it reasonable to infer that the putative class members had not consented to receive calls. Accordingly, the court granted the defendant's motion to strike the allegations relating to the Revocation Class, but denied the motion to strike the allegations relating to the No-Consent Class.

Decisions Denying Motions to Strike

***Humphreys v. Budget Rent A Car System, Inc.*, No. 10-cv-1302, 2014 WL 1608391 (E.D. Pa. Apr. 22, 2014).**

Judge Lawrence F. Stengel of the U.S. District Court for the Eastern District of Pennsylvania denied the defendants' motion to strike class allegations in a case arising out of a dispute over alleged damage to a car the plaintiff rented from Budget. Initially, the court noted that it was disinclined to strike class allegations before discovery produces information necessary to perform a rigorous analysis. This was particularly true because the allegations in the plaintiffs' complaint demonstrated that the requirements of class certification could be met. Budget had over 2,500 car rental locations, used standardized provisions in its rental contract and used standardized formulas for determining damage amounts. As such, there was nothing on the face of the pleadings to indicate that the case was "one of those rare instances" when class allegations should be stricken prior to discovery.

***Wilson v. Consolidated Rail Corp. (In re Paulsboro Derailment Cases)*, No. 13-784 (RBK/KMW), 2014 U.S. Dist. LEXIS 48209 (D.N.J. Apr. 8, 2014).**

Judge Robert B. Kugler of the U.S. District Court for the District of New Jersey denied a motion to strike class allegations in a suit brought by plaintiffs who allegedly suffered economic losses as a result of a train derailment and chemical spill in New Jersey. The defendants argued that the class was not ascertainable and that joinder was in fact practicable. With regard to ascertainability, the defendants relied on a line of cases denying class certification where there was no objective proof of class membership. The court found these cases distinguishable in two respects. For one thing, those cases involved motions for class certification — not motions to strike class allegations. Further, the court reasoned that ascertaining class membership would be relatively easy and verifiable: "The area affected by the chemical spill may be shown by discovery to be discrete, the applicable time frame is well established in the pleading, and purported class members either resided or did business within delineated areas or they did not." The court also refused to strike the class allegations on the ground that joinder of approximately 600 or more class members would be practicable. According to the court, such an inquiry would be better suited for resolution after the parties conducted discovery regarding the size of class and damages.

***James D. Hinson Electrical Contracting Co. v. AT & T Servs., Inc.*, No. 3:13-cv-29-J-32JRK, 2014 WL 1118015 (M.D. Fla. Mar. 20, 2014).**

Judge Timothy J. Corrigan of the U.S. District Court for the Middle District of Florida denied the defendants' motion to strike class allegations in a suit asserting claims for unjust enrichment and statutory fraud on behalf of a nationwide class with four subclasses. The plaintiffs — excavators who had damaged facilities maintained by the defendants — alleged that although they were required to pay repair costs under state statutes like the Florida Underground Facility Damage Prevention and Safety Act, the defendants improperly tacked on charges for loss of use and installation of marker balls. The defendants argued that variations in state law on unjust enrichment and on the permissible recovery for underground facilities made certification of the national class impossible under Rule 23(b)(3). The court held that any determination as to whether there are material conflicts among the states' laws would be premature. As it explained, "[d]epending on how discovery develops, material differences among the state statutes may fall away or at least become more manageable." Accordingly, the court directed the parties to engage in class discovery so that it could decide whether class certification was possible on a more fully developed record.

***McPherson v. Canon Business Solutions, Inc.*, No. 12-7761 (JBS/AMD), 2014 WL 654573 (D.N.J. Feb. 20, 2014).**

Judge Jerome B. Simandle of the U.S. District Court for the District of New Jersey denied the defendant's motion for partial summary judgment or, in the alternative, to strike the class definition. The plaintiff alleged that Canon Business Solutions violated the Fair Credit Reporting Act (FCRA) when it terminated her employment based on information received in a criminal background report without first providing her with proper disclosure or an opportunity to dispute the accuracy of the information. The plaintiff proposed claims on behalf of a class of employees and applicants who suffered similar adverse employment actions by Canon within the previous five years. The FCRA permits plaintiffs to bring claims not later than the earlier of (i) two years after the date of discovery of the violation by the plaintiff or (ii) five years after the date on which the violation occurs. The defendant took issue with including claims arising before the immediately preceding two-year period because individual issues would predominate over common issues as the court would have to engage in "individual mini-trial[s]" to determine when that person discovered her alleged FCRA violation. The court denied the defendant's motions, finding that Rule 23 issues should only be decided before a motion for certification where it is clear, "as a matter of law," that the plaintiff's class allegations must fail. The court concluded that doing so here would be premature and the plaintiff was entitled to reasonable discovery to support her class claims.

***Shamblin v. Obama For America* No. 8:13-cv-2428-T-33TBM, 2014 WL 631931 (M.D. Fla. Feb. 18, 2014).**

Judge Virginia M. Hernandez Covington of the U.S. District Court for the Middle District of Florida denied a motion to strike class allegations in a case alleging that defendant Obama for America violated the Telephone Consumer Protection Act by targeting voters' cell phones with unsolicited, auto-dialed calls and pre-recorded messages. The court explained that the issue of "[w]hether Plaintiff's claim deserves class treatment is a fact-dependent inquiry unsuitable for a motion to dismiss or strike." The court noted that motions to strike are drastic measures, disfavored by the courts, and more appropriately presented at the Rule 23 stage.

Decisions Rejecting/Denying Class Certification

***Bussey v. Macon County Greyhound Park, Inc.*, --- F. App'x ----, 2014 WL 1302658 (11th Cir. Apr. 2, 2014).**

On appeal from the U.S. District Court for the Middle District of Alabama, the U.S. Court of Appeals for the Eleventh Circuit (Hull, Black and Smith, JJ.) reversed Chief Judge W. Keith Watkins's grant of class certification. The plaintiffs, electronic bingo players, sued a gaming park and the manufacturers of electronic bingo machines, alleging that operation of the machines constituted illegal gambling activity and seeking money lost while playing the machines during the six months preceding the lawsuit. The defendants opposed certification, arguing that determining damages was an individualized inquiry despite the loyalty card program in which the players participated because players used each other's loyalty cards and some players loaned their cards to friends to accumulate extra points. The district court rejected these arguments and granted certification, holding that the presence of individualized damages issues does not defeat the predominance requirement, and that any "shortcomings of the data" should be addressed at the merits stage. The Eleventh Circuit reversed, relying on *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). According to the court, under *Comcast*, "class certification is an *evidentiary* question, not just an analysis of the pleadings." The district court's "fail[ure] to conduct the 'rigorous analysis' required by" *Comcast* could not be overlooked because the shortcomings in the loyalty card data were significant and bore directly on the issue of predominance. The court also noted that the plaintiffs had not identified any method for quantifying their losses at the game level, as opposed to the session level, even though their complaint sought recovery of game-level losses.

***Algarin v. Maybelline, LLC*, No. 12cv3000 AJB (DHB), 2014 WL 1883772 (S.D. Cal. May 12, 2014).**

Judge Anthony J. Battaglia of the U.S. District Court for the Southern District of California denied certification of a class of consumers seeking monetary and injunctive relief under California consumer-protection laws for alleged misrepresentations regarding the "long-wearing" nature of SuperStay makeup products. The court concluded that the class was overbroad because it did not exclude purchasers who received refunds and difficult to ascertain because Maybelline did not keep purchaser lists, and it was unlikely that purchasers had retained any proof of purchase. Judge Battaglia also found commonality and typicality lacking because a substantial number of class members were not misled by the claim that the makeup would last for 24 hours. Finally, Judge Battaglia held that the plaintiffs' damages model was speculative.

***Montgomery v. Kraft Foods Global, Inc.*, No. 1:12-CV-00149, 2014 WL 1875022 (W.D. Mich. May 9, 2014).**

Judge Gordon J. Quist of the U.S. District Court for the Western District of Michigan denied certification in a case involving allegedly deceptive coffeemaker packaging. The plaintiff alleged that the machine's packaging continued promoting its ability to brew Starbucks coffee for some period of time after Starbucks stopped providing supplies to create Starbucks-branded brewing packages. The court denied certification for lack of commonality and predominance. According to the court, the plaintiff had not produced any evidence that the proposed class members were influenced by the Starbucks representation, whereas the defendant pointed to market research showing that consumers purchased the machine for reasons unrelated to the Starbucks representation. Further, individualized damages calculations would overwhelm any questions common to the class because the machine did perform its essential function of brewing coffee, and each individual's alleged damages would therefore depend on the value that individual placed on having a coffeemaker that could brew Starbucks coffee in particular.

***Paulino v. Dollar Gen. Corp.*, No. 3:12-CV-75, 2014 U.S. Dist. LEXIS 64233 (N.D. W. Va. May 9, 2014), 23(f) pet. pending.**

Judge Gina M. Groh of the U.S. District Court for the Northern District of West Virginia denied the plaintiff's motion for class certification in a suit alleging that the defendants violated the West Virginia Wage Payment and Collection Act (WPCA) when they failed to pay the plaintiff her wages in full within 72 hours of her termination. The plaintiff sought to certify a class of all "former employees who were terminated within five years of the filing of suit and not timely paid, or, in the alternative, not paid the liquidated damages and interest as required by the WPCA." The court declined to certify the class for several reasons. The court first determined that the proposed class amounted to an impermissible "fail safe" class because it would have to analyze the "merits" of each class member's claim just to determine whether he or she was part of the class. The court also held that predominance was lacking because it would need to determine whether each class member was discharged under the meaning of the WPCA, which would involve highly individualized evidence — for example, the time and date of the discharge and the date of payment of final wage.

***Legg v. Voice Media Group, Inc.*, No. 13-62044-CIV-COHN/SELTZER, 2014 U.S. Dist. LEXIS 61836 (S.D. Fla. May 5, 2014).**

Judge James I. Cohn of the U.S. District Court for the Southern District of Florida denied a motion for class certification in a suit challenging a defendant company's alleged practice of sending unwanted text messages to individuals throughout the country. The plaintiff had once subscribed to the defendant's alert service, but then allegedly unsubscribed by texting the phrase "STOP ALL" to the defendant. The plaintiff asserted a claim under the Telephone Consumer Protection Act and sought to represent a class of Florida cellular telephone subscribers with various area codes who attempted to unsubscribe from receiving text messages from the defendant, but were subsequently sent such messages. The court denied the motion for class certification on multiple grounds. First, the court held that the class did not satisfy the numerosity requirement because the claim that the class included at least 1,026 individuals was based exclusively on expert evidence that had previously been excluded by the court. (The court had previously excluded that evidence because it "lack[ed] a foundation, [was] speculative, and dr[ew] on no special expertise." *Legg v. Voice Media Grp., Inc.*, No. 13-62044-CIV-COHN/SELTZER, 2014 U.S. Dist. LEXIS 61322, at *11 (S.D. Fla. May 2, 2014).) The court went on to explain that, even if it had not excluded that expert evidence, its conclusion with respect to numerosity would not change because the 1,026 figure was based on the total number of "Stop All" messages that were sent to the defendant rather than the number of individuals who continued to receive unwanted texts after sending the "Stop All" message.

***Ticknor v. Rouse's Enterprises, LLC*, No. 12-1151, 12-2964, 2014 WL 1764738 (E.D. La. May 2, 2014).**

Judge Susie Morgan of the U.S. District Court for the Eastern District of Louisiana denied the plaintiffs' motion to certify a class. The plaintiffs alleged that the defendant failed to properly truncate the plaintiffs' credit card information as required by the Fair and Accurate Transaction Act

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(FACTA). The court found that the plaintiffs were unable to establish that common questions of fact predominated. Specifically, the court noted that in order to recover under FACTA, each class member would have to show that he or she was a "consumer," a "cardholder," and received a receipt from the defendant's store, requiring individualized inquiries. The court also noted that the plaintiffs had effective alternatives for obtaining relief because FACTA permits plaintiffs to recover attorneys' fees, reducing the risk that individual plaintiffs would be deterred from bringing FACTA claims due to the high costs of litigation.

***Miri v. Clinton*, No. 11-15248, 2014 WL 1746403 (E.D. Mich. May 1, 2014).**

Nancy G. Edmunds of the U.S. District Court for the Eastern District of Michigan granted a motion to decertify a class after dismissing claims for injunctive relief in an action asserting claims for alleged violations of 42 U.S.C. § 1983 against the Michigan state treasurer and two Michigan state troopers. The court had previously certified a class of individuals and businesses who were subjected to searches or seizures of their property by the Michigan state treasurer that were not consented to and not judicially approved. On the defendants' motion, the court subsequently dismissed the injunctive-relief claims because the class was not under an imminent threat of repeated Fourth Amendment violations. Of the 162 class members, only 11 class members had viable damages claims against the defendants, because the putative damages claims of the other class members were barred by the statute of limitations. Because those 11 class members were all local and their identities were "easily ascertainable," joinder of those 11 class members was not impracticable. Consequently, the court decertified the class. (Judge Edmunds' initial order granting class certification is discussed in the Fall 2013 issue of the *Chronicle* on page 16.)

***Medina v. Public Storage, Inc.*, No. 12 C 00170, 2014 WL 1715517 (N.D. Ill. Apr. 30, 2014).**

Judge John J. Tharp, Jr. of the U.S. District Court for the Northern District of Illinois denied class certification in a case alleging that the defendant wrongly denied insurance coverage for items that were stolen from self-storage units rented from the defendant. Specifically, the plaintiff sought certification of a class in connection with her claim that the insurance policy's definition of burglary as requiring visible signs of "forcible entry" was unconscionable. The court, however, concluded that the plaintiff's claims were not typical of the class because the plaintiff was unable to prove that her storage unit was locked at the time of the theft.

***Alberton v. Commonwealth Land Title Insurance Co.*, No. 06-3755, 2014 WL 1643705 (E.D. Pa. Apr. 24, 2014), 23(f) pet. pending.**

The defendants in this class action alleging overcharges for title insurance in violation of the Title Insurance Rating Bureau of Pennsylvania Manual (the TIRBOP Manual) moved to decertify the class based on changes in both the procedural law governing class actions and the substantive law underlying the claim in the six years since the initial certification of the class. In particular, the U.S. Supreme Court's ruling in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), clarified that Rule 23(a)'s commonality requirement requires more than simply identifying some common questions. Instead, plaintiffs must establish that class members have suffered the same injury. The stricter interpretation of commonality (and similarly, typicality), combined with changes in the interpretation of the TIRBOP Manual, led the court to grant the motion for decertification. Judge Eduardo C. Robreno of the U.S. District Court for the Eastern District of Pennsylvania held that the plaintiffs failed to satisfy the commonality and typicality requirement because the court would need to determine, on a plaintiff-by-plaintiff basis, whether the proper discount rate was applied.

***Church v. Accretive Health, Inc.*, No. 14-0057-WS-B, 2014 WL 1623787 (S.D. Ala. Apr. 24, 2014).**

Chief Judge William H. Steele of the U.S. District Court for the Southern District of Alabama denied the plaintiff's motion for class certification in a case alleging violations of the Fair Debt Collection Practices Act. Before the defendant filed its responsive pleading or formal discovery commenced, the plaintiff filed simultaneously a barebones motion for class certification and a motion to stay consideration of that motion until class discovery had taken place. The concern that prompted the plaintiff to file the motion for class certification so early was the U.S. Court of Appeals for the Seventh Circuit's rule that a defendant could "'render moot a possible class action by offering to settle for the full amount of the plaintiff's demands before the plaintiff files a motion for class certification.'" This rule "spawned fears" that "defendants might 'pick off' . . . a putative class representative via unaccepted offer of judgment, thereby mooting a class action *before* the plaintiff had been able to complete the necessary discovery to file a Rule 23 motion." The court held that this concern "might be compelling" in the Seventh Circuit, but such a rule "recently faced a withering attack from four U.S. Supreme Court Justices in *Genesis Healthcare Corp. v. Symczk*, 133 S. Ct. (Kagan, J., dissenting)." Because the plaintiff's "straight-out-of-the-chute" motions could not advance her case, but would only impose administrative costs, both motions were denied as premature.

***In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 1:12-md-2343, 2014 WL 1623705 (E.D. Tenn. Apr. 23, 2014).**

Judge Curtis L. Collier of the U.S. District Court for the Eastern District of Tennessee denied the plaintiffs' motion for reconsideration of his order denying class certification in a case claiming that pharmaceutical manufacturers violated antitrust laws by allegedly conspiring to delay generic competition. The court previously ruled that the proposed class of consumers and end payors was not ascertainable because determining whether an entity incurred an increased price for the branded drug due to the lack of generic competition in a given transaction would depend on whether the end payor had a price-sharing arrangement with a pharmacy benefit manager or welfare plan. In seeking reconsideration, the plaintiffs highlighted an industry expert's declaration, attached to their sur-sur-reply, which would have allegedly altered the court's analysis if properly considered. The court rejected this argument because it had already considered the declaration in its original opinion, and the declaration was duplicative of other evidence the plaintiffs had presented. The court also rejected the plaintiffs' argument that it should have, as an alternative, certified a consumer-only class. None of the named plaintiffs were individual consumers; the named plaintiffs had never sought to certify a consumer-only class; and since the time for filing motions for class certification had passed, there would be little judicial economy realized by reconsidering the order to create a new class, which would presumably require additional briefing and discovery. (Judge Collier's initial order denying class certification is discussed in the Spring 2014 issue of the *Chronicle* on page 5.)

***Yordy v. Plimus, Inc.*, No. 12-cv-00229-TEH, 2014 WL 1466608 (N.D. Cal. Apr. 15, 2014).**

Judge Thelton E. Henderson of the U.S. District Court for the Northern District of California denied a renewed motion for certification of a narrower class of purchasers who purportedly paid a fee processed by defendant Plimus for "unlimited downloads" of media titles at three "Unlimited Download Websites" (UDWs), but received content that violated copyright law or was already available for free. (The previous order denying class certification involving 19 different websites was summarized in the Winter 2013 issue of the *Chronicle* on page 6.) In support of the renewed bid, the plaintiff argued that there were common questions to the class, including, *inter alia*, whether Plimus knew that the products offered by the UDWs were fraudulent but failed to suspend them or demand changes. The court held, however, that the answer to such a question would have no bearing on the validity of the plaintiff's claim against Plimus as required by *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). This is because the plaintiff's causes of action — including those under California's False Advertising Law, Consumer Legal Remedies Act and Unfair Competition Law — require that a defendant directly participate in the alleged unlawful activity, and thus the question whether Plimus knew of the UDW's fraud was "not central" to Plimus's liability. Moreover, the court also concluded that the plaintiff could offer "no evidence that Plimus operated in [a] similar manner with respect to all three websites such that its liability [could] be assessed as to all three websites together" or that Plimus's involvement with the allegedly false advertising was common across all UDWs. For these reasons, commonality could not be satisfied.

***Caldera v. J.M. Smucker Co.*, No. CV 12-4936-GHK (VBKX), 2014 WL 1477400 (C.D. Cal. Apr. 15, 2014).**

The plaintiff sought certification of four classes of consumers alleging violations of various California consumer protection statutes and breaches of implied and express warranties based on allegedly misleading packaging implying that certain products were healthy when in fact they contained trans-fats and/or high fructose corn syrup. Chief Judge George H. King of the U.S. District Court for the Central District of California refused to certify monetary relief classes under Rule 23(b)(3) because the plaintiff had no classwide proof to support her claim for restitution. According to the court, the California sales data offered by the plaintiff was insufficient because "[r]estitution based on a full refund would only be appropriate if not a single class member received any benefit from the products," and the evidence showed some class members received some benefit. The court also held that "restitution may be proven on a classwide basis by computing the effect of unlawful conduct on the market price of the product purchased by the class," but that the plaintiff failed to introduce any such evidence, which would vary anyway, depending on individual consumer motivation.

***Gomez v. Kroll Factual Data, Inc.*, No. 13-cv-0445-WJM-KMT, 2014 WL 1456530 (D. Colo. Apr. 14, 2014).**

Judge William J. Martinez of the U.S. District Court for the District of Colorado denied certification of a class of consumers seeking statutory damages for negligent and willful violations of the Fair Credit Reporting Act (FCRA). According to the court, the allegedly common issue of the reasonableness of the defendant's procedures did not predominate because "[t]he success of the class members' claims will depend on several issues that must be determined individually: (1) whether the credit report was inaccurate; and (2) whether Defendant willfully failed to comply with the FCRA."

***In re Photochromic Lens Antitrust Litig.*, No. 8:10-md-02173-T-27EA, 2014 WL 1338605 (M.D. Fla. Apr. 3, 2014).**

Judge James D. Whittemore of the U.S. District Court for the Middle District of Florida denied a motion for class certification in a multi-district litigation proceeding involving antitrust claims brought by three groups of direct purchasers, alleging that the defendant engaged in anticompetitive conduct in the development, manufacture and sale of photochromic treatments for corrective ophthalmic lenses. The court found that the plaintiffs had not sustained their burden of demonstrating that the named plaintiffs would adequately represent the absent class members. Specifically, the court found the potential for fundamental conflicts within the class between those class members who benefitted from their exclusive dealing with the defendant and those who suffered net economic harm.

***Cox v. Sherman Capital LLC*, No. 1:12-cv-01654-TWP-MJD, 2014 WL 1328147 (S.D. Ind. Mar. 31, 2014).**

Judge Tanya Walton Pratt of the U.S. District Court for the Southern District of Indiana sustained the defendant's objections to the report and recommendation of the magistrate judge relating to class certification. The case involved alleged misconduct associated with the collection of debts in violation of the Fair Debt Collection Practices Act. The plaintiffs filed a motion for class certification simultaneously with the filing of their complaint. The plaintiffs did not file a brief in support of their motion, and no discovery on class certification was conducted. The court observed that the plaintiffs could not rely upon conclusory allegations or speculation as to the size of the class to show numerosity. Because the plaintiffs' numerosity allegations were made "on information and belief," they were speculative and could not support a finding that the numerosity requirement had been satisfied. In addition, the plaintiffs' complaint did not provide any detail in support of their conclusory assertion that their claims were typical of other class members' claims; nor did it provide any explanation as to which plaintiff purportedly represented which subclass.

***Martin v. Mountain State Univ., Inc.*, No. 5:12-03937, 2014 WL 1333251 (S.D. W. Va. Mar. 31, 2014).**

Judge David A. Faber of the U.S. District Court for the Southern District of West Virginia denied the plaintiff's motion for class certification in a suit alleging harm suffered as a result of the defendant university's loss of accreditation in July 2012. The plaintiff sought to represent a class defined as "[a]ll individuals who reside outside West Virginia and had enrolled in any program at Mountain State University prior to July 10, 2012," alleging claims of negligence, breach of fiduciary duty, negligent misrepresentation, unjust enrichment, breach of contract and violation of the West Virginia Consumer Credit and Protection Act. The court held that the plaintiff failed to demonstrate predominance under Rule 23(b)(3) because he did not present any choice-of-law analysis. The court also held that the varied circumstances of the proposed class members indicated that individualized proof of damages and causation would overwhelm any common issues.

***McPeters v. LexisNexis*, No. 4:11-CV-2056, 2014 WL 1321117 (S.D. Tex. Mar. 31, 2014).**

Judge Keith P. Ellison of the U.S. District Court for the Southern District of Texas denied the plaintiffs' motion to certify a class in an action alleging, among other things, that the county courts' e-filing system and fees violated the Texas Deceptive Trade Practices Act (DTPA). In addition to other relief, the plaintiffs moved to certify a class for violations of the DTPA which states, in pertinent part, that a "consumer" may bring suit where "any unconscionable action or course of action by any person" causes "economic damages or damages for mental anguish." The court refused to certify the class because adjudicating an unconscionability claim would require individualized inquiries into what each class member knew and the relative sophistication of each class member.

***Barton v. RCI, LLC*, No. 10-3657 (PGS)(DEA), 2014 WL 1292236 (D.N.J. Mar. 31, 2014).**

The plaintiff moved to certify a class of individuals who had entered into a participation agreement with RCI, a vacation-exchange program at certain resorts. The plaintiffs alleged that RCI induced them to enter into an agreement by explaining that points could be used for a wide variety of vacation-related expenses and then subsequently restricted the number of points that could be exchanged for airline tickets, cruises and car rentals (but not resort stays) in violation of the New Jersey Consumer Fraud Act. Judge Peter G. Sheridan of the U.S. District Court for the District of New Jersey denied the motion for class certification, holding that the experiences of class representatives were sufficiently different from those of the putative class members to preclude certification. In particular, the variety of ways that member used (or did not use) their points indicated that many putative class members may not have suffered any economic harm and individualized issues would therefore predominate.

***Byrd v. Aaron's, Inc.*, No. 11-101E, 2014 WL 1316055 (W.D. Pa. Mar. 31, 2014), 23(f) pet. pending.**

Judge Cathy Bissoon of the U.S. District Court for the Western District of Pennsylvania adopted the recommendation of Magistrate Judge Susan Paradise Baxter to deny the plaintiffs' motion to certify a class of plaintiffs

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who alleged violations of the Electronic Communications Privacy Act related to surveillance by Aaron's Inc. of computers purchased or leased from the company. The court held that the plaintiffs failed to meet the threshold requirement of ascertainability because it would be difficult to identify every individual who used a sold or leased computer and because it would not be feasible to determine whose information was collected.

***Seibert v. Quest Diagnostics Inc.*, No. 11-0304 (KSH), 2014 WL 1293510 (D.N.J. Mar. 31, 2014).**

Judge Katharine S. Hayden of the U.S. District Court for the District of New Jersey denied certification of a class of former sales employees of Quest Diagnostics Inc. who were terminated without full severance benefits after placement on a performance improvement plan. The plaintiff sought injunctive relief under the Employee Retirement Income Security Act, which prohibits employers from making a "conscious decision to interfere with the employee's attainment of . . . benefits." The court found that the plaintiff did not meet the adequacy and typicality requirements of Rule 23(a) because the plaintiff had other avenues of relief available to her (including administrative appeals and claims under a state statute) that may not be available to the other class members and because the plaintiff may be entitled to a different benefit payout than the other members of the proposed class. The court also found that the superiority and predominance factors of Rule 23(b) were not satisfied. Common issues did not predominate within the class because class members faced different geographical challenges and worked under different managers, all possibly affecting their performance, and a class action was not the superior method of resolving the dispute because individual plaintiffs would be better able to tailor their claims to their lengths of service and territorial/market-based realities.

***Mullis v. Mountain State Univ., Inc.*, No. 5:12-03158, 2014 WL 1276150 (S.D. W. Va. Mar. 27, 2014).**

Judge David A. Faber of the U.S. District Court for the Southern District of West Virginia denied a motion for class certification in a case alleging that the defendant university failed to provide geographically convenient or otherwise practicable clinical sites at which students could fulfill the Diagnostic Medical Sonography (DMS) clinical externship requirements. The complaint alleged five causes of action: breach of contract, negligence, negligent misrepresentation, unjust enrichment/breach of quasi-contract and violation of the West Virginia Consumer Credit and Protection Act. The court denied the motion for class certification on numerosity grounds because the plaintiff's enrollment chart represented students who chose DMS as a major — not those students who were actually accepted into the online DMS program underlying the lawsuit, which was a more modest number.

***In re POM Wonderful LLC*, No. ML 10-02199 DDP (RZx), 2014 WL 1225184 (C.D. Cal. Mar. 25, 2014).**

At the conclusion of class discovery, Judge Dean D. Pregerson of the U.S. District Court for the Central District of California granted the defendant's motion to decertify a damages class of consumers of Pom Wonderful 100% juice product asserting claims under California's consumer protection law for allegedly false and misleading advertising regarding the health benefits of certain juice products. Despite rejecting the defendant's interpretation of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the court found that both of the plaintiffs' proposed damages models were unworkable. The plaintiffs' model that used the full retail price paid as the measure of damages was not an appropriate determination of restitutionary damages because it failed to account for any value consumers received in the form of hydration, vitamins and minerals. The plaintiffs' model calculating a "price premium" was also flawed because it was essentially a "fraud on the market" theory, which was not relevant to damages or consumer actions. The court held that "where, as here, consumers buy a product for myriad reasons, damages resulting from the alleged misrepresentations will not possibly be uniform or amenable to class proof," and the plaintiffs' expert did not even attempt to explain how the alleged misrepresentations led to a higher price. The court also concluded that there was no administratively manageable method of determining class membership because "[n]o bottle, label, or package included any of the alleged misrepresentations" and "[f]ew, if any, consumers are likely to have retained receipts during the class period, which closed years before the filing of this action." Thus, "despite Plaintiffs' best efforts, there is no way to reliably determine who purchased Defendant's products or when they did so."

***Steimel v. Minott*, No. 1:13-cv-957-JMS-MJD, 2014 WL 1213390 (S.D. Ind. Mar. 24, 2014).**

Judge Jane Magnus-Stinson of the U.S. District Court for the Southern District of Indiana denied class certification in a case brought against various Indiana state agencies alleging violations of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973. The plaintiff, on behalf of a putative class of developmentally disabled individuals, argued that the agency's policy change relating to Medicaid waiver services caused many individuals to face a reduction in services. The court concluded that identifying putative class members who would face a reduction in services would require a complex, highly individualized inquiry into the specific needs of each enrollee. Thus, the putative class was not sufficiently ascertainable to permit certification.

***Sandusky Wellness Center, LLC v. Wagner Wellness, Inc.*, No. 3:12 CV 2257, 2014 WL 1224418 (N.D. Ohio Mar. 24, 2014), 23(f) pet. granted.**

Judge David A. Katz of the U.S. District Court for the Northern District of Ohio denied a motion to certify a class of individuals who allegedly received unsolicited faxes in violation of the Telephone Consumer Protection Act (TCPA). The court explained that if the recipient of an allegedly unsolicited fax had given permission to send the fax or had a prior established business relationship with the fax's sender, then there was no TCPA violation. Because the proposed class included individuals who had given permission or had an established relationship with the sender, there was no TCPA violation as to faxes sent to those individuals, and commonality was lacking.

***In re TRS Recovery Services, Inc.*, No. 2:13-MD-2426-DBH, 2014 WL 1119695 (D. Me. Mar. 20, 2014).**

Judge D. Brock Hornby of the U.S. District Court for the District of Maine denied the plaintiffs' motion to certify four additional classes of residents of California, Kansas, New York and North Carolina who received allegedly misleading letters from TRS Recovery Services (a debt collector), purportedly in violation of the Federal Debt Collection Practices Act (FDCPA), after related lawsuits from those states were transferred to his court by the Judicial Panel on Multidistrict Litigation. (The court had previously certified a class of Maine residents asserting FDCPA claims against TRS.) The court held that the named plaintiffs in the Maine lawsuit could not represent the four new proposed classes because of statute of limitations issues. The court rejected the plaintiffs' argument that certification of a class of Maine residents tolled the limitations period for members of the proposed California, Kansas, New York and North Carolina classes.

***In re Google Inc. Gmail Litig.*, No. 13-MD-02430-LHK, 2014 WL 1102660 (N.D. Cal. Mar. 18, 2014), 23(f) pet. denied.**

Judge Lucy H. Koh of the U.S. District Court for the Northern District of California denied the plaintiffs' motion to certify four classes and three subclasses in a multidistrict litigation proceeding involving alleged violations of state and federal anti-wiretapping laws. Judge Koh found that the question whether email users in the proposed classes consented to the alleged interceptions of email was a central issue in the case, and individual issues of consent were likely to predominate over common issues, making class certification inappropriate. In particular, the question whether email users gave implied consent would require examining individual circumstances such as the "panoply of sources" from which the email users could have learned of Google's interceptions, including media sources and Google's own policies.

***Automotive Leasing Corp. v. Mahindra & Mahindra, Ltd.*, No. 1:12-CV-2048-TWT, 2014 WL 988871 (N.D. Ga. Mar. 14, 2014).**

Judge Thomas W. Thrash, Jr. of the U.S. District Court for the Northern District of Georgia declined to certify a proposed class in a suit arising out of the defendant manufacturer's decision not to enter the U.S. market after agreeing to allow various motor vehicle dealers to distribute its vehicles in the United States. The plaintiffs brought suit on behalf of all motor vehicle dealers who agreed to distribute the defendant's vehicles in the United States before the defendant announced it would not be entering the U.S. market. The plaintiffs sought to recover the fees they paid to the defendant for the right to distribute its cars in the domestic market. The court concluded that the plaintiffs failed to meet the requirements of Rules 23(a) and 23(b). According to Judge Thrash, the class failed the commonality requirement of Rule 23(a) because the plaintiffs did not present any evidence that Georgia state law, under which they brought suit, "would necessarily apply to all of the putative class members' state law claims." Further, the court found that the determinations of which law to apply to class members' claims for unjust enrichment and promissory estoppel would require individualized choice-of-law analyses among class members sufficient to defeat commonality. The court also found that the class did not meet the predominance requirement of Rule 23(b)(3), noting that the damages amounts individual plaintiffs sought to recover varied considerably, and that the "need for individualized assessments of damages counsels against class certification under Rule 23(b)(3)."

***Henke v. Arco Midcon, L.L.C.*, No. 4:10CV86 HEA, 2014 WL 982777 (E.D. Mo. Mar. 12, 2014).**

Judge Henry Edward Autrey of the U.S. District Court for the Eastern District of Missouri denied class certification in a case involving allegations of property damage caused by contamination from the defendants' pipeline. The plaintiffs sought to certify a class of individuals who owned property on which there was a record indicating there was a leak or spill of petroleum but no report indicating the leak or spill had been remediated. According to the court, such a class was not ascertainable because it necessitated individual inquiries as to whether a remediation record could be found and correlated with each potential class member's property. The named plaintiffs also failed to sufficiently establish that they were members of the class because they had not come forward with evidence that they owned property with a record of a leak or spill from the pipeline. Finally, the court held that the plaintiffs failed to meet the requirements of both Rule 23(a) and (b) because, *inter alia*, the most important questions in the litigation were individualized — did the putative class member's property have any contamination and was it from the defendant's pipeline?

***Slapikas v. First American Title Insurance Co.*, No. 06-0084, 2014 WL 899355 (W.D. Pa. Mar. 7, 2014).**

Judge Joy Flowers Conti of the U.S. District Court for the Western District of Pennsylvania granted the defendant's motion for decertification of a class of Pennsylvania homeowners alleging that the title insurance company First American overcharged homeowners for title insurance when they refinanced their home mortgages. The plaintiff class sought relief under the Unfair Trade Practices and Consumer Protection Law (UTPCPL). Because UTPCPL actions require that the plaintiff show justifiable reliance on the defendant's wrongful conduct, the court found that individualized issues would predominate over common ones.

***Chapman v. First Index, Inc.*, No. 09 C 5555, 2014 WL 840565 (N.D. Ill. Mar. 4, 2014).**

Judge Sara L. Ellis of the U.S. District Court for the Northern District of Illinois denied class certification in a case alleging that the defendant sent unsolicited fax messages in violation of the Telephone Consumer Protection Act. Because the defendant had submitted uncontroverted evidence that it obtained consent prior to sending faxes to the contacts in its database, the court agreed that individualized inquiries regarding consent precluded class certification. Specifically, the court noted that it would be required to engage in case-by-case inquiries to determine whether each fax was transmitted without prior express invitation or permission, making the class unascertainable and defeating predominance.

***Karhu v. Vital Pharmaceuticals, Inc.*, No. 13-60768-CIV, 2014 WL 815253 (S.D. Fla. Mar. 3, 2014), 23(f) pet. denied.**

Judge James I. Cohn of the U.S. District Court for the Southern District of Florida declined to certify a putative nationwide false advertising class involving the dietary supplement Meltdown. The plaintiff consumer brought claims against a pharmaceutical company, alleging consumer fraud and breach of warranty. The plaintiff sought to represent all persons in the United States who have purchased Meltdown for purposes other than resale since April 4, 2008. The court denied the motion for class certification, finding that the class was not ascertainable and also failed Rule 23(b)(3)'s predominance requirement. With respect to ascertainability, the court emphasized that the defendant sold mostly to distributors and retailers rather than to consumers directly. Thus, the defendant did not have a record of individuals who purchased the product, making it virtually impossible to ascertain class membership. The court also found that predominance was not satisfied in light of the wide variations among the relevant state laws.

***Labou v. Cellco Partnership*, No. 2:13-cv-00844-MCE-EFB, 2014 WL 824225 (E.D. Cal. Mar. 3, 2014).**

Chief Judge Morrison C. England, Jr. of the U.S. District Court for the Eastern District of California denied certification of a nationwide class of "'all persons within the United States who received any telephone calls from Defendant [doing business as Verizon] . . . made through the use of any automatic telephone dialing system; in the past four years,' when that person 'had not previously . . . provided their cellular telephone number to Defendant.'" The plaintiff, a non-Verizon customer, brought two claims for negligent and willful violations of the Telephone Consumer Protection Act, alleging that she received automated calls on her cellular phone from the defendants, attempting to collect unpaid bills owed by the plaintiff's former brother-in-law. The court found that the plaintiff failed to meet the typicality requirement of Rule 23(a)(3) because she was a non-Verizon customer, whereas most of the putative class members were Verizon customers who "have written contracts containing provisions both for automated calls upon prior written consent and for arbitration." The plaintiff similarly failed to meet the adequacy requirement under Rule 23(a)(4) since, as a non-Verizon customer, she "neither possess[ed] the same interest nor suffer[ed] the same injury as the majority of the proposed class."

***Phillips v. Philip Morris Cos. Inc.*, No. 5:10CV1741, 2014 WL 809005 (N.D. Ohio Feb. 28, 2014).**

Judge Sara Lioi of the U.S. District Court for the Northern District of Ohio denied a motion to certify a class of purchasers of Marlboro Lights cigarettes in a suit claiming that Philip Morris had falsely claimed that light cigarettes delivered less tar and nicotine than full-flavored cigarettes. The plaintiffs alleged claims for fraud, unjust enrichment and breach of express and implied warranties. As a preliminary matter, the court rejected the plaintiffs' argument that an Ohio state trial court decision in a predecessor case certifying a class against Philip Morris for violation of the Consumer Sales Practices Act (CSPA) was law of the case requiring certification here. According to the court, that decision only certified the CSPA claim, it was reversed by the Ohio Supreme Court, it was ultimately voluntarily dismissed (and re-filed in federal court), and the decision did not undertake the "rigorous analysis" required for class certification in federal court. The court went on to conclude that Rule 23(b)(3)'s predominance requirement was not satisfied, for three reasons. First, based on expert analysis, a significant percentage of the putative class may have received the benefit of the bargain (a lower tar and nicotine cigarette), making the class overinclusive. Second, the plaintiffs' fraud and warranty claims required proof of actual reliance on the alleged misrepresentations, which would necessitate individualized inquiries. Third, in

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contrast to the washing machines in *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014), there was no alleged inherent defect or defective design in the light cigarettes. Accordingly, the plaintiffs did not have classwide proof of injury.

***Hugh's Concrete & Masonry Co. v. Southeast Personnel Leasing, Inc.*, No. 8:12-CV-2631-T-17AEP, 2014 WL 794317 (M.D. Fla. Feb. 26, 2014).**

Judge Elizabeth A. Kovachevich of the U.S. District Court for the Middle District of Florida declined to certify a proposed class on the basis that it failed to meet the numerosity, commonality and typicality requirements of Rule 23(a). The plaintiff, a concrete contractor, sued an employee-leasing company for allegedly over-withholding payroll taxes. In denying certification, Judge Kovachevich held that the plaintiff failed to offer anything "beyond mere speculation" regarding class size. At most, the plaintiff alleged that the defendant was "one of the largest privately owned companies in Florida" and had a "broad Internet advertising campaign." But this did not constitute "substantive proof" that the numerosity requirement was satisfied. Similarly, while the plaintiff attempted to prove commonality by alleging that the defendant entered into standardized agreements and uniformly charged certain taxes, the court held that the plaintiff failed to offer any evidence beyond these allegations that was sufficient to meet the commonality requirement. Finally, as to typicality, the plaintiff's allegation that it would be able to show that all class members were damaged in the same manner and suffered the same injuries after discovery was insufficient.

***Spread Enterprises, Inc. v. First Data Merchant Services Corp.*, No. 11-CV-4743 (ADS) (AKT), 2014 WL 724803 (E.D.N.Y. Feb. 22, 2014), 23(f) pet. pending.**

Judge Arthur D. Spatt of the U.S. District Court for the Eastern District of New York denied class certification in breach-of-contract case brought by a merchant against a credit card processing company. The plaintiff had alleged that the processing company charged duplicative authorization fees on certain credit card transactions. Judge Spatt determined that the plaintiff failed to meet the numerosity, commonality and predominance requirements of Rule 23 because, *inter alia*, other merchants using defendants' services might have had different fee arrangements or may not have experienced similar charges. (Judge Spatt then dismissed the named plaintiff's claims for lack of subject-matter jurisdiction, believing that jurisdiction no longer existed under the Class Action Fairness Act.)

***Grodzitsky v. American Honda Motor Co.*, No. 2:12-cv-01142-SVW-PLAx, 2014 WL 718431 (C.D. Cal. Feb. 19, 2014).**

Judge Stephen V. Wilson of the U.S. District Court for the Central District of California denied certification of a nationwide class of consumers who purchased or leased vehicles manufactured and sold by Honda with allegedly defective window regulators. The court held that the plaintiffs failed to establish commonality pursuant to Rule 23(a)(2) because they did not provide evidence that all of the window regulators in all class vehicles were made of the same materials. As such, the court concluded, "Plaintiffs have not established that the question 'is there a defect?' is capable of classwide resolution." The court also assessed predominance under Rule 23(b)(3) in light of the "highly analogous" *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012). The court held that because Honda "presented evidence sufficient to show material differences between state consumer protection laws on matters material to the instant dispute — intent, reliance, and class representation," common issues did not predominate over individual issues as required pursuant to Rule 23(b)(3).

Decisions Permitting/Granting Class Certification

***Rodriguez v. It's Just Lunch, Int'l*, No. 07 Civ. 9227(SHS), 2014 WL 1921187 (S.D.N.Y. May 14, 2014).**

Judge Sidney H. Stein of the U.S. District Court for the Southern District of New York granted certification of a nationwide class with respect to fraud claims but denied certification of unjust enrichment claims. The defendants offered personalized matchmaking services, and the plaintiffs alleged that they were enticed to pay exorbitant fees ($1,000 for one year of service) as a result of the defendants' misrepresentations. The court denied certification of the unjust enrichment claim because the plaintiffs had not demonstrated that common questions predominated in light of state law variations. As to common law fraud, however, the court held that the defendants' representations regarding "multiple matches" were materially uniform, that the plaintiffs could prove reliance through common evidence and that variations in state fraud laws did not preclude a finding of predominance. Second, the court determined that a class action was the superior mode of adjudicating the fraud claims because class members would have little interest in controlling such low-value claims individually.

***Baker v. Castle & Cooke Homes Hawaii, Inc.*, No. 11-00616 SOM-RLP, 2014 WL 1669158 (D. Haw. Apr. 28, 2014).**

Chief Judge Susan Oki Mollway of the U.S. District Court for the District of Hawaii adopted the magistrate judge's recommendation and certified a class of homeowners in a housing development whose plumbing systems were constructed with allegedly defective brass fittings. The court held that the proposed class contained at least 40 potential class members, enough to satisfy the numerosity requirement, and the common contention that the fittings at issue were defective products met the commonality and predominance requirements. Judge Mollway rejected the defendant's argument that the named plaintiffs were inadequate representatives because they did not understand certain scientific and legal issues.

***Lanovaz v. Twinings North America, Inc.*, No. C-12-02646-RMW, 2014 WL 1652338 (N.D. Cal. Apr. 24, 2014), 23(f) pet. pending.**

Judge Ronald M. Whyte of the U.S. District Court for the Northern District of California granted in part and denied in part the plaintiff's motion for class certification of a purported class of tea purchasers. The plaintiff alleged that she paid a premium for green and black tea, and would not have purchased the teas but for the defendant's unlawful labeling that described the tea as a "Natural Source of Antioxidants." The court found the proposed class was ascertainable because it was administratively feasible to determine whether a particular individual was a member of the class. The court also held that the plaintiff's claims were typical, since all of the products included in the class definition, including the products purchased by the named plaintiff, had the same statement on the label and were made from the same type of tea plant. Finally, the question of materiality was a common question, based on whether a reasonable consumer would attach importance to the antioxidant statements. For these reasons, the court certified a class for injunctive relief under Rule 23(b)(2). However, because the plaintiff could not provide a damages model that would link a price premium to the allegedly misleading statements about antioxidants, the court denied certification of a damages class under Rule 23(b)(3).

***Forcellati v. Hyland's, Inc.*, No. CV 12-1983-GHK-MRWx, 2014 WL 1410264 (C.D. Cal. Apr. 9, 2014).**

Chief Judge George H. King of the U.S. District Court for the Central District of California certified a nationwide consumer-fraud and warranty class in a case alleging that the defendants' homeopathic cold and flu products were defective and deceptively marketed. Before delving into the class certification analysis, Judge King found that California law applied to the class claims under California's choice-of-law regime because the defendants were headquartered in that state. In so doing, the court rejected the defendants' reliance on *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012), focusing on the defendants' failure to identify any material differences between the consumer-protection and warranty laws of California and those of other states. The court next concluded that the class was sufficiently ascertainable, even though there were no sales records identifying individuals in the class. According to Judge King, the defendants did not have a due-process right to challenge class membership because "[their] aggregate liability is tied to a concrete, objective set of facts—[their] total sales—that will remain the same no matter how many claims are submitted." In addition, resolving the issue of class membership was not a barrier to class certification because any unclaimed damages would be distributed via a cy pres remedy. The court also concluded that the express Rule 23 prerequisites were satisfied, reasoning that the defendants' representations regarding their products' ability to "safely and effectively treat flu and cold symptoms" were uniform and their veracity could be established through clinical studies and expert testimony.

***Hawk Valley Inc. v. Taylor*, No. 10-cv-00804, 2014 WL 1302097 (E.D. Pa. Mar. 31, 2014), 23(f) pet. denied.**

Judge James Knoll Gardener of the U.S. District Court for the Eastern District of Pennsylvania granted the plaintiff's motion to certify a class of plaintiffs who received unsolicited facsimile advertisements sent by the defendant in violation of the federal Telephone Consumer Protection Act (TCPA). The court held that despite the presence of some individualized issues, the primary facts, including the fact that the fax numbers were received from a common purveyor, were common to the class, pointing to other TCPA cases as precedent.

***Smith v. ConocoPhillips Pipe Line Co.*, No. 4:11-CV-2040-JAR, 2014 WL 1314942 (E.D. Mo. Mar. 31, 2014), 23(f) pet. granted.**

Judge John A. Ross of the U.S. District Court for the Eastern District of Missouri granted in part and denied in part the plaintiffs' motion for class certification in an action resulting from petroleum contamination from a leak in the defendant's pipeline system. The plaintiffs sought to certify both a property damage class and a medical monitoring class. The defendant challenged both the property damage and medical monitoring class definitions, arguing that they were overbroad because they encompassed property that may not have been exposed to the contamination or individuals who were not exposed. The court rejected the argument with respect to the property damage class, finding that there was sufficient evidence of exposure to support that class definition. However, the court was persuaded that the medical monitoring class definition was inadequate for lack of proof of exposure.

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The court so reasoned because while the plaintiffs provided expert evidence of property damage exposure, they did not furnish any evidence showing exposure on the part of individuals — a requirement for medical monitoring. The court therefore denied the motion for class certification as to the medical monitoring class. The court certified the property damage class, however, concluding that common issues regarding the contamination predominated and that a class action was superior to other methods of adjudication because "[t]he proof regarding the history of the pipeline system, the leak, the impact on the soil and groundwater, possible remedies, etc. would be identical."

***In re Cablevision Consumer Litig.*, No. 10-CV-4992 (JS)(AKT), 2014 WL 1330546 (E.D.N.Y. Mar. 31, 2014).**

Judge Joanna Seybert of the U.S. District Court for the Eastern District of New York granted class certification in a consumer class action arising out of Cablevision Systems Corp. and CSC Holdings, LLC's failure to provide certain programming on networks owned by Fox Cable Network Services during a two-week period. The plaintiffs alleged that Cablevision failed to credit any of its subscribers for the two weeks they were without the Fox channels and did not provide alternative programming to replace them. Judge Seybert found that the plaintiffs satisfied Rule 23's requirements of numerosity, commonality, typicality and adequate representation. According to Judge Seybert, whether Cablevision's failure to provide Fox channels was a "program or service interruption" under the Terms of Service was common to all putative class members. The court found that predominance was also satisfied because (i) each class member was bound by the same standard form contract; (ii) whether the voluntary payment doctrine and the contract's notification provision applied were common issues and (iii) damages could be determined on a classwide basis. Judge Seybert also rejected Cablevision's argument that class certification was improper because the class included members who lacked Article III standing.

***In re Electronic Books Antitrust Litig.*, No. 11 MD 2293(DLC), 2014 WL 1282293 (S.D.N.Y. Mar. 28, 2014), 23(f) pet. denied.**

Judge Denise L. Cote of the U.S. District Court for the Southern District of New York granted class certification in this "paradigmatic antitrust class action." The plaintiffs were a class of customers who allegedly paid inflated prices for e-books as a result of a centralized price-fixing conspiracy between Apple Inc. and five major publishers. In the court's words: "'where plaintiffs were allegedly aggrieved by a single policy of the defendant[ ], and there is a strong commonality of the violation and the harm, this is precisely the type of situation for which the class action device is suited.'" The court also determined that a class action was superior to other methods of adjudication because the class members' injuries were so minor that no other practical method of adjudication existed.

***Kristensen v. Credit Payment Services*, No. 2:12-CV-00528-APG, 2014 WL 1256035 (D. Nev. Mar. 26, 2014).**

Judge Andrew P. Gordon of the U.S. District Court for the District of Nevada certified a nationwide class of all individuals who were sent a text message from three identified telephone numbers during a specified time period. The plaintiff brought claims under the Telephone Consumer Protection Act, alleging that the defendants marketed their services by causing their agents to send an unauthorized text message to his cell phone. According to the court, the plaintiff identified "several common issues" that would "generate common answers," including (i) whether the equipment used to send the text messages was an automatic telephone dialing system, as defined by statute; (ii) whether defendants were vicariously liable for the text messages and (iii) whether the class members expressly consented to receive the text messages. As the court explained, vicarious liability turned on federal agency principles that looked to the defendants' relationship and conduct, without any need to determine how individual class members perceived or acted upon the text message. Similarly, the court held that it "should ignore a defendant's argument that proving consent necessitates individualized inquiries" where, as in that case, there was an "absence of any evidence that express consent was actually given" by any class member. The court cautioned, however, that should the defendants "develop proof of consent that requires burdensome, individualized inquiries, the Court [could] take remedial measures up to and including decertification."

***Cox v. Community Loans of America, Inc.*, No. 4:11-CV-177 (CDL), 2014 WL 1216511 (M.D. Ga. Mar. 24, 2014), 23(f) pet. pending.**

Judge Clay D. Land of the U.S. District Court for the Middle District of Georgia certified a damages class of active duty military service members and their dependents alleging that the defendant vehicle loan companies violated the Military Lending Act (MLA), which imposes limitations on terms of consumer credit extended to service members and their dependents, and the Racketeer Influenced and Corrupt Organizations Act (RICO). The gravamen of the plaintiffs' suit was that, after entering into vehicle title loan transactions, the plaintiffs were unable to redeem their car titles, and their vehicles were either repossessed or subject to repossession. According to the plaintiffs, these vehicle title loan transactions violated the MLA because the annual percentage rate of interest for each loan far exceeded the MLA's limit of thirty-six percent.

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The plaintiffs sought to certify a class of "[a]ll covered members of the armed services and their dependents who . . . entered into a vehicle title loan by any means with Defendants in violation of the Military Lending Act . . . from October 1, 2007 to January 2, 2013." The court first granted the defendants summary judgment on the RICO claim, obviating the need to address the certifiability of that claim. With respect to the MLA claim, the defendants objected to class treatment under Rule 23(b)(2), arguing that the plaintiffs requested damages and that this relief was not "incidental" to their claims for injunctive relief. The court agreed, reasoning that each class member could recover a different amount of damages based on the amount of interest paid and the amount of the loan at issue. However, the court granted certification under Rule 23(b)(3) on the MLA claim, holding that a damages class of service members and their dependents satisfied the requirements of that Rule 23 subsection, summarily concluding that common issues of law and fact predominated.

***Helmer v. Goodyear Tire & Rubber Co.*, No. 12-cv-00685-RBJ-MEH, 2014 WL 1133299 (D. Colo. Mar. 21, 2014), 23(f) pet. denied.**

The plaintiffs sought certification of a putative class of Colorado homeowners who alleged that the rubber hoses used in radiant heating systems were defectively designed. Judge R. Brooke Jackson of the U.S. District Court for the District of Colorado certified a Rule 23(b)(3) class of Colorado homeowners. The court found that the class of at least 132 Colorado homeowners was sufficiently numerous, and typicality and commonality were satisfied because the potential class members were all exposed to the same injury — degradation of the tubing — "regardless of the factual differences between them." In the court's view, "requir[ing] absolute homogeneity of factual and legal circumstances among a putative class would grant defendants in products liability actions like this one a trump card of sorts." The court rejected the defendant's argument that incorrect installation caused the plaintiffs' injuries and that individualized questions of causation would overwhelm common issues and defeat predominance. According to the court, it would not "refuse to certify a class that otherwise meets the requirements of Rule 23 simply because the defendant raises potentially persuasive arguments about why the plaintiffs will fail on the merits." The court also rejected a separate Article III standing argument based on the fact that many of the hoses had not yet malfunctioned because the "plaintiffs have introduced evidence demonstrating that Entran 3 hoses will degrade over time, within the expected lifetime of the product, and that such degradation will cause malfunctions," which established actual, concrete injury to any homeowner with that product installed.

***Lowell v. Summer Bay Management, L.C.*, No. 3:13-CV-229-TAV-CCS, 2014 WL 1092187 (E.D. Tenn. Mar. 17, 2014).**

Chief Judge Thomas A. Varlan of the U.S. District Court for the Eastern District of Tennessee adopted Magistrate Judge C. Clifford Shirley, Jr.'s recommendation that three classes of timeshare owners be certified in a case against the timeshare developer and the individual who controlled it. Rather than focusing on the requirements of class certification, the defendants argued that the case should be dismissed for two reasons: (i) the court lacked subject-matter jurisdiction under CAFA and (ii) orders in a different case precluded the plaintiffs' claims here. The court, however, approved of the magistrate's refusal to *sua sponte* consider whether CAFA jurisdiction was lacking because that issue was not referred to the magistrate for consideration by the district judge, and the defendants' failure to file a motion to dismiss on that ground denied the plaintiffs an opportunity to properly brief the issue. Similarly, the court rejected the defendants' argument that the orders in a separate case between the defendants and the homeowners' associations precluded these claims because the court was not required to consider whether the claim might be subject to a subsequent dispositive motion in determining whether commonality, typicality or adequacy exist.

***Rodman v. Safeway, Inc.*, No. 11-cv-03003-JST, 2014 WL 988992 (N.D. Cal. Mar. 10, 2014).**

Judge Jon S. Tigar of the U.S. District Court for the Northern District of California granted in part and denied in part certification of a nationwide class of all persons who "registered to purchase groceries through Safeway.com" before Safeway modified its terms of use (the Special Terms), and who "purchased groceries at any time through Safeway.com that were subject to the price markup implemented on or about April 12, 2010." The plaintiff brought a breach-of-contract claim based on allegations that the Special Terms conveyed that the items purchased would be delivered from a specific brick-and-mortar store close to the purchaser, and that the prices charged would be the same as if the consumer shopped at that store. Instead, prices charged to online consumers were 10 percent higher than the in-store prices. The court held that the plaintiff proposed two common questions related to the breach-of-contract claim that could be resolved on a classwide basis, since "[t]he resolution of [the] dispute over the meaning of the Special Terms is far more likely to hinge on the objectively reasonable interpretation of the contractual language rather than the interrogation of each individual class member's personal understanding of these words." However, the court refused to certify the plaintiff's statutory consumer protection claims under California law, because "it appears that an overwhelming majority of Safeway.com customers did not view the alleged misrepresentations."

***Cason-Merenda v. VHS of Michigan, Inc.*, No. 06-15601, 2014 WL 905828 (E.D. Mich. Mar. 7, 2014).**

Chief Judge Gerald E. Rosen of the U.S. District Court for the Eastern District of Michigan reinstated his order certifying a class of nurses asserting antitrust claims based on the defendant hospitals' alleged agreement to keep down nurses' wages, following a Sixth Circuit order instructing reconsideration in light of the U.S. Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). The nurses presented two theories — either the hospitals agreed to keep down nurses' wages (a per se violation) or they agreed to exchange wage-related information, which led to a softening of compensation (a rule-of-reason violation). The defendant argued that the class could not be certified under *Comcast* because the nurses offered "only a single calculation of [ ] damages" and the court had dismissed claims based on the per se theory. The defendant contended that because the "single calculation" had been made when two theories were pending, it no longer fit the class. The court disagreed, noting that the plaintiffs had offered a single calculation that could work for either theory.

***Lasalle Town Houses Cooperative Association v. City of Detroit ex rel. Detroit Water & Sewage Department*, No. 12-cv-13747, 2014 WL 824917 (E.D. Mich. Mar. 3, 2014).**

Judge Gershwin A. Drain of the U.S. District Court for the Eastern District of Michigan certified a class of property owners in an action claiming that the city of Detroit violated the equal protection clause by allegedly classifying multi-unit residential structures as commercial buildings for purposes of water and sewage rates. In opposing certification, the city argued that a settlement agreement from an earlier class action barred the plaintiffs' equal protection claim because the classes were identical. The court rejected the city's argument that the doctrine of *res judicata* barred the plaintiffs' constitutional claims (even though a prior class action with an arguably identical class had been settled), because the parties had not yet developed an adequate record to address the question whether enforcing the earlier release to bar constitutional claims would violate public policy. Noting that the city had stipulated to class action treatment in the prior action, the court found that the proposed class clearly satisfied Rule 23's numerosity, commonality, typicality and adequacy requirements. Further, the court held that a class action was a superior method of resolving the litigation, because individual actions could require the city to engage in incompatible standards with respect to its billing for water and sewage services.

***Gragg v. Orange Cab Co.*, No. C12-0576RSL, 2014 WL 794266 (W.D. Wash. Feb. 27, 2014).**

Judge Robert S. Lasnik of the U.S. District Court for the Western District of Washington granted class certification of a class of customers of the defendant taxi cab company who allegedly were sent at least one marketing text message without prior express consent, in violation of Washington's Commercial Electronic Mail Act (CEMA). First, the court found that there were common questions of law and fact, including whether the defendant sent the text messages, whether the text message constituted a "commercial text message" under CEMA, and whether any exceptions or defenses to CEMA liability applied. As to typicality, the court rejected the defendant's argument that the plaintiff's claims were factually different from some class members' claims on the basis that significant numbers of the proposed class provided express consent to the marketing texts. The court noted that the class definition specifically excluded customers who had given prior consent, and the plaintiff alleged a uniform practice in which the defendants "intentionally denied customers the opportunity to opt out, making express consent a non-issue."

***Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561 (S.D.N.Y. 2014), 23(f) pet. denied.**

Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York certified a class of olive oil purchasers who claimed that the defendants sold a product labeled "100% Pure Olive Oil" when in fact the oil contained an industrially processed substance called pomace. Judge Rakoff refused to follow earlier S.D.N.Y. case law addressing ascertainability and determined that "the class action device, at its very core, is designed for cases like this where a large number of consumers have been defrauded but no one consumer has suffered an injury sufficiently large as to justify bringing an individual lawsuit." The court thus determined that while the ascertainability difficulties were formidable, they "should not be made into a device for defeating the action." The court also rejected the defendants' arguments that common issues did not predominate because some class members may have purchased the olive oil without relying on the label and therefore could not have suffered any damages as a result of the misrepresentation. The court held that because "100% Pure Olive Oil" was the name of the product itself, consumers necessarily had to rely on it. Finally, the court determined that common issues would still predominate even if it had to apply the laws of several states because there were no material differences among the relevant states with respect to common law fraud.

Makaeff v. Trump University, LLC,
No. 3:10-cv-0940-GPC-WVG, 2014 WL 688164 (S.D. Cal. Feb. 21, 2014), 23(f) pet. denied.

Judge Gonzalo P. Curiel of the U.S. District Court for the Southern District of California certified five subclasses of participants in certain Trump University real-estate investment seminars. The plaintiffs alleged violations of California, New York and Florida consumer protection statutes as well as several common law causes of action, including fraud and elder financial abuse, arising from allegedly false representations in the advertising and in the programs themselves. The court certified a Rule 23(b)(3) class, rejecting the defendants' contention that the student experiences varied by program, price and individual performance, because the allegations that the advertising and program materials falsely represented the accreditation status of Trump University and the extent of Donald Trump's involvement and further mentoring and support applied classwide. As to the California, New York and Florida subclasses asserting consumer protection claims, the court concluded that the class members were not required to prove individualized reliance on the misrepresentations due to the uniform nature of the promotional campaign and the likelihood that each class member was exposed to the same representations. The court also certified two senior citizen subclasses for elder financial abuse under California and Florida law for similar reasons. However, Judge Curiel refused to certify a nationwide class and nine other proposed subclasses because of variations among the relevant laws.

Other Class Certification Decisions

***McMahon v. LVNV Funding,* LLC, 744 F.3d 1010 (7th Cir. 2014).**

A unanimous panel of the U.S. Court of Appeals for the Seventh Circuit (Wood, C.J., Flaum and Sykes, JJ.) concluded that the named plaintiff's rejection of the defendant's settlement offer did not moot his interest in a putative class action alleging violations of the Fair Debt Collection Practices Act. The plaintiff's original complaint brought both individual and class claims. The court dismissed the class claims but expressly granted the plaintiff permission to amend and allege narrower class claims. Two hours after that ruling, the defendant tried to "pick off" the plaintiff's individual claims with an offer of settlement. The plaintiff rejected the offer and filed an amended class action complaint and motion for class certification two days later. The court concluded that the defendant's offer of settlement did not moot the plaintiff's claims because the plaintiff "already had brought his class claims before the district court" at the time of the settlement offer and "was diligent in pursuing his class claims."

Guadiana v. State Farm Fire & Casualty Co.,
No. CIV 07-326 TUC FRZ, 2014 WL 977671 (D. Ariz. Mar. 13, 2014).

Magistrate Judge Leslie A. Bowman of the U.S. District Court for the District of Arizona denied the defendant's motion to decertify a class of Arizona homeowners pursuing breach-of-contract claims based on State Farm's alleged failure to pay tear out and replacement costs for plumbing repairs pursuant to their homeowners' policies. The court found a common issue in the plaintiff's expert's contention that if a leak in a certain piping system is found, regardless of cause or severity, the entire piping system would need to be replaced. The court also held that there were no new legal or factual developments justifying reopening the issues of ascertainability or predominance of individual issues as to calculation of damages.

CLASS ACTION FAIRNESS ACT DECISIONS

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

Grawitch v. Charter Communications, Inc.,
--- F.3d ----, 2014 WL 1718737 (8th Cir. May 2, 2014).

A unanimous panel of the U.S. Court of Appeals for the Eighth Circuit (Wollman, Bye and Melloy, JJ.) affirmed the district court's judgment and held that the district court had jurisdiction under CAFA in a suit alleging that Charter Communications, Inc. violated the Missouri Merchandising Practices Act by allegedly providing class members with internet modems that were incapable of operating at the speed Charter had promised. The court observed that the plaintiffs alleged a nationwide class consisting of at least 50,000 members and sought to recover up to $50,000 in damages per class member. "Based on these allegations," the court concluded, "a jury might conclude that the class suffered damages of more than $5 million [], even if the individual class members' monthly overpayment was minimal."

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***Clark v. Lender Processing Services*, --- F. App'x ----, 2014 WL 1408891 (6th Cir. Apr. 14, 2014).**

A unanimous panel of the U.S. Court of Appeals for the Sixth Circuit (Cole, Rogers and Hood, JJ.) held that CAFA provided the district court with subject-matter jurisdiction to hear the plaintiffs' state law consumer protection claims arising from residential foreclosures after dismissing related federal law claims. The court held that CAFA's home-state and local-controversy exceptions were not jurisdictional, and thus, the plaintiffs' failure to press their argument before the district court waived that argument. As the court explained, CAFA "speaks only of a district court's *declining* jurisdiction if the exceptions apply. This language clearly indicates that the exceptions do not deprive the court of jurisdiction it otherwise possesses because a court could not 'decline' jurisdiction that it never had in the first place."

***Johnson v. Pushpin Holdings, LLC*, 748 F.3d 769 (7th Cir. 2014).**

A unanimous panel of the U.S. Court of Appeals for the Seventh Circuit (Posner, Rovner and Tinder, JJ.) granted interlocutory review and reversed the district court's decision remanding a putative class action alleging violation of the Illinois Consumer Fraud Act. Although the complaint limited the class claim to $3.5 million in damages, the court recognized that the U.S. Supreme Court's decision in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), prevented the named plaintiff from limiting the amount of potential damages in the complaint for purposes of CAFA.

***Louisiana v. American National Property & Casualty Co.*, 746 F.3d 633 (5th Cir. 2014).**

A unanimous panel of the U.S. Court of Appeals for the Fifth Circuit (Jolly, Smith and Clement, JJ.) reversed the district court's order remanding certain individual cases, which had been severed from a CAFA class action, to state court. Louisiana brought suit in state court against several insurance companies to recover on homeowner insurance policies that were purchased by Louisiana citizens but later assigned by the policy holders to the State in return for financial assistance in repairing and rebuilding the policy holders' homes. The defendant insurance companies asserted jurisdiction under CAFA and removed the case to federal district court. The state subsequently dropped its class action allegations, severed the instant individual action (and 1,503 others like it), from the original action, and filed an amended complaint for the individual cases, which were assigned to different district court judges. The defendants argued that federal jurisdiction continued to exist over the severed cases because jurisdictional facts are assessed at the time of removal and are not affected by later events. The district courts disagreed, but the Fifth Circuit reversed. According to the appellate panel, jurisdiction remains over severed claims that were originally subject to federal jurisdiction. To hold otherwise, the Fifth Circuit explained, would be inconsistent with the text of CAFA, which focuses on the status of an action when filed.

***Lemy v. Direct General Finance Co.*, --- F. App'x ----, 2014 WL 903371 (11th Cir. Mar. 10, 2014).**

The U.S. Court of Appeals for the Eleventh Circuit (Hull, Hill and Pannell, JJ.) affirmed the district court's ruling that the local-controversy exception to CAFA did not apply. The plaintiffs brought a class action in state court against a group of insurers, alleging that the defendants acted in concert to sell the plaintiffs a worthless insurance product in violation of the Florida Insurance Code. The defendants included one local defendant and two out-of-state entities. When the defendants removed the action under CAFA, the plaintiffs moved to remand, invoking the local-controversy exception. As the court explained, under CAFA, a local controversy is one in which the plaintiffs are seeking significant relief from a local defendant. Inasmuch as the plaintiffs sought restitution of insurance premiums paid by the Florida class, the district court assessed the share of insurance premiums retained by the local defendant compared to the others, determining that it retained only 4.5 percent of the total premiums paid by the class. On appeal, the Eleventh Circuit held that this finding was not erroneous.

***O'Shaughnessy v. Cypress Media, L.L.C.*, No. 4:13-cv-0947-DGK, 2014 WL 1791065 (W.D. Mo. May 6, 2014).**

Judge Greg Kays of the U.S. District Court for the Western District of Missouri denied the plaintiffs' motion to remand in a class action alleging that a newspaper publisher unlawfully double-billed its subscribers. The court observed that there were approximately 763,313 potential class members, and "[a]ssuming compensatory damages of $9.24 per class member, the compensatory damages in dispute alone exceed $7 million, not including punitive damages or attorneys' fees." The court also found that minimal diversity was satisfied. Moreover, the court rejected the plaintiffs' attempt to invoke CAFA's local-controversy exception, noting that (i) less than two-thirds of the proposed class members were citizens of Missouri, the state in which the action was filed; and (ii) no defendant was a citizen of Missouri.

***Hug v. American Traffic Solutions, Inc.*, No. 4:14CV00138 ERW, 2014 WL 1689303 (E.D. Mo. Apr. 29, 2014).**

Judge E. Richard Webber of the U.S. District Court for the Eastern District of Missouri denied the plaintiff's motion to remand in a lawsuit brought on behalf of a proposed class of all persons accused of a red-light violation based upon a red-light camera in the city of St. Louis, Missouri since the enactment of an ordinance authorizing such cameras. The court concluded that the defendant had demonstrated the $5 million amount in controversy requirement by a preponderance of the evidence. The plaintiff alleged that the class contained thousands of members, that a $100 fine was typically assessed against those accused of red light violations, and that the defendant issued several thousand red light camera violations per month — resulting in fines of over $5 million for the most recent five years of the ordinance's enforcement. Moreover, the defendant's senior account manager provided a declaration stating that over 280,000 violation notices were paid in full or in part over the past five years. Thus, given the standard fee of $100 per violation, the amount in controversy would be as much as $28 million. Because the plaintiff did not attempt to establish to a legal certainty that less than $5 million was in controversy, the court denied the plaintiff's motion to remand.

***Dutcher v. Matheson*, No. 2:11-CV-666 TS, 2014 WL 1660585 (D. Utah Apr. 25, 2014).**

After the U.S. Court of Appeals for the Tenth Circuit remanded the action for the purpose of determining CAFA jurisdiction, Judge Ted Stewart of the U.S. District Court for the District of Utah found that jurisdiction existed under CAFA. The proposed class consisted of all persons whose homes had been sold by the defendants in allegedly unlawful foreclosure sales. The court held that the plaintiffs had not established that the local-controversy exception applied because (i) the plaintiffs did not introduce any evidence to show that two-thirds of the proposed class members were Utah citizens; (ii) "Plaintiffs' hyperbolic characterization of the importance of [certain resident defendants] to their claims" was contradicted by the complaint's allegations establishing that the resident defendants were merely agents of the primary defendants and were "at most, ancillary defendants"; and (iii) another class action asserting the same factual allegations against the same defendants had been filed eight months before the instant action in federal court. The court declined to apply the home-state exception to CAFA jurisdiction for the same reasons, and also noted that, *inter alia*, the class claims implicated the National Banking Act and therefore would not be governed entirely by Utah state law.

***Fergerstrom v. PNC Bank, N.A.*, No. 13-00526 DKW-RLP, 2014 WL 1669101 (D. Haw. Apr. 25, 2014).**

Judge Derrick K. Watson of the U.S. District Court for the District of Hawaii adopted the magistrate judge's findings and recommendation denying the plaintiff's motion to remand. The magistrate judge found that the plaintiff's proposed class exceeded 100 members, and defendant PNC timely asserted the court's jurisdiction pursuant to CAFA. The proposed class included consumers subjected to a notice of foreclosure sale on behalf of PNC. According to the defendant, the class contained between 108 and 144 putative members. However, the plaintiff disagreed, arguing that certain of those individuals should be excluded from the class. The magistrate judge found these exclusions to be inconsistent with the plaintiff's own class definition, and once the improperly excluded mortgagers were accounted for, CAFA's 100-person numerosity requirement was met. While PNC removed the case more than 30 days after it was served with the complaint, this delay was excusable, as the plaintiff's complaint affirmatively alleged that there were less than 100 proposed class members. PNC timely invoked CAFA jurisdiction once it discovered the plaintiff's allegation about the number of affected homeowners was incorrect.

***Marino v. Countrywide Financial Corp.*, No. SACV 14-0046-JLS (ANx), 2014 WL 1631414 (C.D. Cal. Apr. 23, 2014).**

Judge Josephine L. Staton of the U.S. District Court for the Central District of California denied the plaintiff's motion to remand a class action alleging inadequate disclosures with respect to adjustable rate mortgages. Judge Staton rejected the plaintiff's argument that CAFA's home-state exception applied, finding that the non-resident Bank of America defendants were "primary defendants" under 28 U.S.C. § 1332(d)(4)(B), because their potential liability as alleged successors-in-interest was "more akin to direct liability than vicarious liability," and because the plaintiff sought relief from all the defendants collectively. The court also found that the local-controversy exception did not apply because the alleged wrongful conduct — issuing loans — was not confined to California but was "national in scope."

***Williams v. Employers Mutual Casualty Co.*, No. 4:13-CV-2393 SNLJ, 2014 WL 1375470 (E.D. Mo. Apr. 8, 2014).**

Judge Stephen N. Limbaugh, Jr. of the U.S. District Court for the Eastern District of Missouri denied the plaintiff's motion to remand. The plaintiff brought an equitable garnishment action against several insurers on behalf of a previously certified class of individuals, seeking to satisfy a judgment previously obtained by the class in a state court

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action for damages caused by drinking and using contaminated water in a mobile home park. After one of the defendants removed the case to federal court, the plaintiff moved to remand to state court, arguing that her garnishment action did not qualify as a "class action" under CAFA. The court rejected the plaintiff's argument, concluding that the plaintiff's lawsuit "seeks to recover for the class, and it undoubtedly 'resembles' a class action and thus should be considered as such for the purpose of CAFA."

***Barfield v. Sho-Me Power Electric Cooperative*, No. 2:11-cv-04321-NKL, 2014 WL 1343092 (W.D. Mo. Apr. 4, 2014).**

Judge Nanette K. Laughrey of the U.S. District Court for the Western District of Missouri denied the defendant's motion to dismiss for lack of jurisdiction under CAFA. The court concluded that the defendant did not make the motion within a reasonable time, as required by the U.S. Court of Appeals for the Eighth Circuit. The court noted that more than 26 months had passed since the case was filed in federal court and that extensive discovery and motion practice had been in progress. Moreover, the defendant had not provided a persuasive reason for its lengthy delay in filing the motion to dismiss. Accordingly, the court denied the defendant's motion and declined to consider its substantive arguments regarding the applicability of the local controversy or home-state exceptions to CAFA jurisdiction.

***Moll v. Intuitive Surgical, Inc.*, No. 13-6086, 2014 WL 1389652 (E.D. La. Apr. 1, 2014).**

Judge Eldon E. Fallon of the U.S. District Court for the Eastern District of Louisiana denied the plaintiff's motion to remand and dismissed the plaintiff's claims against defendant Ochsner Health Systems. The plaintiff, a Louisiana resident, filed a class action to recover for injuries allegedly sustained from a robot-assisted laparoscopic hysterectomy. The court rejected the plaintiff's argument that CAFA's local-controversy exception applied and explained that because the plaintiff's case was not sufficiently provincial in nature, it was not the type of dispute for which CAFA's local-controversy exception was created. In particular, the robotic device at issue in the case had been distributed throughout the United States, and the company that manufactured and designed the product was not a Louisiana entity. In short, "[t]here is nothing about [the plaintiff's] alleged injury that suggests it is unique to individuals in Louisiana."

***Downing v. Riceland Foods, Inc.*, No. 4:13CV321 CDP, 2014 WL 1316776 (E.D. Mo. Mar. 31, 2014).**

Judge Catherine D. Perry for the U.S. District Court for the Eastern District of Missouri denied the defendant's motion to dismiss for lack of subject-matter jurisdiction under CAFA. The plaintiffs filed a putative class action in federal court on behalf of all persons or entities that provided or paid for common benefit services in connection with multidistrict litigation involving genetically modified rice. The defendant argued that the class had fewer than 100 class members because any putative class member that had settled in the multidistrict litigation had necessarily released all claims against the defendant. The court noted, however, that a release is a contract-based affirmative defense and does not strip the court of subject-matter jurisdiction. Moreover, the defendant had not provided any evidence — even excluding class members who had signed releases — that the number of proposed class members was less than 100. Accordingly, the defendant failed to carry its burden of showing that there were fewer than 100 plaintiffs in the proposed class, and the court denied the defendant's motion to dismiss under CAFA.

***Stewart v. Ruston Louisiana Hospital Co., LLC*, No. 3:14-CV-00083-RGJ-KLH, 2014 WL 1246139 (W.D. La. Mar. 25, 2014).**

Magistrate Judge Karen L. Hayes of the U.S. District Court for the Western District of Louisiana denied the plaintiffs' motion to remand a class action alleging various violations of state law related to the defendants' billing and collection practices. The plaintiffs advanced two arguments in support of remand: (i) the defendants did not prove that CAFA's $5 million amount-in-controversy threshold had been met and (ii) the local-controversy exception applied. The court was unconvinced by the plaintiffs' first argument, relying on a declaration submitted by the defendants showing that over $10 million was collected on behalf of the hospital defendants by the collection agency defendant. The court also held that the plaintiffs failed to provide sufficient evidence that the local-controversy exception applied. Specifically, the plaintiffs did not offer evidence showing that at least two-thirds of the expansively defined class were residents of Louisiana, a requirement for invoking this CAFA exception. The court noted that the plaintiffs could have limited the class to unnamed residents or citizens of Louisiana, but chose not to, belying their argument that the local-controversy exception applied.

***Michelle's Restaurant of Georgetown, Inc. v. Advanced Disposal Services, Inc.*, No. 4:13-CV-488 CDL, 2014 WL 824211 (M.D. Ga. Mar. 3, 2014).**

Judge Clay D. Land of the U.S. District Court for the Middle District of Georgia denied the plaintiffs' motion to remand after finding that the amount in controversy exceeded $5 million. The plaintiffs contracted with the defendants for solid waste disposal services. When the relationship soured, the plaintiffs filed a putative class action alleging claims for trespass, unjust enrichment,

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breach of contract and violation of Georgia's Racketeer Influenced & Corrupt Organizations (RICO) Act. The RICO claims were based on the defendants' collection of various fees, including a "fuel surcharge," a "fuel/environmental fee," and "administration fees." In support of removal, the defendants produced affidavits stating that they had "recognized revenues" attributable to the fees that the plaintiffs challenged in excess of $5 million during the time period alleged in the complaint. The court accepted this evidence and held that the defendants had shown by a preponderance of the evidence that the amount in controversy exceeded the jurisdictional minimum.

***Clements v. DIRECTV, LLC*, No. 4:13-cv-4048, 2014 WL 794287 (W.D. Ark. Feb. 27, 2014).**

Judge Susan O. Hickey of the U.S. District Court for the Western District of Arkansas denied the plaintiffs' motion to remand in a putative class action alleging that DIRECTV converted Arkansas customers' property when it made unauthorized charges on their credit and debit cards. The court found that DIRECTV had carried its burden of showing by a preponderance of the evidence that CAFA's amount-in-controversy requirement had been met. DIRECTV submitted a declaration stating that it had initiated charges of $5,599,114.61 on Arkansas residents' credit and debit cards during the class period. This amount, which exceeded $5 million, did not take punitive damages and attorneys' fees into consideration. Further, plaintiffs had offered no evidence showing that it was legally impossible to recover in excess of $5 million. The court also concluded that DIRECTV had established by a preponderance of the evidence that the class was made up of at least 100 members.

Decisions Granting Motion to Remand/Finding No CAFA Jurisdiction

***Perritt v. Westlake Vinyls Co.*, --- F. App'x ----, 2014 WL 1410256 (5th Cir. Apr. 14, 2014).**

A unanimous panel of the U.S. Court of Appeals for the Fifth Circuit (Davis, Southwick and Higginson, JJ.) affirmed the district court's order remanding consolidated class actions to state court. The plaintiffs sought damages resulting from an explosion at the defendants' factory that released toxic chemicals into the local area. The defendants removed all of the class actions resulting from the explosion. The district court determined that the cases did not satisfy the 100-plaintiff and $5 million jurisdictional threshold, and the court of appeals agreed. According to the court, the defendants were still required to either submit summary judgment evidence of the amount in controversy and number of class members or demonstrate that it was "facially apparent" from the plaintiffs' pleadings that CAFA's requirements were met. The defendants had submitted an affidavit to the district court that did not provide any estimate of the claims that the defendants would be required to pay and did not contain sufficient facts that would help the court determine the number of class members. Remand was therefore appropriate.

***Parson v. Johnson & Johnson*, --- F.3d. ---, 2014 WL 1399750 (10th Cir. Apr. 11, 2014).**

A unanimous panel of the U.S. Court of Appeals for the Tenth Circuit (Briscoe, C.J., McKay and Anderson, JJ.) affirmed the district court's decision remanding 11 product liability actions brought by 650 plaintiffs against manufacturers of transvaginal mesh medical devices. At the outset, 702 plaintiffs from 26 different states and Puerto Rico brought 12 "nearly identical" actions against the defendants, corporate residents of New Jersey, in the same Oklahoma state court. None of the individual actions contained 100 or more plaintiffs, each action included at least one New Jersey resident plaintiff and all 12 actions were assigned to the same state court judge. The complaints stated that the claims had been joined for the purpose of pretrial discovery and proceedings but disclaimed joinder for trial purposes. The Tenth Circuit rejected the claim that these filings constituted "gamesmanship" intended to evade jurisdiction under CAFA. Analyzing CAFA's statutory text, legislative history and case law interpreting the "mass action" provision, the court concluded that "[f]ar from 'proposing' a joint trial" as required to constitute a mass action, the "plaintiffs here have explicitly disclaimed such an intention in their complaints." Nevertheless, the Tenth Circuit also noted that the actions could become removable if the plaintiffs later sought to join their claims for trial, and Judge Anderson wrote separately to stress that the real possibility of joint trial meant that the removals might simply have been "premature."

***Myers v. B.J.'s Wholesale Club, Inc.*, No. 13-05504, 2014 WL 1923277 (E.D. Pa. May 14, 2014).**

Judge Thomas N. O'Neill, Jr. of the U.S. District Court for the Eastern District of Pennsylvania granted the plaintiffs' motion to remand in this class action alleging violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law and common law unjust enrichment. The plaintiffs claimed that B.J.'s overcharged customers by charging Pennsylvania sales tax on original rather than discount prices of items. The defendant removed the case under CAFA, and the plaintiffs moved for remand. The court held that B.J.'s had not met its burden of establishing that the amount in controversy exceeded $5 million because it was impossible at the time of the decision to determine the precise number of class members who had been overcharged. According to the court, a plaintiff is "the master of his own claim and may limit his claim so as to avoid federal subject-matter jurisdiction." The court

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had to assess jurisdiction at the present time, and because the defendant did not prove to a legal certainty that the amount in controversy exceeded $5 million, the court remanded the case to state court. In so doing, the court explained that the defendant could always remove at a later date upon receipt of information demonstrating to a legal certainty that the plaintiffs are seeking more than $5 million.

***Horneland v. U.S. Bank, N.A.*, No. 8:14-cv-527-T-30TGW, 2014 U.S. Dist. LEXIS 61388 (M.D. Fla. May 2, 2014).**

Judge James S. Moody, Jr. of the U.S. District Court for the Middle District of Florida remanded a putative class action, finding that the defendant bank did not establish CAFA's $5 million amount-in-controversy threshold by a preponderance of the evidence. The suit alleged that the bank failed to promptly apply mortgage loan prepayments of principal to its consumers' accounts. The putative class encompassed borrowers who owned property in Florida under a mortgage serviced by the bank and whose prepayments were not promptly applied to their accounts. The defendant bank submitted an affidavit with its notice of removal providing two estimates purporting to establish that more than $5 million was at stake. These calculations were based on the bank's holding the subject prepayments in suspense for two time periods: (i) from as early as March 2011 through the present time or (ii) for four months. According to the court, these two time periods did not necessarily reflect the periods in which the subject prepayments were actually held in suspense, undermining the utility of the bank's affidavit. Further, while the bank advanced another calculation in its response to the motion to remand, the court rejected that one as well. That calculation simply multiplied the $776.84 claimed by the plaintiff as the excess interest he paid by the number of residential mortgages the defendant holds or services in Florida. However, there was no basis for assuming that the plaintiff's claim was typical of all class members.

***Opelousas General Hospital Authority v. PPO Plus LLC*, No. 14-0395, 2014 WL 1713414 (W.D. La. Apr. 29, 2014).**

Judge Richard T. Haik, Sr. of the U.S. District Court for the Western District of Louisiana granted the plaintiff's motion to remand the case to Louisiana state court. The plaintiff, representing a purported class of health care providers, alleged that the defendants violated various Louisiana statutes related to processing and applying discounts to medical bills. The bill processor, HealthSmart, removed to federal court under CAFA, arguing that the local-controversy exception did not apply. In holding that the local-controversy exception applied, the court found that PPO Plus was a "significant defendant" because it directly contracted with the plaintiff for discounted rates and allowed other entities, such as HealthSmart, to apply those rates when processing and paying the plaintiff's medical bills.

***Carolyne v. USPLabs, LLC*, No. CV 14-00620 SJO (JCGx), 2014 WL 1118017 (C.D. Cal. Mar. 19, 2014), and *Little v. USPLabs LLC*, No. CV 14-01540 DDP (SHx), 2014 WL 1660237 (C.D. Cal. Apr. 25, 2014).**

In these two virtually identical cases, Judges S. James Otero and Dean D. Pregerson of the U.S. District Court for the Central District of California remanded putative "mass actions" arising from the manufacturing and marketing of purportedly harmful dietary supplements. Both judges concluded that the 100-claimant threshold for mass actions under CAFA had not been satisfied. In so doing, the judges refused to aggregate the plaintiffs in related cases filed by the same counsel, as well as potential plaintiffs listed in a "Notice of Claims" submitted by the plaintiffs' counsel. The judges also rejected the defendants' claim that the plaintiffs "implicitly propose to try their claims jointly," based on "the well-established rule that plaintiffs, as masters of their complaint, may choose their forum by selecting state over federal court and with the equally well-established presumption against federal removal jurisdiction." Finally, the judges also found that federal-question jurisdiction did not exist because the plaintiffs had asserted purely state law claims that did not turn on the interpretation of the Food Drug & Cosmetic Act.

***Manier v. Medtech Products, Inc.*, No. 14cv209-GPC(NLS), 2014 WL 1609655 (S.D. Cal. Apr. 22, 2014).**

The plaintiffs sought remand of their putative class action asserting consumer protection and breach-of-warranty claims under California law arising from the alleged deceptive marketing and sale of ear drops, because the defendants had failed to show that the amount in controversy exceeded the $5 million required for CAFA jurisdiction. Judge Gonzalo P. Curiel of the U.S. District Court for the Southern District of California agreed, finding that the plaintiffs' claims that the defendants had been enriched by "millions of dollars" and the defendants' estimates of the value of the requested injunctive relief failed to establish by a preponderance of the evidence that the amount in controversy exceeded $5 million, particularly given the low cost of the product and the limited class period, which totaled roughly eight months.

***National Consumers League v. Flowers Bakeries, LLC*, No. 13-1725 (ESH), 2014 U.S. Dist. LEXIS 48221 (D.D.C. Apr. 8, 2014).**

Judge Ellen Segal Huvelle of the U.S. District Court for the District of Columbia remanded a case after finding that it did not qualify as either a "class action" or "mass action" under CAFA. The National Consumers League (NCL) brought suit against the defendant bakery company on behalf of the "general public," alleging violations of the D.C. Consumer Protection Procedures Act (DCCPPA). The plaintiff alleged that the defendant engaged in deceptive marketing of certain bakery products and sought various forms of relief, including restitution and statutory damages under the DCCPPA. The defendant removed the case, invoking traditional diversity of citizenship, as well as CAFA. The court rejected both theories and remanded the case to the D.C. Superior Court. With respect to CAFA, Judge Huvelle concluded that the suit brought by the NCL, acting as a private attorney general, did not constitute a class action under CAFA because, *inter alia*, it was not brought under Rule 23 of the D.C. Superior Court Rules of Civil Procedure. The court also found that the lawsuit did not amount to a mass action under CAFA, relying on the U.S. Supreme Court's ruling in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 744 (2014), that *parens patriae* suits brought by state attorneys general do not satisfy the "100 or more persons" requirement of CAFA.

***Louisiana v. Zealandia Holding Co.*, No. 13-6724, 2014 WL 1378874 (E.D. La. Apr. 8, 2014).**

Judge Eldon E. Fallon of the U.S. District Court for the Eastern District of Louisiana granted the plaintiff's motion to remand the case to Louisiana state court. The plaintiff, the State of Louisiana, brought a *parens patriae* action based on alleged violations of the Louisiana Unfair Trade Practices Act (LUTPA) and various state promotional contest statutes against the defendants, who had sold memberships in a vacation club to Louisiana consumers. The defendants removed the action under CAFA. The plaintiff argued that the U.S. Supreme Court's decision in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), which held that CAFA did not provide jurisdiction over a *parens patriae* action brought by the state, precluded the defendants from asserting jurisdiction under CAFA. The defendants argued that *Hood* was distinguishable because, in that case, the *parens patriae* action was brought under a Mississippi statute that did not allow the state to assert a class. In contrast, the defendants argued that the Louisiana statutes and rules at issue not only allowed Louisiana to assert claims on behalf of a class, but required it to do so in order to obtain the relief requested. The defendants also asserted that the Louisiana statutes and rules were sufficiently similar to Rule 23 to create federal jurisdiction under CAFA. The plaintiff argued that LUTPA was not sufficiently analogous to a class action statute or rule because (i) individuals are required to opt in rather than opt out; (ii) the attorney general is not the individuals' representative, but instead brings the action on behalf of the state and (iii) LUTPA does not contain any notice requirements. The plaintiff further argued that treating LUTPA as a class action statute or rule would force the state's attorney general into the role of private attorney for the Louisiana consumers. The court concluded that the *parens patriae* action was not a mass or class action. The court noted that Louisiana had not asserted a proposed or certified class under Rule 23 or an analogous state statute, and therefore the action was not removable under CAFA. The court also held that the *parens patriae* action was not inherently a class action because LUTPA allows the attorney general to either seek relief in a *parens patriae* action or to bring a class action on behalf of named and unnamed consumers.

***Premo v. Family Dollar Stores of Massachusetts, Inc.*, No. 13-11279-TSH, 2014 WL 1330911 (D. Mass. Mar. 28, 2014).**

Judge Timothy S. Hillman of the U.S. District Court for the District of Massachusetts remanded a putative wage-and-hour class action to state court based on CAFA's local-controversy exception. The court explained that the exception applied because the principal alleged injuries — in violation of Massachusetts's overtime laws — took place only in Massachusetts. Further, the plaintiff had moved to amend his complaint to eliminate the parent company (which argued it was not a proper party to the case). Relying upon *Kaufman v. Allstate New Jersey Insurance Co.*, 561 F.3d 144 (3d Cir. 2009), the court determined that once the complaint was amended to eliminate the parent company, there was no defendant against whom a similar lawsuit had been asserted within three years.

***Romulus v. CVS Pharmacy, Inc.*, No. 13-10305-RWZ, 2014 WL 1271767 (D. Mass. Mar. 27, 2014).**

Judge Rya W. Zobel of the U.S. District Court for the District of Massachusetts remanded for a second time a putative wage-and-hour class action (alleging that certain nonexempt employees were not permitted to take meal or rest breaks), this time on the ground that CVS's removal was untimely. The court had remanded the case the first time because CVS did not show that the amount in controversy exceeded CAFA's $5 million threshold. CVS removed a second time, asserting that new information allowed it to demonstrate that the $5 million threshold was exceeded. But CVS could not identify an amended pleading, motion or other paper that had allowed it to ascertain that the case was removable, making the second removal untimely. According to the court, an email from the plaintiffs to CVS communicating a "limited" analysis of shift supervisor time punch data that originated with the defendant likely did not constitute "other paper" contem-

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plated by the statute. But even if it did, the court held, the email did not contain any "new information" in support of removal. As part of its ruling, the court declined to apply *Roth v. CHA Hollywood Medical Center, L.P.*, 720 F.3d 1121 (9th Cir. 2013), in which the U.S. Court of Appeals for the Ninth Circuit held that a defendant could remove at any time based on its own investigation as long as the 30-day period in 28 U.S.C. § 1446(b) had not run.

***Strickland v. Visible Measures Corp.*, No. 4:13-cv-4030, 2014 WL 1233105 (W.D. Ark. Mar. 25, 2014).**

Judge Susan O. Hickey of the U.S. District Court for the Western District of Arkansas granted the plaintiffs' motion to remand for lack of jurisdiction under CAFA in a case alleging that the defendant engaged in the improper placement of "Flash Cookies" onto computers in violation of Arkansas statutory and common law. The plaintiffs' first amended complaint contained a stipulation that the class would not seek damages in an amount over $5 million. The defendant did not remove the action to federal court. Subsequently, however, the U.S. Supreme Court held in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), that stipulations such as the one in the plaintiffs' complaint do not prevent removal under CAFA. Following the Supreme Court's decision in *Knowles*, the defendant removed the case to federal court. The court concluded that removal was untimely, however, because the damages stipulation in the first amended complaint did not make removal futile. Moreover, the Supreme Court's decision in *Knowles* was not an "order" that triggered removal under 28 U.S.C. § 1446(b)(3).

***Coco v. Heck Industries, Inc.*, No. 13-3059, 2014 WL 1029994 (W.D. La. Mar. 17, 2014).**

Chief Judge Dee D. Drell of the U.S. District Court for the Western District of Louisiana granted the plaintiffs' motion to remand a nuisance case to Louisiana state court, finding that CAFA's local-controversy exception applied because (i) at least two-thirds of the plaintiffs in the putative class were Louisiana citizens; (ii) the only defendant also was a citizen of Louisiana; (iii) the alleged injuries were incurred in Louisiana and (iv) there was no evidence of a prior class action having been filed. The court noted that for diversity purposes, "citizenship means domicile." In determining that two-thirds of the plaintiffs' class were citizens of Louisiana, the court used a "common sense" approach and noted that it was "more probable than not" that at least two-thirds of the class plaintiffs were not merely "located" in Louisiana, but were actually citizens of, and domiciled in, Louisiana.

***Cedar Lodge Plantation, LLC v. CSHV Fairway View I, LLC*, No. 13-129-BAJ-SC, 2014 WL 972033 (M.D. La. Mar. 12, 2014).**

Chief Judge Brian A. Jackson of the U.S. District Court for the Middle District of Louisiana granted the plaintiffs' motion to remand a case to state court involving the alleged discharge of hazardous substances onto plaintiffs' property. The court ruled that the plaintiffs' amended complaint, which added a local defendant, triggered CAFA's local-controversy exception, requiring remand. The court also noted that the plaintiffs presented sufficient evidence to show that they did not engage in forum manipulation because they did not learn of the additional defendant's potential liability until after the defendants removed the action.

***Reilly v. Amy's Kitchen, Inc.*, No. 13-21525-CIV, 2014 WL 905419 (S.D. Fla. Mar. 7, 2014).**

Judge James I. Cohn of the U.S. District Court for the Southern District of Florida granted the defendant's motion to dismiss for lack of subject-matter jurisdiction after finding that the plaintiff failed to establish that the value of injunctive relief sought would exceed $5 million. The plaintiff alleged that she purchased three of the defendant's food products containing allegedly misleading labeling and brought claims on behalf of all Florida consumers who purchased any of the defendant's products with the same misrepresentation. On its motion to dismiss, the defendant argued that CAFA's $5 million jurisdictional threshold was not met because Florida sales for the three products purchased by the plaintiff totaled only $1,045,993 during the class period. The plaintiff argued that the amount in controversy is established at the time of filing the complaint — and that post-filing developments, such as the court's dismissal of claims related to 57 products the plaintiff had not purchased, do not divest the court of subject-matter jurisdiction — but the court disagreed, holding that the plaintiff lacked standing to bring claims based on those other products even at the time of filing. Thus, the required $5 million was never in controversy. The court also held that while the plaintiff was correct that attorneys' fees and costs could be included in the amount in controversy, the plaintiff failed to place any dollar amount on that figure. In any event, it was inconceivable that attorneys' fees would raise the amount in controversy from $1,045,993 to $5 million. Finally, the court ruled that the value of the injunctive relief requested — barring the defendant from using misleading labeling — was too speculative to bring the aggregate amount in controversy above the $5 million threshold.

***Rainbow Gun Club, Inc. v. Denbury Resources, Inc.*, No. 2:13-CV-590, 2014 WL 869504 (W.D. La. Mar. 5, 2014).**

Judge Patricia Minaldi of the U.S. District Court for the Western District of Louisiana affirmed the magistrate judge's order granting the plaintiffs' motion to remand in a mass action involving alleged negligence in drilling a well. The court remanded the case under CAFA's "local single event" exception for mass actions. In its ruling, the court noted that every occurrence or event is "invariably divisible into increasingly tiny units of time," but that each of the plaintiffs' allegations were related to the negligent drilling of the well, which was one overarching event, making the exception applicable.

***West v. Nissan North America, Inc.*, No. 4:13-cv-4070, 2014 WL 825217 (W.D. Ark. Mar. 4, 2014).**

Judge Susan O. Hickey of the U.S. District Court for the Western District of Arkansas granted the plaintiff's motion to remand to state court for lack of CAFA jurisdiction. The case involved allegations that the 2004-2006 models of certain Nissan vehicles possessed faulty braking systems and that Nissan concealed the defect from customers. The second amended complaint contained a stipulation that damages would not be accepted if they caused the amount in controversy to exceed $5 million. It was not until the plaintiff filed an amended motion for class certification — two years after the filing of the complaint — that the defendant removed the action to federal court. The court first concluded that the plaintiff's amended motion for class certification, which included additional arguments regarding the 2007 and 2008 models of the vehicles at issue, did not modify the relief the plaintiff was seeking. Because the complaint included only the 2004-2006 models, only those models were relevant to determining the amount in controversy under CAFA. Second, the court held that the defendant's attempt to remove the action was untimely. The filing of the amended motion for class certification did not trigger removal; nor did the U.S. Supreme Court's decision in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), which held that stipulations such as the one in the plaintiff's complaint do not prevent removal under CAFA.

***McDaniel v. Fifth Third Bank*, No. 6:13-cv-01878-GAP-GJK, 2014 WL 805508 (M.D. Fla. Feb. 28, 2014).**

Judge Gregory A. Presnell of the U.S. District Court for the Middle District of Florida granted the plaintiff's motion to remand after finding that the amount in controversy did not meet CAFA's $5 million jurisdictional requirement. The lawsuit arose out of the defendant bank's practice of charging non-account holders, who wished to cash checks at the bank's branch offices, a $4 fee. The plaintiff sought to represent a class of non-account holding persons in Florida who were so charged. The plaintiff's complaint asserted nine causes of action, including fraud, fraud in the inducement and violation of Florida's Consumer Collection Protection Act (FCCPA). While the parties agreed that the total amount of compensatory and statutory damages did not exceed $3 million, the defendant nevertheless removed the case to federal court on the basis that the jurisdictional threshold was met with the addition of the plaintiff's claim for punitive damages. In evaluating whether punitive damages were legally recoverable in the case, the court found that the plaintiff did not appear to have viable fraud claims. Moreover, the FCCPA, the only other basis to recover punitive damages, limited the amount of punitive damages recoverable to $1.5 million. Thus, the defendant could not establish that the amount-in-controversy requirement was satisfied.

***West Virginia ex rel. McGraw v. Bristol Myers Squibb Co.*, No. 13-1603 (FLW), 2014 WL 793569 (D.N.J., Feb. 26, 2014).**

Judge Freda L. Wolfson of the U.S. District Court for the District of New Jersey found that the court lacked jurisdiction under CAFA over an action alleging that the defendants engaged in unfair and deceptive marketing practices relating to the efficacy of Plavix, an anti-clotting prescription drug. Because the suit was a *parens patriae* action brought by the state on behalf of its citizens, and the state was the only named plaintiff, the case was not removable in accordance with the U.S. Supreme Court's decision in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014).

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

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