The Class Action Chronicle

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This is the inaugural edition of *The Class Action Chronicle*, a quarterly publication that will provide 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 Fall 2013 edition highlights the U.S. Court of Appeals for the Seventh Circuit's recent — and troubling — approval of issues classes as a means to facilitate class certification in cases where the requirements of Rule 23 are not met.

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ISSUES CLASSES: THE LATEST ASSAULT ON RULE 23(B)(3)

"Issues classes" are cases in which one or more common issues are certified for class treatment while other, individualized questions are left to be decided later in separate trials. Issues class proposals have been generally rejected by federal courts as improper attempts to end run Rule 23(b)(3)'s predominance requirement, but the U.S. Court of Appeals for the Seventh Circuit has recently embraced the concept, potentially opening the door to a slew of class actions that otherwise would not be certifiable.

The genesis of "issues classes" is Federal Rule of Civil Procedure 23(c)(4), which provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to Particular issues." Plaintiffs' attorneys have seized on this language, arguing that it permits courts to identify particular questions that are common to a proposed class — such as whether a product has a design defect — and order a classwide trial that would resolve only those inquiries. This would allow courts to authorize class actions even where the plaintiffs' claims involve highly individualized questions that cannot possibly be answered in a classwide setting based on common evidence.

Historically, courts have been skeptical of issues classes on the ground that they are inconsistent with Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." Accordingly, some courts — including the U.S. Court of Appeals for the Fifth Circuit — have held that Rule 23(c)(4) is a mere "housekeeping rule" that may only be applied if predominance is first satisfied as to the entire cause of action. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). As the Fifth Circuit explained in *Castano*, "[r]eading Rule 23(c)(4) as allowing a court to sever issues … would eviscerate the predominance requirement of Rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended."

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Consistent with this view, district courts across the country have rejected attempts to certify issues classes, finding that classwide resolution of only a single issue would be grossly inefficient. *See, e.g., City of St. Petersburg v. Total Containment, Inc.*, 265 F.R.D. 630, 646 (S.D. Fla. 2010) (rejecting the plaintiff's proposal for an issues-only class under Rule 23(c)(4); "many other courts have emphatically rejected attempts to use the (c)(4) process for certifying individual issues as a means for achieving an end run around the (b)(3) predominance requirement" (internal quotation marks and citation omitted)); *In re Genetically Modified Rice Litig.*, 251 F.R.D. 392, 400 (E.D. Mo. 2008) (refusing to certify issues class because it would "lead to procedural difficulties," "would not resolve any individual plaintiff's claims," and "would do little if anything to increase the efficiency of this litigation"). In addition, issues trials are inherently unfair to defendants because it is much easier for plaintiffs to secure a classwide verdict when the jury does not hear the actual facts of the plaintiffs' claims — which in many cases will be highly relevant to the allegedly "common" issues to be resolved. *See, e.g., In re Paxil Litig.*, 212 F.R.D. 539, 547 (C.D. Cal. 2003) (refusing to certify class to resolve the purportedly "common" issue of general causation because such a trial would unfairly rob the defendant of the ability to present individualized "evidence rebutting the existence or cause of" the plaintiffs' alleged illnesses). Courts have also expressed concern that class treatment of a single issue when individual issues otherwise predominate could violate the Seventh Amendment, which bars a second jury from re-deciding issues resolved by a first jury — as might be the case if the common trial phase were to be followed by individualized proceedings on the remaining issues before different juries. *See, e.g., In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 698-99 (N.D. Ga. 2008) (rejecting request to certify issues class to resolve common questions related to a defendant's "knowledge, conduct and duty," with respect to allegedly tainted peanut butter; the proposal would be inefficient and would also likely violate the defendant's Seventh Amendment rights against re-examination of facts in light of the "risk that a second jury would have to reconsider the liability issues decided by the first jury").

> "The Seventh Circuit's decision may prompt a new wave of efforts by the plaintiffs' bar to seek certification of classes that traditionally have not been allowed class treatment."

Despite this trend, the Seventh Circuit has recently embraced Rule 23(c)(4) as a means to facilitate class certification in cases where individualized issues would otherwise predominate. In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 338 (2012), for example, the Seventh Circuit found that class certification was appropriate in an employment discrimination suit notwithstanding the Supreme Court's recent rejection of a very similar proposed class action in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In so holding, Judge Richard Posner — who wrote for the Seventh Circuit — concluded that common questions related to whether Merrill Lynch's employment policies discriminated against African-American financial advisers presented "a pair of issues that can most efficiently be determined on a class-wide basis, consistent with" Rule 23(c)(4), regardless of whether individualized issues existed. 672 F.3d at 491; *see also Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir. 2010) (*per curiam*) (upholding class certification with respect to one "common issue" — "whether the windows suffer from a single, inherent design defect leading to wood rot" — even though causation would require individualized inquiries).

Judge Posner advanced a similar position very recently in *Butler v. Sears, Roebuck & Co.*, Nos. 11-8029, 12-8030, 2013 WL 4478200 (7th Cir. Aug. 22, 2013). There, the Seventh Circuit held that a class of washing machine purchasers alleging that their machines were prone to develop mold and other problems was certifiable even though individualized inquiries would be necessary to determine whether each proposed class member experienced any problem with his or her washer and, if so, the amount of his or her damages. According to Judge Posner, the case could proceed as an issues class: "a class action limited to determining liability on a class-wide basis, with separate hearings to determine — if liability is established — the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed." Specifically, the court found that "[t]here is a single, central, common issue of liability: whether the Sears washing machine was defective," that could be resolved on a classwide basis. In the court's view, all other, noncommon issues, including both injury and damages, could be resolved separately in individual trials. More information on this case can be found on page 11.

The Seventh Circuit's recent approval of issues classes may prompt a new wave of efforts by the plaintiffs' bar to seek certification of classes that traditionally have not been allowed class treatment — and to push for "issues trials." This is troubling for class action defendants because of the significant settlement pressure that comes hand in hand with class certification. It is also concerning because

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plaintiffs may find it much easier to prevail at trial when there is just one "issue" involved — whether the defendant had a discriminatory policy, whether a product is prone to fail or some other generalized question — and no need to prove injury or causation. At the same time, the benefits to plaintiffs are questionable. Although the Seventh Circuit's approach to issues classes may lower the bar to class certification, certification itself is now potentially meaningless to plaintiffs who, in a case like *Butler*, could invest significant resources in litigating the supposedly common phase of the case with no damages award even if they "win" at trial. Although a common-phase victory would potentially set the stage for recoveries in individual follow-on suits, the recovery in such follow-on suits (particularly those involving consumer purchases) may be small and outweighed by the cost to litigate. The net effect could be a surge of suits by plaintiffs hoping to parlay "issues" certification into a settlement.

For all of these reasons, defendants should be prepared to argue adamantly that the Seventh Circuit's approach should not be followed. Specifically, defendants should press the point made by the Fifth Circuit that, as a matter of common sense, Rule 23(c)(4) must be a housekeeping rule only or else a class could be certified in virtually every case. Defendants should also stress the questionable efficiency benefits of an issues class approach that resolves nothing after the first phase and requires an individualized trial for each class member — particularly in cases involving low-value claims. And defendants should also assert their Seventh Amendment rights against any issues class proposal that poses any risk that juries in subsequent individualized trials would be asked to consider any factual issues decided by a different jury in the common issue phase.

CLASS CERTIFICATION DECISIONS

Decision Granting Motion to Strike

***Hill v. Wells Fargo Bank*, N.A., No. 12 C 7240, 2013 WL 2297056 (N.D. Ill. May 24, 2013).**

Judge Gary Feinerman of the U.S. District Court for the Northern District of Illinois granted defendant Wells Fargo's motion to strike class allegations in a case brought by plaintiffs alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act. The plaintiffs alleged that the defendants, Wells Fargo and LPS Field Services, Inc., took actions to effectuate dispossession of their homes before entry of any judgment of foreclosure. Wells Fargo moved to strike the class allegations, and the court granted the motion. First, the court rejected the plaintiffs' contention that class certification decisions cannot be made at the pleading stage, reasoning that "sometimes the complaint will make it clear that class certification is inappropriate." The court then concluded that the plaintiffs could not satisfy the predominance requirement of Rule 23 because "the lawsuit presents a slew of legal and factual questions that are unique to each class member," such as what actions the defendants took against particular class members, when those actions took place, and whether the defendants had a court order entitling them to dispossess the class member.

Decisions Denying Motions to Strike

***Huffman v. Electrolux North America, Inc.*, No. 3:12CV2681, --- F. Supp. 2d ----, 2013 WL 4428803 (N.D. Ohio Aug. 13, 2013).**

Judge James G. Carr of the U.S. District Court for the Northern District of Ohio denied a washing machine manufacturer's motion to strike class allegations in a case concerning mold in front-loading high-efficiency washing machines. Applying *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838 (6th Cir. 2013) (discussed in more detail on page 11), which the court characterized as containing "virtually indistinguishable" facts, the court determined that "[n]othing in plaintiff's complaint clearly shows that plaintiff cannot successfully apply for certification of a class." Consequently, the motion to strike class allegations was denied. Instead, the court reasoned that the parties would need to "take discovery and present evidence on the pertinent issues."

***Law Offices of Leonard I. Desser, P.C. v. Shamrock Communications, Inc.*, No. JKB-12-2600, 2013 U.S. Dist. LEXIS 94268 (D. Md. May 21, 2013).**

Judge James Bredar of the U.S. District Court for the District of Maryland denied the defendant company's motion to strike class allegations in a case brought by a law firm asserting violations of the Telephone Consumer Protection Act (TCPA). The plaintiff alleged that the defendant violated the TCPA by sending "junk faxes" that did not comply with the statute. The defendant moved to strike the class allegations on the grounds that commonality, typicality and predominance were lacking given the individualized inquiries necessary to determine whether each fax was in fact unsolicited. The court denied the motion, reasoning that the defendant's motion was premature. The court was unwilling to consider the viability of the plaintiff's class claims before discovery had concluded and before the plaintiff had moved for class certification. Notably, in moving to strike the class allegations, the defendant relied on affidavits

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from potential members of the class. The court refused to consider this evidence, explaining that "[t]his contact with potential class members … especially for the purpose of opposing certification of the class, is problematic."

***Blagman v. Apple Inc.*, No. 12-5438(ALC)(JCF), 2013 WL 2181709 (S.D.N.Y. May 20, 2013).**

Judge Andrew L. Carter of the U.S. District Court for the Southern District of New York denied the defendants' motion to dismiss and motion to strike the class allegations. The plaintiff held copyrights in three musical compositions and brought suit against Apple, Google and other companies that make digital music available online, arguing that the defendants did not ensure that the compositions were properly licensed before distribution. The plaintiff also brought his claims on behalf of a putative class of people who allegedly also had their copyrights similarly infringed by the defendants. The defendants moved under Rule 12(f) to strike the class allegations on a number of grounds, including that the proposed class was overbroad because it encompassed a number of individuals whose works were being lawfully distributed and who therefore lacked standing. The court held that a motion to strike class claims was premature because the issues to be decided were the same that would be evaluated at the time of class certification under Rule 23.

Decisions Rejecting/Denying Class Certification

***In re Rail Freight Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013).**

On interlocutory review, the U.S. Court of Appeals for the District of Columbia Circuit (Garland, Brown and Sentelle, JJ.) unanimously vacated the U.S. District Court for the District of Columbia's class certification order in an antitrust suit alleging that freight railroads engaged in a price-fixing conspiracy. Four major freight railroads — which account for nearly 90 percent of rail freight traffic — imposed rate-based fuel surcharges on shipments over their tracks, leading a group of shippers to bring an antitrust suit accusing them of a price-fixing conspiracy and to seek certification of a class of similarly situated shippers. After the district court granted certification, the railroads petitioned for interlocutory review, arguing that separate trials were needed to determine which shippers were injured by the alleged conspiracy since some had legacy contracts that protected them from these new rates. The D.C. Circuit found interlocutory review was warranted because the damages at stake — especially after trebling — were "astronomical" and the district court's certification was "questionable." In particular, the district court failed to recognize that the plaintiffs' damages model yielded the same results for shippers with legacy contracts as it did for others, even though those shippers could not have suffered injuries. Citing the U.S. Supreme Court's recent ruling in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), Judge Janice Rogers Brown, writing for the panel, concluded: "If the damages model cannot withstand [ ] scrutiny then, that is not just a merits issue. . . . No damages model, no predominance, no class certification." The D.C. Circuit vacated class certification and remanded the case to the district court for an opportunity to consider these issues.

***Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013).**

The U.S. Court of Appeals for the Third Circuit (Scirica, Ambro and Fuentes, JJ.) unanimously vacated and remanded the certification of a class of purchasers of Wal-Mart's extended warranty plans alleging breach of contract, unjust enrichment and violation of the New Jersey Consumer Fraud Act. The plaintiff alleged that the defendant sold him and class members as-is products without disclosing that such products were excluded from extended warranty coverage. The district court granted the plaintiff's motion for class certification, and the defendant appealed based on the Third Circuit's intervening decision in *Marcus v. BMW of North America, LLC*, 687 F.3d 383 (3d Cir. 2012), a decision that analyzed the ascertainability prerequisite to class certification. Applying that prior ruling, the Third Circuit vacated the lower court's ruling, holding that it failed to consider whether there was a reliable and administratively feasible method for ascertaining class membership. As the appellate court explained, no plan had been advanced to demonstrate, *inter alia*, which of the 3,500 transactions at issue involved the sale of as-is items, and whether members who purchased service plans for ineligible as-is items nonetheless received service or refunds. In addition to finding that the ascertainability requirement had not been proven, the Third Circuit determined that evidence presented before the trial court did not adequately justify a finding of numerosity.

***Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213 (10th Cir. 2013) and *Chieftain Royalty Co. v. XTO Energy, Inc.*, 12-7047, --- F. App'x ---- 2013 WL 3388629 (10th Cir. July 9, 2013).**

In these companion cases, the U.S. Court of Appeals for the Tenth Circuit (Kelly, McKay and Matheson, JJ.) unanimously vacated the certification of two classes of royalty owners in light of the Supreme Court's recent rulings in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Both classes consisted of thousands of royalty owners who had allegedly received inadequate gas and oil royalties from the defendant lessee. In *Roderick*, which involved claims for breach of contract, unjust enrichment and accounting, the Tenth Circuit held that the district court improperly placed the burden of proving commonality on the defendant — for example, by requiring the defendant to disprove the plaintiff's claim

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that there was an implied duty of marketability classwide with respect to all of the subject leases. Because 400 leases had not even been examined by the plaintiff or the district court, the lower court's commonality analysis was in error. The Tenth Circuit also directed the district court to evaluate whether individualized damages determinations were fatal to predominance in light of *Dukes* and *Comcast*. In *Chieftain*, which involved claims for, *inter alia*, breach of contract, fraud, conversion and accounting, the district court had failed to the consider the impact of variations in the leases on the issue of commonality. Indeed, as in *Roderick*, many of the subject leases had not even been examined by the trial court in *Chieftain*. While the district court concluded that the marketability and lease language issues could be resolved on summary judgment, the Tenth Circuit disagreed, concluding that "the district court must address the lease language issue as it relates to Rule 23 *before* certifying the class." The court once again encouraged the lower court on remand to consider issues of lease language and marketability and their impact on commonality, typicality and adequacy, playing close attention to *Dukes* and *Comcast*.

Halvorson v. Auto-Owners Insurance Co., 718 F.3d 773 (8th Cir. 2013).

The U.S. Court of Appeals for the Eighth Circuit (Loken, Smith and Benton, JJ.) unanimously reversed the district court's grant of class certification in a case alleging claims for breach of contract and bad faith against an auto insurer due to the insurer's percentile reduction of claims paid to medical providers. The court concluded that the predominance requirement of Rule 23(b)(3) was not met because individual questions were necessary to determine whether the insurer was liable for breach of contract and bad faith. These individual questions included whether a particular medical provider's charge was "usual and customary" for a particular class member. Moreover, the court noted that some putative class members would not have standing if a medical provider accepted the insurer's reduced payment as payment in full. For these reasons, the panel held that "the district court abused its discretion in certifying the class."

Authors Guild, Inc. v. Google Inc., 721 F.3d 132 (2d Cir. 2013) (*per curiam*).

The U.S. Court of Appeals for the Second Circuit (Leval, Cabranes and Parker, JJ.) vacated class certification in a suit alleging that Google engaged in copyright infringement by scanning millions of books and making "snippets" of these books available through online searches. After discovery, the parties moved for final approval of a settlement agreement, which the district court denied. Thereafter, the plaintiffs moved to certify a class of essentially all persons who held a copyright interest in at least one of the books of which portions were made available online by Google. The district court granted class certification and Google appealed. The Second Circuit noted that Google's argument that the plaintiffs were not representative of the class because many class members benefitted from the defendant's conduct may "carry some force." Nonetheless, the Second Circuit vacated the district court's class-certification order given the individualized, fact-specific nature of Google's fair-use defense.

Football Association Premier League Ltd. v. YouTube, Inc., No. 07-3582(LLS), 2013 WL 2096411 (S.D.N.Y. May 15, 2013).

Judge Louis L. Stanton of the U.S. District Court for the Southern District of New York denied the plaintiffs' motion for class certification in a copyright infringement action brought by owners of copyrighted videos against a video-sharing website operator. The plaintiffs sought to certify a class of "every person and entity in the world" that owns infringed copyrights that were either blocked by YouTube after notice but were subsequently uploaded or musical copyrights that the defendants allowed to be uploaded without authorization. The district court described the case as a "Frankenstein monster posing as a class action." As the court explained, 24 hours of new video is uploaded to YouTube every minute; thus, the suggestion that a class action of such proportions could be managed "with judicial resourcefulness is flattering, but unrealistic." Relying on *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the court determined that the class was so numerous that administration of all the claims in a single action would be impracticable because the court would have to make specific, individualized findings with respect to each copyright. Such an inquiry doomed not only commonality, but also predominance.

Bank v. Caribbean Cruise Line, Inc., No. 11-CV-2744 (MKB), 2013 WL 4458742 (E.D.N.Y. Aug. 15, 2013).

Judge Margo K. Brodie of the U.S. District Court for the Eastern District of New York adopted in its entirety the report and recommendation of Magistrate Judge Viktor Pohorelsky, which recommended denying the plaintiff's motion for class certification. The plaintiff alleged that the defendant violated the Florida Electronic Mail Communications Act by sending him a misleading email bearing the subject line "You won a cruise to the Bahamas." The plaintiff, an attorney, sought appointment as both class representative and class counsel. The court noted that the plaintiff's application to certify a class failed because the plaintiff could not satisfy the prerequisites of Rule 23(a). Specifically, the court concluded that the plaintiff failed to prove that the defendant was responsible for sending the email he received. The evidence showed that upon learning these emails were being sent, the defendant conducted an investigation and sued the individual responsible. In turn, because the plaintiff defined the class as including "persons and entities to whom CCL" sent such emails, the plaintiff failed to prove that he was a member of

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such a class or that such class even existed. The court also questioned in *dicta* whether a *pro se* plaintiff should serve as class representative or whether a class representative should serve as class counsel. The court noted that "[n]umerous courts" had denied such requests because of the inherent conflict of interest.

***Pileggi v. Wells Fargo Bank, N.A.*, No. C 12-01333 WHA, 2013 U.S. Dist. LEXIS 115817 (N.D. Cal. Aug. 14, 2013).**

The plaintiff moved to certify a proposed class seeking declaratory and injunctive relief arising from allegedly discriminatory loan practices directed at persons under 59.5 years old using income from a retirement account, in violation of the Equal Credit Opportunity Act. Relying on *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), Judge William Alsup of the U.S. District Court for the Northern District of California refused to certify the class, finding that the class definition was overbroad. First, for those individuals whose loan applications were denied, there was no evidence that they would have any future interaction with Wells Fargo, rendering any injunctive relief meaningless. Second, as to individuals whose applications had been granted (and presumably were not harmed), the court likewise reasoned that injunctive relief would provide little benefit. The court further reasoned that the plaintiffs had not provided any objective methodology for identifying class membership, making it impossible to determine whether the threshold requirement of numerosity had been satisfied. According to the court, "[p]laintiffs were afforded substantial additional time to conduct class discovery in support of their motion" but did not satisfy their Rule 23 evidentiary burden.

***Gist v. Pilot Travel Centers, LLC*, No. 5:08-293-KKC, 2013 WL 4068788 (E.D. Ky. Aug. 12, 2013).**

Judge Karen K. Caldwell of the U.S. District Court for the Eastern District of Kentucky denied a motion to certify a nationwide class alleging that a roadside merchant violated the Fair And Accurate Credit Transactions Act (FACTA), which prohibits sellers from printing credit card receipts showing "more than the last five digits of the card number or the expiration date." The court first found that that the proposed class was not ascertainable because, among other things, there was no practicable way to determine which purchasers had actually received a receipt with the prohibited credit card information (under FACTA a person only has a claim where he or she was "provided" a receipt with the proscribed information), even though the merchant conceded that "there was a period of time in 2007 and 2008 when" its locations did in fact print receipts containing that prohibited information. Further, an individualized inquiry would be necessary to determine if the merchant had engaged in "willful" violations of FACTA, because the merchant's "technology varied during the class period, throughout the country and over different point-of-sale devices," and software "bugs" may have caused some of the problems. Finally, "a class action is not a superior method for resolving this dispute" because surmounting the just-summarized issues would be difficult and costly, and "FACTA does provide plaintiffs with costs and attorneys' fees in a successful action," which "make[s] individual suits a more adequate alternative."

***Wyatt v. Philip Morris USA, Inc.*, No. 09-C-0597, 2013 WL 4046334 (E.D. Wis. Aug. 8, 2013).**

Judge Lynn Adelman of the U.S. District Court for the Eastern District of Wisconsin denied class certification in a case where the plaintiff sought to represent a class of all Wisconsin residents who purchased light cigarettes manufactured by Philip Morris. The plaintiff's claims rested on the theory that purchasers believed that Philip Morris's light cigarettes were safer to smoke than regular cigarettes and that they suffered an injury as a result. The court, however, concluded that "it is impossible to distinguish between the class members who were injured by Philip Morris's conduct (*i.e.*, those who believed during the class period that lights were necessarily safer to smoke than regular cigarettes) and those who were not without holding an individualized hearing for each class member." Because these individual issues predominated over common issues, the class certification requirements of Rule 23 were not met.

***Bohn v. Pharmavite, LLC*, No. CV 11-10430-GHK (AGRx), 2013 WL 4517895 (C.D. Cal. Aug. 7, 2013).**

The plaintiff moved to certify a 17-state class alleging violations of California consumer protection law, or alternatively, classes of California and Illinois purchasers, based on allegedly false or misleading representations about the benefits of the defendant's Vitamin E product. Judge George H. King of the U.S. District Court for the Central District of California denied the motion because the plaintiff could not adequately represent the interests of the class due to inconsistencies in her testimony about her purchase of the product, which "raise[d] serious questions about her standing to assert" claims under California and Illinois law and damaged her credibility, while her failure to perform due diligence about her purchases contradicted the plaintiff's purported "interest in and commitment to vigorously prosecuting this action on behalf of the classes." The court also found the plaintiff's "close personal friendship" with one of the proposed class counsel "troubling," suggesting "Plaintiff may have, at best, unduly relied on her close friend, or, at worst, have no real interest in prosecuting this action other than to assist her close friend in recovering a sizeable fee award relative to the small individual recoveries of the class members."

***Pollock v. Energy Corp. of America*, No. 10-1553, 2013 WL 4015777 (W.D. Pa. Aug. 5, 2013).**

Magistrate Judge Robert C. Mitchell of the U.S. District Court for the Western District of Pennsylvania found that numerosity was not satisfied in a case brought by Pennsylvania landowners alleging that the defendant lessee deducted amounts from royalty payments that were not permitted under their leases. The court reasoned that the plaintiffs offered no proof that any of the leases, other than those of named plaintiffs, contained the provisions that the plaintiffs claimed were unlawful. Magistrate Judge Mitchell also concluded that commonality and typicality were not satisfied due to differing lease provisions among putative class members.

***Bright v. Asset Acceptance, LLC*, No. 11-5846 (JBS/JS), 2013 WL 3990817 (D.N.J. Aug. 1, 2013).**

Chief Judge Jerome B. Simandle of the U.S. District Court for the District of New Jersey denied class certification in an action in which the plaintiff alleged that the defendant violated the Fair Debt Collection Practices Act (FDCPA) when it called New Jersey consumers from a telephone number falsely displaying the name "Warranty Services" on caller identification devices (caller IDs). The plaintiff alleged that, as a result, consumers were misled about the identity of the caller as a debt collection agency in direct violation of the FDCPA. The court denied class certification on the basis that the class could not be ascertained as it was impossible to determine which putative class members had caller IDs. Further, the court found that typicality and predominance were not satisfied and held that individual damage calculations overwhelmed questions common to the class, such as whether the local phone provider for each class member attempted to obtain the updated caller identification information for the defendant (which correctly revealed its identity rather than the previous owner's "Warranty Services").

***Premier Health Center, P.C. v. UnitedHealth Group*, No. 11-425 (ES), 2013 WL 3943516 (D.N.J. Aug. 1, 2013).**

Judge Dickinson R. Debevoise of the U.S. District Court for the District of New Jersey denied certification of a proposed class in a case brought by chiropractors and health care providers against health insurers, in which the plaintiffs asserted claims for benefits, failure to provide a full and fair review, and equitable relief under the Employee Retirement Income Security Act. The plaintiffs sought to certify a class of all health care providers who were subjected to retroactive requests for repayment of insurance benefits paid by the defendants within the past six years. The court refused to certify the recoupment class, holding that the class failed to satisfy the typicality requirement because the defense of voluntary payment may apply with respect to class members other than the named plaintiffs, none of whom submitted a voluntary repayment, rendering the claims of the named plaintiffs "atypical of the class as a whole." The court further held that the named plaintiffs did not adequately represent the class because none of the named plaintiffs would be subject to the defense of voluntary payment.

***Eastman v. First Data Corp.*, No. 10-4860 WHW, 2013 WL 3936215 (D.N.J. July 31, 2013).**

Judge William H. Walls of the U.S. District Court for the District of New Jersey denied the plaintiffs' motion for class certification in this case, brought by small business owners against a providers of hardware and software, alleging that the defendants defrauded them by charging large fees under a lease agreement for credit and debit card equipment. The plaintiffs sought to certify a class of those who leased point-of-sale credit and/or debit card processing equipment from the defendant from the time period set by the applicable statute of limitations. The court held that whether each class member was charged usurious interest or whether the defendants failed to disclose certain information could not be proven with common evidence. The court similarly determined that resolving whether the defendants' lease prices were unconscionable was not amenable to classwide proof because each individual merchant may value the defendants' services differently.

***Jamison v. First Credit Services, Inc.*, No. 12 C 4415, 2013 WL 3872171 (N.D. Ill. July 29, 2013).**

Judge Virginia Kendall of the U.S. District Court for the Northern District of Illinois denied the plaintiff's motion to reconsider the court's denial of the plaintiff's motion for class certification under the Telephone Consumer Protection Act (TCPA). The plaintiff alleged that the defendants called his cellular telephone multiple times without his consent to collect a debt. The court reaffirmed its decision that the plaintiff was not an adequate class representative because he had been convicted of fraud and therefore had serious credibility problems. In addition, the evidence indicated that the plaintiff's cellphone actually belonged to his mother, which may have deprived him of standing under the TCPA. Moreover, the court concluded that common issues would not predominate because there was evidence that a large percentage of the potential class consented to receive calls at their cellphone numbers. Thus, the court concluded that it "would be required to conduct a series of mini-trials to determine the population of the class and to determine liability."

***Turnbow v. Life Partners, Inc.*, No. 3:11-cv-1030-M, 2013 WL 3479884 (N.D. Tex. July 9, 2013).**

Judge Barbara M.G. Lynn of the U.S. District Court for the Northern District of Texas denied the plaintiffs' motion for class certification in a case against a life insurance provider alleging that the insurer breached its fiduciary duty to the

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plaintiffs by retaining a doctor who substantially underestimated life expectancies. The court concluded that individualized questions predominated because a "file-by-file review" was required to determine whether the life expectancy estimates were reasonable in each individual case. In addition, relying on the Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the court found that the plaintiffs could not present a viable common method for calculating class damages.

***Sprint Nextel Corp. v. Middle Man Inc.*, No. 12-2159-JTM, 2013 WL 3819938 (D. Kan. July 24, 2013).**

Judge J. Thomas Marten of the U.S. District Court for the District of Kansas denied the defendant's motion to certify a class of counterclaimants consisting of re-sellers of cellphones "originally programmed to operate on the Sprint network" seeking declaratory relief that the Sprint contract did not preclude Sprint customers from reselling the phones to members of the proposed class. Relying heavily on the *Roderick* opinion (described on page 4), the court found that Middle Man could not demonstrate numerosity sufficient to satisfy Rule 23(a). Noting that "[i]n class action suits there must be presented some evidence of established, ascertainable numbers constituting the class in order to satisfy even the most liberal interpretation of the numerosity requirement," Judge Marten held that while Middle Man claimed the class might contain "scores" of similarly situated defendants, it "specifically point[ed] to four other similarly situated parties — the other defendants Sprint has sued — but provides no evidence that joinder of these parties would be impracticable."

***Simms v. Jones*, Nos. 3:11-CV-0248-M, 3:11-CV-345-M, 2013 WL 3449538 (N.D. Tex. July 9, 2013).**

Judge Barbara M.G. Lynn of the U.S. District Court for the Northern District of Texas denied the plaintiffs' motion for class certification in a case brought by Super Bowl ticketholders against the National Football League asserting claims for breach of contract based on unavailability of seats and obstructed views. The plaintiffs sought to certify four subclasses of ticketholders, including those (i) who were denied seats because of unavailability, (ii) whose access to seats was delayed because of unavailability, (iii) who received replacement seats because of unavailability and (iv) who had an obstructed view that was not disclosed on their tickets. The court found that none of the proposed subclasses satisfied Rule 23's predominance requirement. First, with respect to the proposed class of ticketholders who were denied seats, there was no formula to adjudicate damages on a classwide basis because ticketholders incurred vastly different expenses to attend the Super Bowl. Second, the proposed class of ticketholders whose seat access was delayed presented individualized issues of whether the ticketholders missed any game activity, the length of the delay, and damages. Third, the proposed class of ticketholders who were relocated required individualized inquiries into the location and value of each replacement seat. Finally, with respect to the proposed obstructed view class, an individualized inquiry into the extent of the obstruction was required to gauge the materiality of the breach and the amount of damages suffered by each class member.

Martin v. Ford Motor Co.*, No. 10-2203, 2013 WL 3328231 (E.D. Pa. July 2, 2013), *pet. to appeal denied.

The plaintiff, the purchaser of a Ford minivan whose rear axle allegedly failed, brought a putative class action against the manufacturer and sought to certify four classes based on state-law claims of breach of implied warranty, unjust enrichment, breach of express warranty and violation of consumer protection statutes. Judge Joel H. Slomsky of the U.S. District Court for the Eastern District of Pennsylvania held that (i) the named plaintiff failed to satisfy the typicality and adequacy requirements for the express warranty and consumer protection classes, (ii) all four classes failed the predominance and superiority prongs of Rule 23(b)(3), and (iii) the class could not be certified for injunctive and/or declaratory relief under Rule 23(b)(2).

The court found that the plaintiff failed to satisfy the typicality requirement for the express warranty and consumer protection classes because such classes included only plaintiffs who were residents of certain states that define those causes of action similarly, which did not include the named plaintiff's home state of Pennsylvania. Since the named plaintiff was not part of either class, his claims were not typical of those of class members. The court also found that the express warranty and consumer protection classes failed the adequacy requirement for the same reasons. The court further held that all four classes failed the predominance prong of Rule 23(b)(3). The express warranty class failed because the laws of the 23 included states were not sufficiently similar for classwide application at trial. The implied warranty class failed because individual issues of fact regarding breach and calculation of damages would predominate (particularly on the issue of fitness for the ordinary purpose). The consumer protection class failed because the Kansas Consumer Protection Act is materially different from the laws of the other states and because individual issues of fact would predominate on issues of whether a class member suffered an ascertainable loss that was the result of the defendant's concealment of information. Finally, the unjust enrichment class failed because the court would have to deal with multiple plausible arguments on the precise meaning of unjust enrichment under different state laws and because individual facts outweighed those common to the class. The four classes also failed the superiority prong because many class members had already been provided some sort of relief due to the defendant's

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voluntary recall, which would complicate the process of calculating damages. The plaintiff also sought to certify a nationwide class of all owners of the vehicle at issue for injunctive relief under Rule 23(b)(2). However, the court held that the named plaintiff was neither a typical nor adequate representative of such class because he failed to participate in the defendant's voluntary recall and thus declined the same injunctive relief he sought for the class. Further, a single injunction would not provide relief to each class member.

***Stoneback v. ArtsQuest*, 12-CV-03287, 2013 WL 3090714 (E.D. Pa. June 20, 2013).**

Judge James K. Gardner of the U.S. District Court for the Eastern District of Pennsylvania denied the plaintiffs' motion for class certification in a case alleging deceptive business practices and fraudulent conduct by the defendant and its officers in connection with the sale and marketing of memorabilia sold at a music festival hosted by the defendant. There, the plaintiff asserted claims for common-law fraud, consumer fraud and violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act based on the allegation that the defendants sold commemorative beer steins and mugs at the festival that were advertised as made in Germany when in reality they were made in China. The court found that the plaintiffs failed to satisfy the predominance requirement because their claims required proof of reliance, which was not susceptible to classwide proof. According to the court, a classwide presumption of reliance was not appropriate, particularly because it was unclear whether one of the named plaintiffs himself relied on the defendant's alleged misrepresentations in purchasing the product at issue. In addition, the plaintiffs could not demonstrate which class members were actually exposed to the supposed misrepresentations. "Because individual issues predominate[d] over whether proposed class justifiably relied on defendants' alleged misrepresentations[,] class certification [was] not appropriate with respect to plaintiffs'" claims. Finally, while the plaintiffs also sought injunctive relief under 23(b)(2), the court found that (b)(2) certification was not appropriate because the plaintiffs were seeking primarily monetary relief.

***Daniel v. Ford Motor Co.*, No. 2:11-02890 WBS EFB, 2013 U.S. Dist. LEXIS 85641 (E.D. Cal. June 17, 2013), *on appeal*.**

Judge William B. Shubb of the U.S. District Court for the Eastern District of California denied a motion to certify a class in connection with an alleged suspension defect in the 2005 to 2011 Ford Focus, which allegedly caused premature tire wear, because the plaintiff could not satisfy the predominance requirement of Rule 23(b)(3). The court held that determining whether the car was unfit for its ordinary purpose due to premature tire wear required individualized comparisons of "the mileage at which a tire needed replacing and its otherwise expected mileage" and was therefore not a common question to the class. Further, the proposed class was not limited to individuals who had to replace their tires within a year of their purchase, which raised individual questions of whether the proposed class members' defects arose within the implied warranty period. Finally, the court cited numerous other factors that contributed to tire wear, such as driving habits and failure to properly maintain the vehicle, which meant "[r]esolving whether the alleged suspension defect caused the tire wear in Daniel's vehicle will not resolve the same question for other class members who might have experienced different types of tire wear caused by different factors."

***Vaccariello v. XM Satellite Radio, Inc.*, No. 08 5336(RO), 2013 WL 2896974 (S.D.N.Y. June 13, 2013).**

Judge Richard Owen of the U.S. District Court for the Southern District of New York adopted the report and recommendation of Magistrate Judge George A. Yanthis and denied the plaintiff's motion for class certification. The plaintiff alleged that XM's practice of automatically renewing customers' subscriptions violated New York's business and general obligations laws and sought to certify a class of all New York subscribers who had their subscriptions automatically renewed. The court first determined that the plaintiff could not certify a class under Rule 23(b)(2) because he was not an XM customer at the time he commenced the action and therefore lacked standing. The court reasoned that the plaintiff faced no threat of future injury and was also now aware of XM's renewal practices. The court also determined that the plaintiff failed to meet Rule 23(b)(3)'s predominance requirement because issues of whether certain customers requested or approved renewal of their subscription were not amendable to resolution through classwide proof. Moreover, the fact that the claims would be susceptible to individual defenses made the action inappropriate for class treatment. Finally, because unjust enrichment claims can only lie in the absence of a binding agreement, the court concluded that the plaintiff's unjust enrichment claim was not amenable to class treatment because individual determinations as to which putative class members had entered into agreements with XM would be required.

***Major v. Ocean Spray Cranberries, Inc.*, No. 5:12-CV-03067 EJD, 2013 WL 2558125 (N.D. Cal. June 10, 2013).**

The plaintiff sought certification of a putative consumer class claiming that several of the defendant's juice products were misleadingly labeled in violation of several California and federal consumer protection laws. Judge Edward Davila of the U.S. District Court for the Northern

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District of California refused to certify the class, finding that the plaintiff failed to satisfy Rule 23(a)(3)'s typicality requirement because "Plaintiff's proposed classes are so broad and indefinite that they encompass products that she herself did not purchase … As such, the claims of the unnamed plaintiffs who purchased products Plaintiff herself did not buy are not 'fairly encompassed by [plaintiff's] claims.'" Furthermore, the overbroad class definition encompassing entire lines of products failed to take into account that "the content that purportedly gives rise to Plaintiff's claims is unique to the specific and particular product she purchased and has no applicability to other products within the same line." As the plaintiff had failed to establish typicality, the court found it "unnecessary" to reach the other Rule 23 factors and denied the class certification motion.

***Bridging Communities, Inc. v. Top Flite Financial, Inc.*, No. 09-14971, 2013 WL 2417939 (E.D. Mich. June 3, 2013).**

Judge Lawrence P. Zatkoff of the U.S. District Court for the Eastern District of Michigan denied a motion for class certification in a Telephone Consumer Protection Act (TCPA) case seeking statutory penalties for unsolicited "junk faxes." The court held that common issues did not predominate because whether class members had consented to receiving faxes from the defendant was an inherently individualized determination. Although the plaintiff presented evidence that the defendant's third-party fax broadcaster purchased fax lists without contacting the proposed recipients to confirm their consent, the court reasoned that some of the class members could have given their consent before receiving the advertisement to either the defendant or the company from which the list was purchased. The court noted that while other courts in this district had granted class certification under similar facts, the U.S. Court of Appeals for the Sixth Circuit has not ruled on whether class certification is available under TCPA and no other precedential authority conflicted with the denial of class certification.

***O'Connor v. Diversified Consultants, Inc.*, No. 4:11CV1722 RWS, 2013 WL 2319342 (E.D. Mo. May 28, 2013).**

Judge Rodney W. Sippel of the U.S. District Court for the Eastern District of Missouri denied the plaintiff's motion to certify a class under the Fair Debt Collection Practices Act (FDCPA) and Telephone Consumer Protection Act (TCPA). The plaintiff alleged that the defendant violated the FDCPA and TCPA when its representatives called him several times on his cellphone in an attempt to collect a debt. The proposed FDCPA class consisted of debtors who were subjected to phone calls that amounted to "overshadowing," a collection tactic that leads a debtor to believe that he does not have any right to challenge the debt. The court determined that "[t]he inquiry of which debtors were subjected to such alleged tactics is an individual inquiry" into the communications made to each plaintiff. As for the proposed TCPA class, the court concluded that an individual inquiry was required to determine whether the debtors were charged for the calls to their cellphones (an element of a TCPA claim) or whether they consented to be contacted at their cellphone numbers (an affirmative defense to a TCPA claim). "Such an individualized inquiry," the court found, "weighs against class certification."

***Lamb v. Graco Children's Products Inc.*, No. 4:11CV477-RH/WCS, 2013 WL 1907895 (N.D. Fla. May 7, 2013).**

Judge Robert L. Hinkle of the U.S. District Court for the Northern District of Florida granted the defendant's motion for summary judgment and denied the plaintiffs' motion for class certification in a case where the plaintiffs alleged that the defendant defrauded them into buying a child car seat that failed compliance tests and federal safety standards. In particular, the plaintiffs claimed that a part used in manufacturing the armrest was too thin for the screws used to anchor it, allowing the armrest to change positions or separate from the seat's base in a crash. Even though the plaintiffs' car seats performed without incident — and even though the plaintiffs failed to even install the retention screws — the plaintiffs asserted economic injuries and sought to certify a class of Florida residents who bought the same product prior to a design change in 2008. The court rejected their claims and their bid for certification. Because the plaintiffs did not install the retention screws, they could not have relied on any representation that the screws would hold, dooming their fraud claim. This failure also rendered the plaintiffs' claims atypical and rendered the plaintiffs inadequate representatives for class members who assembled and used the product as directed. Class certification was also inappropriate because determining whether a class member bought a car seat that predated the design change and whether the class member installed the retention screws would require individual inspection and analysis.

***Diacakis v. Comcast Corp.*, No. C 11-3002 SBA, 2013 WL 1878921 (N.D. Cal. May 3, 2013), *pet. to appeal denied*.**

The plaintiff alleged that the defendant violated various California consumer protection statutes by failing to disclose additional charges for the rental of a cable modem. Judge Saundra Brown Armstrong of the U.S. District Court for the Northern District of California denied the motion, finding that the proposed class was overbroad and not ascertainable, as the class "include[d] *anyone* who purchased any bundled package, irrespective of whether he or she was deceived by Comcast's alleged failure to disclose the existence of additional modem

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charges." The plaintiff also failed to offer any evidence of the number of subscribers who were allegedly misled by the defendant to satisfy numerosity. The plaintiff further failed to meet the typicality requirement, as he offered no uniform evidence of misrepresentations or omissions, only personal conversations with sales representatives. Because the plaintiff admitted he saw no advertising, the court held that "he cannot adequately represent a class member who claims to have been harmed by Comcast's alleged marketing program." Finally, the plaintiff did not satisfy the predominance factors because he failed to show "any uniform practice" of misrepresentations or omissions, or even that "anyone other than Plaintiff was allegedly misinformed about the modem fees."

Decisions Permitting/Granting Class Certification

***Butler v. Sears, Roebuck & Co.*, Nos. 11-8029, 12-8030, --- F. 3d ----, 2013 WL 4478200 (7th Cir. 2013).**

A unanimous panel of the Seventh Circuit (Posner, Ripple and Hamilton, JJ.) reinstated its decision permitting class certification in a case involving two class actions complaining of alleged defects in Kenmore brand Sears washing machines after the Supreme Court remanded the case for further consideration in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Writing for the court, Judge Posner distinguished the case from Comcast, concluding that "there is no possibility … that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis" because the damages at issue — *i.e.*, mold and problems with the control units of the washers — all resulted from the two common defects alleged in the case. Judge Posner also warned that "[i]t would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages." Thus, the court concluded that "[i]f the issues of liability are genuinely common issues, and the damages of individuals can be readily determined in individual hearings, in settlement negotiations or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification."

***In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838 (6th Cir. 2013).**

Following the U.S. Supreme Court's order directing reconsideration in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the U.S. Court of Appeals for the Sixth Circuit (Martin and Stranch, JJ.) unanimously affirmed the certification of a class of purchasers of front-loading high-efficiency washing machines manufactured by Whirlpool for claims relating to mold build-up in those machines. The court held that Rule 23(a)'s commonality and typicality requirements were satisfied because there were two common questions that would drive classwide resolution — "whether a design defect proximately causes mold or mildew to develop" and "whether Whirlpool had a duty to warn consumers about the propensity for mold growth … and breached that duty." Further, the court reasoned that Whirlpool's documents indicated it was aware that mold would develop "despite" consumers' and service technicians' efforts and "despite" variation in consumer laundry habits. The court also held that all purchasers were properly class members, even if they had not experienced mold build-up in their machine, because if a defective design existed, purchasers should not have paid a premium price for the machines. Finally, the court concluded that Rule 23(b)(3)'s predominance requirement was satisfied because the district court certified a liability-only class, leaving damages to subsequent individual determinations, in contrast to *Comcast Corp.*, where the district court had certified a class on both liability *and* damages.

***Hughes v. Kore of Indiana Enterprise, Inc.*, No. 13-8018, 2013 U.S. App. LEXIS 18873 (7th Cir. Sept. 10, 2013).**

Judge Richard Posner, writing for the U.S. Court of Appeals for the Seventh Circuit (Posner, Manion and Wood, JJ.) in a unanimous decision, recently reversed a trial court's decertification of a class asserting a claim under the Electronic Funds Transfer Act (EFTA). The plaintiff alleged that the defendant owners of ATMs failed to provide proper notice that the machines charged a fee for their use. The district court decertified the class on two grounds: (i) class members would be better off bringing individual suits because they could recover more money in private actions under the ETFA; and (ii) notice to class members could not be accomplished because ATMs do not store users' names. The Seventh Circuit reversed, relying largely on notions of efficiency and the *cy pres* doctrine. The appellate court reasoned that "[t]he smaller the stakes to each victim of unlawful conduct, the greater the economies of class action treatment and the likelier that the class members will receive some money rather than (without a class action) probably nothing, given the difficulty of interesting a lawyer in handling a suit for such modest statutory damages as provided for in the [EFTA]." Recognizing that few class members would "bother" submitting a claim to obtain a paltry few dollars, the Seventh Circuit declared that "[t]he best solution may be what is called … a 'cy pres' decree." Specifically, the court reasoned that "[p]ayment of $10,000 to a charity whose mission coincided with, or at least overlapped, the interest of the class (such as a foundation concerned with consumer protection) would amplify the effect of the modest damages in protecting consumers." With respect to notice, the Seventh Circuit held that the proposal to place sticker notices on the ATMs at issue and in a newspaper and on a website was "adequate" under the

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circumstances. In so doing, the court explained that while some class members may fail to receive the notice and therefore not be able to opt out of the class action, "there [was] no indication that any member of the class ha[d] a damages claim large enough to induce him to opt out and bring an individual suit for damages."

***Annunziato v. Collecto, Inc.*, No. 12-CV-3609 (ADS) (AKT), 2013 WL 4045810 (E.D.N.Y. Aug. 9, 2013).**

Judge Arthur Spatt of the U.S. District Court for the Eastern District of New York granted the plaintiff's motion for class certification in a suit alleging that the defendant violated the Fair Debt Collection Practices Act (FDCPA) by sending a form letter that allegedly sought recovery of debt outside the applicable statute of limitations and contained misstatements designed to harass and intimidate the plaintiff. The plaintiff alleged that hundreds of such letters were sent to consumers in New York, and moved to certify a class of those who received such letters.

The court found that commonality and typicality were satisfied because all claims were based on the letters' purported violation of the FDCPA. The defendant argued that the claims were not typical because individualized determinations were needed with respect to whether the claim was time-barred or whether certain putative class members authorized the collection of fees. But the court concluded that these issues could be taken off the table by changing the class definition, which it narrowed to exclude those putative members whose debt was not time barred or who entered into debt collection agreements with the entity that hired the defendant. The court also determined that the plaintiff adequately represented the class, rejecting the defendant's argument that counsel had done a poor job briefing class certification and that the plaintiff lacked familiarity with the action. Turning to Rule 23(b)(3), the court concluded that the plaintiff demonstrated predominance because the common question of whether the debt collection letters violated the FDCPA predominated over uncommon questions such as damages. The court further found the superiority requirement met because the amount of the individual claims was small enough that no individual plaintiff would have an interest in prosecuting the action.

***Cox v. Sherman Capital LLC*, No. 1:12-cv-01654-TWP-MJD, 2013 WL 4051032 (S.D. Ind. Aug. 8, 2013).**

Judge Tanya Walton Pratt of the U.S. District Court for the Southern District of Indiana adopted the magistrate judge's report and recommendation and granted class certification in a case alleging claims under the Fair Debt Collection Practices Act, the Racketeer Influenced and Corrupt Organizations Act, and for restitution. The court concluded that the plaintiffs satisfied the requirements of Rule 23 for all three causes of action because the claims were based on the defendants' uniform debt collection activities as to all class members, including form collection letters and complaints. Thus, the court found that individualized inquiries did not predominate over classwide inquiries.

***Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, No. 06-cv-1842 (NG)(JO), 2013 WL 4067116 (E.D.N.Y. Aug. 7, 2013).**

Judge Nina Gershon of the U.S. District Court for the Eastern District of New York granted the plaintiff's motion for class certification in this suit against an insurer, alleging that it declined to pay first-party no-fault benefits within the 30-day statutory time period and refused to pay state-mandated interest on payments made thereafter.

The court first considered ascertainability. It rejected the defendant's claim that ascertaining class membership would require mini-trials on liability, holding that a putative class member only needs to show that it submitted a proof of claim, that the claim was not disputed, that payment was made after the 30-day period expired and that interest was not paid on the late amount. The court next found numerosity satisfied where there were at least 73 prospective class members. It also found commonality met because Shady Grove had alleged a common injury of delay in receipt of no-fault benefit payments. The court next rejected the defendant's argument that the plaintiff's claims were not typical of the class because it had subsequently made payments with interest. The court noted that such payments were only made as a result of this litigation. Nor did the plaintiff's status as a Maryland entity deprive it of typicality because the benefits sought arose from New York statutory law. The court also rejected the defendant's argument that the class representative was not adequate in light of her lack of knowledge, noting that attacks on adequacy are generally disfavored and that class representatives need have only personal knowledge of the case. Turning to Rule 23(b)(3), the court disagreed with the defendant that inquiries into each individual claim file meant that individual issues predominated.

The court concluded that resolving whether the defendant's late payments and failure to pay interest violated the applicable statute related to the entire class. The court also distinguished the U.S. Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), on the basis that the defendant had not challenged the plaintiff's damages methodology because here classwide damages calculations would not be necessary. Finally, the court found superiority because of the small amount of damages each claimant could expect. The defendant asserted that adjudication of "hundreds of thousands of mini-trials" to determine the facts relating to each individual claim would make a class action "exceedingly difficult." The court disagreed, noting that such information could be obtained simply by reviewing claim files and that an array of tools are available to assist a court in addressing individualized damages issues that might arise in a class action.

***McDonald v. Asset Acceptance LLC*, No. 2:11-cv-13080, 2013 WL 4028947 (E.D. Mich. Aug. 7, 2013).**

Judge Marianne O. Battani of the U.S. District Court for the Eastern District of Michigan certified a class in a case alleging that a debt collection company violated the Fair Debt Collection Practices Act by seeking interest on debts that had been charged off by the original creditor before being sold. The plaintiffs' theory was that the collection company could not charge interest after the charge-off date because the original creditors waived the right to collect additional interest after they decided to charge-off the accounts, and that the collection company was subject to those waivers. The defendant's principal argument — asserted under grounds of both ascertainability and predominance — was that the question of waiver was individualized and case-specific. The court disagreed, explaining that the question was simply whether the decision to charge-off was tantamount to a waiver as a matter of law — a question that could be resolved by considering the general business practices of the original creditors and the purchase agreements transferring the debts to the collection company.

***Gaudin v. Saxon Mortgage Services, Inc.*, No. 11-cv-01663-JST, 2013 WL 4029043 (N.D. Cal. Aug. 5, 2013), *on appeal*.**

Judge Jon S. Tigar of the U.S. District Court for the Northern District of California certified a class of California borrowers who entered into Trial Period Plans (TPP) pursuant to the federal Homeowners Affordable Modification Program (HAMP), alleging breach of contract and violation of various state and federal laws arising from the defendant's failure to deliver promised HAMP loan modifications. The court found common questions arising from the defendant's uniform practices and the nature of the TPP as an enforceable or binding contract. The typicality and adequacy requirements were met because "Plaintiff's alleged injury is similar to, even precisely the same as, the injury for which class counsel will seek redress on behalf of all other members of the Proposed Class." Judge Tigar also found that common questions predominated over individual issues because establishing the plaintiff's claims would "mainly involve an inquiry into the nature of the TPP itself and Defendant's uniform practices."

***In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation*, MDL No. 1674, 2013 WL 3972458 (W.D. Pa. July 31, 2013).**

The plaintiffs brought a putative class action involving the alleged predatory lending scheme of the Shumway/Bapst Organization, a residential mortgage loan business, which formed a relationship with the defendant, Community Bank of Northern Virginia. The plaintiffs claimed that the defendants violated the Real Estate Settlement Procedures Act, the Truth in Lending Act, the Home Ownership Equity Protection Act, and the Racketeer Influence and Corrupt Organizations Act. Judge Arthur J. Schwab of the U.S. District Court for the Western District of Pennsylvania certified the nationwide class of all persons who obtained a second mortgage on their primary residence from the defendants, as well as five subclasses. The court held that the commonality and typicality requirements were satisfied because the viability of class members' claims was ascertainable by examining identical loan documents and because all claims were based on the same scheme. The court also held that the adequacy requirement was met because the potential for "intra-class conflict" could be remedied by creating subclasses. The court further found that the predominance and superiority requirements were satisfied, summarily concluding that "[a]ll plaintiffs' claims arise from the same alleged fraudulent scheme."

***Hooks v. Landmark Industries, Inc.*, No. H-12-173, 2013 WL 3937029 (S.D. Tex. July 30, 2013).**

Judge Sim Lake of the U.S. District Court for the Southern District of Texas adopted the magistrate judge's report and recommendation and certified a class under the Electronic Fund Transfer Act. The magistrate judge rejected the defendant's argument that determination of the proposed class involved individualized issues, noting that class members would only need to show that they used a particular ATM during the relevant time period. The magistrate judge added that the plaintiff had identified a number of objective means by which potential class members could be ascertained.

***Astiana v. Kashi Co.*, No. 3:11-CV-01967-H (BGS), 2013 WL 3943265 (S.D. Cal. July 30, 2013), *pet. to appeal denied*.**

Judge Marilyn L. Huff of the U.S. District Court for the Southern District of California granted in part and denied in part the plaintiffs' motion for certification of a class alleging defendant's Kashi products advertised as "Nothing Artificial" and "All Natural" contained synthetic ingredients and asserting violation of California consumer protection statutes, breach of express warranty, and quasi contract claims. The plaintiffs sought to certify one class of purchasers of products labeled as "Nothing Artificial" and another for purchasers of products labeled "All Natural."

The court certified two classes. First, it certified a California class of purchasers of products with the "Nothing Artificial" representation. It rejected the defendant's argument that individualized proof would be necessary because "Defendant does not have records of consumer purchases, and potential class members will likely lack proof of their purchases" so there was "no feasible mechanism for identifying class members," holding that "[t]here is no requirement that "'the identity of the class members … be known at the time of certification.'" Judge Huff also found

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sufficient commonality and typicality in legal and factual issues, such as "all class members were exposed to such representations and purchased Kashi products" and sought common restitutionary and injunctive relief. Judge Huff likewise found the predominance requirement satisfied because individual questions of reliance were trumped by common factual and legal issues related to "a common advertising scheme to which the entire class was exposed" and plaintiffs presented "a viable theory of how to calculate damages." The court also certified a class of California "All Natural" purchasers, though narrower in scope than originally proposed by the plaintiffs. The defendants demonstrated that all but three of the challenged ingredients appear in many "organic" foods. With respect to those three ingredients, the court certified a class because the plaintiffs had shown that their inclusion in foods labeled "All Natural" might be considered a material misrepresentation. With respect to the other ingredients, however, the court declined to certify a class, explaining that "Plaintiffs fail[ed] to sufficiently show that 'All Natural' has any kind of uniform definition among class members, that a sufficient portion of class members would have relied to their detriment on the representation, or that Defendant's representation of 'All Natural' in light of the presence of the challenged ingredients would be considered to be a material falsehood by class members." Finally, citing the choice-of-law analysis of *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), Judge Huff "decline[d] to apply California consumer protection law to a nationwide class in this matter."

***Powers v. Credit Management Services, Inc.*, No. 8:11CV436, 2013 WL 3716412 (D. Neb. July 12, 2013), *pet. to appeal denied*.**

Judge Joseph F. Bataillon of the U.S. District Court for the District of Nebraska adopted the magistrate judge's report and recommendation and granted class certification in a case involving allegations that the defendant's collection complaints violated the Fair Debt Collection Practices Act (FDCPA) and the Nebraska Consumer Protection Act (NCPA). The court granted class certification, concluding that the central issue was whether the defendant's standardized complaint documents violated the FDCPA and NCPA and that a single determination on that issue would be applicable to all putative class members. Moreover, the court noted that a class action was superior to individual litigation because it would "provide[ ] incentives to prosecute despite small individual recoveries."

***A Aventura Chiropractic Center, Inc. v. Med Waste Management LLC*, No. 12-21695, 2013 WL 3463489 (S.D. Fla. July 3, 2013), *pet. to appeal denied*.**

Judge Cecilia M. Altonaga of the U.S. District Court for the Southern District of Florida granted the plaintiff's motion for reconsideration of its order denying class certification in a case alleging violation of the Telephone Consumer Protection Act (TCPA). The plaintiff sought to certify a class of persons in Florida, New York and New Jersey who were sent fax advertisements that did not contain an opt-out provision and who did not expressly permit defendants to send such faxes or have an established business relationship with defendants. The court had originally denied class certification because the class definition did not distinguish between recipients who may have consented to the advertisements and the TCPA's established-business-relationship provision (EBR) would involve individualized questions not suitable for class treatment. In its motion for reconsideration, the plaintiff argued that consent and EBR were irrelevant because the defendants' fax advertisements failed to contain opt-out language required for all fax advertisements under the TCPA — regardless of whether the sender received prior express permission or had an EBR. The court read this argument as an attempt to amend the proposed class definition to remove the consent and EBR issues from the equation. Without these issues, class treatment was feasible because the question of whether the faxes contained the correct opt-out language did not require individualized inquiries. Accordingly, the court granted the plaintiff's motion for reconsideration and certified a redefined class of "All persons who were sent one or more facsimiles in May 2010 from 'Med Waste Management' with the phone number '888-431-6386' and offering 'Guaranteed 20% Savings.'"

***Lane v. Wells Fargo Bank, N.A.*, No. C 12-04026 WHA, 2013 WL 3187410 (N.D. Cal. June 21, 2013).**

Judge William Alsup of the U.S. District Court for the Northern District of California granted in part and denied in part a motion to certify a nationwide class and two state subclasses of mortgage holders who were required to purchase flood and hazard insurance by defendant Wells Fargo while Wells Fargo was allegedly receiving "kickbacks" under exclusive agreements with its insurers. The plaintiffs asserted claims for violation of the Bank Holding Company Act (BHCA) and breach of contract, including breach of the implied covenant of good faith and fair dealing, and consumer fraud claims under various state laws. Judge Alsup refused to certify a nationwide class on the breach of contract and breach of fair dealing claims because "variations in state law … swamp any common issues and defeat predominance." The court held in abeyance the motion to certify a nationwide class on the BHCA claim pending a decision on a motion to dismiss such claims in a similar force-placed insurance case proceeding in the Northern District. Judge Alsup also denied the motion to certify an Arkansas class because "Plaintiffs have failed to meet their burden of establishing that concentration of the litigation here is desirable, where none of the putative class members are located in California." But the court certified a California

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class asserting various claims under state law. It limited the class to borrowers with FHA form mortgages who were forced to buy flood insurance — excluding those who were forced to buy hazard insurance because the California class representative herself had not purchased such insurance. The court found that common issues of fact prevailed, because, *inter alia*, "class members had similar contracts and received the same form notice of lapsed insurance," but further narrowed the class as to damages to exclude charges for insurance that had been reimbursed or not been paid. Finally, Judge Alsup found the current California plaintiff's counsel inadequate based on counsel's misrepresentations to the court and poor efforts in discovery. He also disapproved of the other applicant firms and found it "disturbing that counsel proposes to employ four law firms and thus multiply the lodestar, all at the expense of the class." The court therefore conditioned certification "on receiving and evaluating other applications to represent the class."

***Manno v. Healthcare Revenue Recovery Group, LLC*, 289 F.R.D. 674 (S.D. Fla. 2013), *pet. to appeal denied*.**

Judge Robert N. Scola, Jr. of the U.S. District Court for the Southern District of Florida denied a motion for reconsideration of his order certifying claims under the Telephone Consumer Protection Act (TCPA) and the Fair Debt Collection Practices Act (FDCPA), but agreed to modify the class definition in that case. While at a hospital for treatment, the proposed class representative filled out paperwork which required disclosure of his cellphone number. In an effort to collect payment for medical services, the defendants called the plaintiff using the cellphone number provided. The plaintiff claimed that such calls violated the TCPA and FDCPA and sought to certify a class of "all Florida residents" who received similar calls. After the class was certified, the defendants sought reconsideration on a number of grounds, all of which were rejected by the court. First, the court amended the class definition to avoid the need for fact-specific inquiries to determine who was a "Florida resident" identified by the defendants. In addition, the court disagreed that the issue of consent was individualized and precluded class treatment, reminding the defendants that their theory all along had been that consent was given when the putative class members gave the hospital their phone numbers — a contention that was subject to classwide resolution. The court also allowed the plaintiff to withdraw his request for willful and knowing damages — which could have required individualized inquiries — and held that withdrawal of the claim did not render the plaintiff an inadequate class representative because the class action opt-out procedure was sufficient to safeguard the interests of any class members who wished to pursue such damages. Finally, the court held that the defendants' unique defense of "bona fide error" as to the named plaintiff's claim did not "defeat certification" because it would not become a "consuming focus of the litigation."

***Munoz v. PHH Corp.*, No. 1:08-CV-0759-AWI-BAM, 2013 WL 2146925 (E.D. Cal. May 15, 2013).**

U.S. Magistrate Judge Barbara McAuliffe of the U.S. District Court for the Eastern District of California granted in part and denied in part the plaintiffs' motion to certify a class of homeowners who obtained mortgages from the defendants the agreements for which allegedly included captive reinsurance arrangements that were designed to provide the defendants with "kickbacks, referral payments and unearned fee splits" in violation of the Real Estate Settlement Procedures Act (RESPA). The court certified a class of mortgage holders who obtained loans after June 2007 but denied certification as to mortgage holders who secured loans before that date, finding that their claims were subject to a statute of limitations defense not applicable to the remainder of the class. In finding that the commonality requirement was met, the court acknowledged that "[t]he Supreme Court's recent decision in *Dukes* … has undoubtedly increased the burden on class representatives by requiring that they identify *how* common points of facts and law will drive or resolve the litigation," but nonetheless concluded that the commonality factor was satisfied by numerous common questions, such as the standard of decision to be applied, Atrium's contractual obligations, Atrium's performance of reinsurance services, whether Atrium's agreements with the primary pnsurers limited the company's liability or how the borrower was referred to the insurers. As to predominance, the court noted that the U.S. Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), "found a class action should not be certified when the damages traceable to the actionable conduct can not be determined on a classwide basis" but noted that "[t]he *Comcast* decision does not infringe on the long-standing principle that individual class member damage calculations are permissible in a certified class under Rule 23(b)(3)." The court found that the plaintiffs could prove classwide damages based on common evidence because, if liability under RESPA was proven, "the damages for this violation are provided by statute" and "[d]iffering amounts of individual class members' damages does not defeat certification."

***Wallace v. Powell*, 3:09-CV-286, 2013 WL 2042369 (M.D. Pa. May 14, 2013).**

Judge Richard Caputo of the U.S. District Court for the Middle District of Pennsylvania certified a class (and several subclasses) of former inmates at two juvenile detention facilities and their families who alleged claims under 42 U.S.C. Section 1983, Racketeer Influenced and Corrupt Organizations (RICO) and state false imprisonment laws based on the construction and operation of the facilities. The court held that the plaintiffs satisfied Rule 23(b)(3) with respect to their claims for violations of right to impartial tribunal, violations of right to counsel and colloquy and false imprisonment. In addition, the

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court held that "certification of specific issues relevant to Defendants' liability on Plaintiffs' Section 1983, RICO, and wrongful imprisonment claims" was appropriate under Rule 23(c)(4) — despite the presence of individualized questions related to damages — because a single body of law applied to the claims, certification of a liability class would be more efficient than individual resolution, individual proceedings will have no impact on the class proceeding, and "the evidence presented in support of liability will be different than that needed to establish individualized damage claims." The court further noted that judicial solutions have been devised to determine individual damages issues, including bifurcating liability and damage trials with different juries or decertifying the class after a liability trial and then notifying class members as to how they may proceed with regard to damages.

***Miri v. Dillon*, No. 11-15248, 2013 WL 2034310 (E.D. Mich. May 14, 2013).**

Judge Nancy G. Edmunds of the U.S. District Court for the Eastern District of Michigan certified a liability-only class in a Section 1983 case alleging that the Michigan Treasury Department's policy of issuing nonjudicial warrants to enter private property and seize assets to satisfy tax debts violated the Fourth Amendment. The plaintiff sought to certify a class under Rule 23(b)(1), Rule 23(b)(2), and Rule 23(b)(3). The defendants opposed class certification on grounds that, *inter alia*, the claims for monetary damages were barred by the Eleventh Amendment, the claims for injunctive review were moot due to changes in the department's policy and the alleged Fourth Amendment violations presented individual facts that predominate over common issues. (The defendants also challenged the scope of the proposed class definition and the individual defendants named in the suit.) The court found that these claims all raised questions common to the proposed class, satisfying the commonality requirement of Rule 23(a)(3) and the predominance requirement of Rule 23(b)(3). Further, because the alleged damages suffered by the purported class members could vary significantly, the court certified the class for liability purposes only "[i]n an abundance of caution," but cited Justices Ginsburg and Breyer's dissent in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and noted that the issue of damages could be decided by a special master or other method under Rule 12(c)(4).

***Bauer-Ramzani v. Teachers Insurance & Annuity Association of America-College Retirement & Equities Fund*, 290 F.R.D. 452 (D. Vt. 2013).**

Judge J. Garvan Murtha of the U.S. District Court for the District of Vermont granted the plaintiffs' motion for class certification but modified the class definition. The plaintiffs alleged that the defendants engaged in prohibited transactions involving accounts covered by the Employee Retirement Income Security Act, kept funds invested after requests for transfers for purposes other than the plaintiffs' benefit and did not compensate all customers for the delayed payment. In particular, the plaintiffs challenged the defendants' company-wide policy of retaining funds in accounts after a transfer request had gone unfulfilled within seven days, the time period provided in the funds' prospectus. Judge Murtha held that the commonality requirement was met, citing Judge Posner's decision opinion in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012), which certified a class where the alleged economic harm was the result of "corporate-wide" policies. According to Judge Murtha, "whether [defendants'] policy is held lawful or unlawful, a question central to the validity of each member's claim would be resolved." Turning to typicality, the court observed slight variations in the two named plaintiffs' claims but concluded that the plaintiffs satisfied the typicality requirement because both alleged delays in receiving all funds due and that the defendants' practice of retaining gains in members' accounts when transfers were not affected within seven days was unlawful. The court further found that the plaintiffs were adequate class representatives because they were asking for one kind of relief for the class and their general interests aligned with the interest of the class. With respect to predominance, the court rejected the defendants' argument that individual questions, such as the reason for each payment delay, prevented class certification. The court held that even where the defendants may have unique defenses for some claims, the device of a class action was particularly suited to cases where the plaintiffs were "allegedly aggrieved by a single policy of the defendants[.]" Finally, the court modified the class definition to limit it to accounts that experienced a gain as well as those who requested transfers between two of the defendants' funds.

Decisions Granting Decertification of Classes

***Powell v. Tosh*, No. 5:09-CV-00121, 2013 U.S. Dist. LEXIS 120448 (W.D. Ky. Aug. 2, 2013).**

On the defendants' motion, Judge Thomas B. Russell of the U.S. District Court for the Western District of Kentucky decertified a class of property owners asserting permanent nuisance claims after narrowing those claims on summary judgment, finding that the remaining cause of action could not be resolved based on common questions. Under Kentucky law, a plaintiff must prove that the alleged nuisance presented a "substantial annoyance," which has both objective and subjective components, neither of which could be answered on a classwide basis. The court concluded that the subjective component could not be answered on a classwide basis because the deposition testimony of several absent class members established that their experiences with the alleged nuisance varied. The objective component also could not be answered on

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a classwide basis because it depended on facts unique to each property. Because each class member was situated uniquely, the court also found that the typicality and adequacy requirements were not satisfied.

Decision Denying Decertification of Class

***In re Urethane Antitrust Litigation*, MDL 1616, 2013 WL 2097346 (D. Kan. May 15, 2013).**

Judge John W. Lungstrum of the U.S. District Court for the District of Kansas denied defendant Dow Chemical's motion to decertify a class of consumers claiming Dow conspired with other manufacturers to fix prices for certain urethane chemical products in violation of the Sherman Act. The court rejected the motion, brought on the eve of trial and nearly three years after the class was certified, as untimely. The court also rejected Dow's arguments on the merits, including Dow's complaint that not all class members suffered damages. According to the court, "all members of the class may be shown to have been impacted by a conspiracy that elevates prices above the competitive level, even if some members may have mitigated their damages or otherwise did not suffer damages that may be quantified." Dow also complained that the class continued to include purchases made in 2004 "even after the plaintiffs abandoned any claim of a conspiracy during that year," but the court held that "any problems from the inclusion of such members within the class are obviated by modification of the class to exclude those members" and modified the class accordingly because "such modification is far superior to decertification."

CLASS ACTION FAIRNESS ACT DECISIONS

Decisions Denying Motions to Remand/Reversing Remand Orders

***Roth v. CHA Hollywood Medical Center, L.P.*, 720 F.3d 1121 (9th Cir. 2013).**

The U.S. Court of Appeals for the Ninth Circuit (Trott, Lucero and Fletcher, JJ.) unanimously reversed an order of remand, finding that where a plaintiff has not provided information indicating that grounds exist for removal, the defendant is not required to remove within 30 days of receiving the plaintiff's pleading but "may remove to federal court when it discovers, based on its own investigation, that a case is removable." The case was removed after the defendant, CHA, learned through its own investigation that one of the plaintiffs, a CHA employee, had since moved to Nevada, providing a basis for satisfying CAFA's diversity requirement. The district court granted the plaintiff's motion to remand because the defendants came by that information on their own, not from the amended complaint or other plaintiff document, and "construed 28 U.S.C. § 1446(b)(1) and (b)(3) to permit removal only during the two thirty-day periods specified in those subsections." The Ninth Circuit disagreed, holding that "§§ 1441 and 1446, read together, permit a defendant to remove outside the two thirty-day periods on the basis of its own information, provided that it has not run afoul of either of the thirty-day deadlines." The court thus reversed the remand order and remanded to the district court to determine whether the action satisfied the CAFA requirements for removal.

***Watkins v. Vital Pharmaceuticals, Inc.*, 720 F.3d 1179 (9th Cir. 2013).**

In a *per curiam* decision, the U.S. Court of Appeals for the Ninth Circuit (Thomas, Silverman and Fisher, JJ.) overturned the district court's *sua sponte* remand of a class action alleging violations of California law arising from alleged erroneous marketing and labeling of Zero Impact protein bars. The defendant had timely removed under CAFA, but the lower court found, based on statements in the notice of removal and a declaration from trial counsel (only one of the two declarations the defendant submitted in support), that the defendant had not satisfied its burden as to the $5 million CAFA amount-in-controversy requirement. On appeal, the Ninth Circuit found that CAFA's provision for appellate review of decisions on remand motions also permitted review of *sua sponte* remand orders, since "[i]f CAFA permitted review of remand orders issued only in response to a party's motion to remand, district court orders remanding class actions *sua sponte* would be insulated from appellate review," which is "inconsistent with CAFA's clearly expressed intention that class actions are exempt from the general jurisdictional rule that district court remand orders are not reviewable on appeal." The majority went on to find that an undisputed declaration from the defendant company's controller stating that product sales over the previous four years exceeded $5 million was sufficient to satisfy the amount-in-controversy requirement, and reversed and remanded to the district court with instructions to exercise jurisdiction over the case. However, Judge Raymond Fisher, concurring in part and dissenting in part, suggested the amount-in-controversy determination should have been remanded for the district court to decide, expressing "serious doubts" that the lower

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court had even considered the controller's declaration, which was "devoid of business record documentation or other foundation," and refusing to "endorse Vital's paltry showing as the new standard for meeting CAFA's heretofore more demanding requirements."

***Raskas v. Johnson & Johnson*, 719 F.3d 884 (8th Cir. 2013).**

The U.S. Court of Appeals for the Eighth Circuit (Wollman, Melloy and Gruender, JJ.) unanimously reversed the district court's holding that the defendants had failed to establish the amount-in-controversy requirement under CAFA. The plaintiffs filed three putative class action suits in Missouri state court alleging that the defendants violated the Missouri Merchandising Practices Act by deceiving customers into throwing away medications after their expiration dates while knowing that the medications were safe and effective beyond the expiration date. The defendants, removed to federal court under CAFA, and the plaintiffs filed motions to remand. In response to the motions, each defendant relied on its own sales figures in Missouri during the relevant time period, which exceeded $5 million. The district court found that these figures were overinclusive because the plaintiffs were only attempting to recover damages for the medications that were wrongfully discarded — not all medications that were sold — and therefore granted the motions to remand for failure to satisfy CAFA's amount-in-controversy requirement. A unanimous panel of the Eighth Circuit reversed, noting that the question "is not whether the damages *are* greater than the requisite amount, but whether a fact finder *might* legally conclude that they are." The court concluded that the defendants' affidavits detailing the total sales of their respective medications in Missouri met the amount-in-controversy requirement, and the plaintiffs were unable to show that it was legally impossible for them to recover more than $5 million.

***Knowles v. Standard Fire Insurance Company*, No. 4:11-cv-04044, 2013 WL 3968490 (W.D. Ark. Aug. 2, 2013), *pet. to appeal denied*.**

Judge P.K. Holmes, III of the U.S. District Court for the Western District of Arkansas denied the plaintiff's second motion to remand, finding that the jurisdictional requirements of CAFA were satisfied. The plaintiff alleged breach of contract due to the defendant's underpayment of claims for loss or damage to real property. The second motion to remand was filed on the heels of the U.S. Supreme Court's seminal decision in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345, 1437 (2013), in which the Court invalidated the trial court's order granting the first motion to remand. In that ruling, the U.S. Supreme Court held that the plaintiff could not evade federal jurisdiction under CAFA by stipulating that the amount in controversy is less than $5 million and waiving any class-claims below the $5 million amount-in-controversy. Assessing the second motion to remand, the trial court noted that including attorneys' fees in the CAFA amount-in-controversy calculation is appropriate where such fees are recoverable under state law. The court also concluded that the defendant appropriately estimated damages by calculating 20 percent of the total payments the defendant made to prospective class members for structural losses and deductibles, even if that estimate was ultimately overinclusive. Finally, it was proper to consider potential punitive damages because the complaint's allegations created at least the possibility that punitive damages could be awarded. As a result, the court held that CAFA's jurisdictional requirements were satisfied.

***Hood ex rel. Mississippi v. JPMorgan Chase & Co.*, No. 3:12-cv-565-WHB-LRA, 2013 WL 3946002 (S.D. Miss. July 31, 2013).**

Judge William H. Barbour, Jr. of the U.S. District Court for the Southern District of Mississippi denied the Mississippi attorney general's motion to remand to state court for lack of jurisdiction under CAFA in a *parens patriae* action alleging claims against several banks for their marketing of fee-based credit card products to Mississippi consumers. The court concluded that the action qualified as a "mass action" under CAFA because (i) it sought monetary relief, (ii) it involved claims of 100 or more people because Mississippi credit card holders were the real parties in interest, (iii) the minimal diversity requirement of CAFA was satisfied, (iv) the claims were proposed to be tried jointly and involved common questions of law and fact, and (v) the aggregate amount in controversy exceeded $5 million. The court also concluded that CAFA's "general public" exception did not apply, reasoning that not all of the claims were asserted on behalf of the general public because Mississippi credit card holders were the real parties in interest.

***Ebin v. Kangadis Food Inc.*, No. 13-2311(JSR), 2013 WL 3936193 (S.D.N.Y. July 26, 2013).**

Judge Jed Rakoff of the U.S. District Court for the Southern District of New York held that the court possessed subject matter jurisdiction over all but one of the plaintiffs' class action claims. The plaintiffs alleged that Kangadis sold olive oil containing an industrial substitute. The plaintiffs premised jurisdiction on both the Magnuson-Moss Warranty Act, which the court rejected, and CAFA. The defendant conceded that the putative class contained at least 100 class members and that CAFA's minimal diversity requirement was satisfied but disputed whether the plaintiffs had met CAFA's $5 million amount-in-controversy requirement. The court first noted that the complaint alleged in "conclusory" fashion that the aggregate amount in controversy exceeded $5 million, but also observed that "a party invoking federal jurisdiction need only show 'a reasonable probability that the claim is in excess of the

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statutory jurisdictional amount.'" The plaintiffs argued that the full retail price paid by consumers was the proper measure of damages while the defendant argued that the proper measure was the benefit of the bargain. The court determined that the full retail price was the proper measure of damages for the plaintiffs' breach of warranty claim, while the benefit of the bargain was the proper measure for all other claims. Under either measure, however, the court concluded that the $5 million threshold was easily met. The benefit of the bargain measure would subtract the industry value of the olive oil substitute from the price the plaintiffs actually paid, which yielded about $10.9 million. Thus, CAFA's $5 million amount-in-controversy requirement was met before consideration of the plaintiffs' claims for punitive damages, treble damages and attorneys' fees.

***Wingo v. State Farm Fire & Casualty Co.*, No. 13-3097-CV-S-FJG, 2013 WL 3872199 (W.D. Mo. July 25, 2013).**

Judge Fernando J. Gaitan, Jr. of the U.S. District Court for the Western District of Missouri held that a district court has jurisdiction to reconsider a remand order in a CAFA case. Although observing that very little case law exists on this point and that the Eighth Circuit has not addressed the issue, the court noted that the Seventh Circuit has treated reconsideration by district courts in a CAFA case as a proper exercise of jurisdiction. The court found the Seventh Circuit precedent to be persuasive and held that "it retains jurisdiction to reconsider [its] remand order." The court then proceeded to hold that CAFA's numerosity and amount-in-controversy requirements were satisfied, stayed the effect of its remand order, and reopened the case.

***Johnson v. MFA Petroleum Co.*, No. 11-0981-CV-W-DGK, 2013 WL 3448075 (W.D. Mo. July 9, 2013).**

Judge Greg Kays of the U.S. District Court for the Western District of Missouri denied the plaintiff's motion to remand under CAFA. The plaintiff initially filed suit in Missouri state court seeking damages and injunctive relief relating to transactions involving the defendant gas stations' single-hose blender gasoline pumps. The plaintiff did not dispute that the defendants satisfied the initial jurisdictional requirements necessary to support removal under CAFA. Instead, the plaintiff argued that the court should remand the case to state court under CAFA's local controversy exception. To qualify under that exception, a plaintiff was required to establish, *inter alia* (i) at least one defendant from whom significant relief is sought was a Missouri citizen and (ii) at least one defendant whose alleged conduct forms a significant basis for the claims asserted was a Missouri citizen. The court looked to the allegations in the plaintiff's complaint to determine whether these factors had been met. Although the complaint alleged that one of the three defendants was a Missouri citizen, it did not allege that the Missouri defendant operated a significant number of gas stations in Missouri. Accordingly, the plaintiff had not satisfied his burden of proving that the Missouri defendant was a "significant defendant" for purposes of CAFA's narrow local controversy exception.

***In re Motor Fuel Temperature Sales Practices Litigation*, MDL No. 1840, 2013 WL 3283859 (D. Kan. June 28, 2013).**

A putative class of California residents who purchased "hot fuel" brought suit asserting breaches of good faith and fair dealing, unjust enrichment and violation of several California consumer protection statutes against seven defendants and alleged minimum diversity jurisdiction under CAFA as part of their complaint. After Costco settled with the plaintiffs and defendant Chevron believed the plaintiffs' claims against Costco would be severed, Chevron moved to dismiss for lack of subject-matter jurisdiction, arguing that the settlement and severance of claims brought the case within CAFA's "home-state exception" to minimal diversity jurisdiction, which requires a district court to decline jurisdiction over class actions where "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." Chevron maintained that "the home-state exception strips the Court of jurisdiction whenever its requirements become satisfied during the course of litigation due to a change of parties."

Judge Kathryn Vratil of the U.S. District Court for the District of Kansas denied the motion to dismiss because Costco remained a "primary defendant" — "[a]lthough the Court has approved the Costco settlement, the Court has not entered judgment against Costco or dismissed it from the case" and thus "the parties have not changed." Based on that finding, Judge Vratil declined to resolve Chevron's "novel and complex" argument that "[i]nstead of determining diversity jurisdiction based on the facts that exist when plaintiffs file suit, courts must reevaluate diversity jurisdiction as the parties to a diversity action change."

***Hood ex rel. Mississippi v. Bristol-Myers Squibb Co.*, No. 1:12-CV-00179-GHD-DAS, 2013 WL 3280267 (N.D. Miss. June 27, 2013).**

Senior Judge Glen H. Davidson of the U.S. District Court for the Northern District of Mississippi denied the Mississippi attorney general's motion to remand for lack of subject matter jurisdiction under CAFA in a *parens patriae* action alleging that the defendants falsely labeled and promoted the prescription drug Plavix to consumers and health care providers. Although the action did not qualify as a "class action" under CAFA, the court concluded that it qualified as a "mass action" because (i) it asserted claims for monetary relief, (ii) it involved claims of 100 or more people because the citizens of Mississippi were the real parties in interest, (iii) the claims were proposed to be tried jointly on the ground that they involve common questions

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of law and fact, and (iv) the amount in controversy was in the hundreds of millions of dollars. The court also found that the action did not fall within the "general public" exception of CAFA. The court cited a recent Fifth Circuit case, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 802 (5th Cir. 2012), for the proposition that where "individual consumers, in addition to the State, are real parties in interest," there is no way that all claims in the action are asserted on behalf of the general public. The court went on to note, however, that the U.S. Supreme Court has granted *certiorari* to resolve a circuit split on whether a state's *parens patriae* action is removable as a "mass action" under CAFA when the state is the sole plaintiff and the claims arise under state law. The court reasoned that "[b]ecause this issue has not been resolved … [it] must follow current controlling precedent in the Fifth Circuit." The court therefore held that the general public exception did not apply and that the case was removable under CAFA as a "mass action."

***Stephenson v. Standard Insurance Co.*, No. SA:12-CV-01081-DAE, 2013 WL 3146977 (W.D. Tex. June 18, 2013).**

Judge David Alan Ezra of the U.S. District Court for the Western District of Texas denied the plaintiff's motion to remand in a case involving denial of an insurance claim. First, the court found that there was minimal diversity of citizenship. Second, the court concluded that the defendants had provided sufficient evidence that the amount in controversy at the time of removal exceeded $5 million because the proposed class consisted of thousands of individuals, all of whom the plaintiff alleged were entitled to rescission of their insurance contracts and a return of their premiums. Moreover, the defendants submitted an affidavit stating that total premiums paid for insurance coverage under the relevant policy exceeded $5 million. Finally, the court found that CAFA's local controversy exception did not apply because the plaintiff failed to state a claim against the two nondiverse defendants, thus failing to meet her burden of demonstrating that a nondiverse defendant was one from whom significant relief was sought and whose alleged conduct formed a significant basis for the claims asserted.

***Deaton v. Frito-Lay North America, Inc.*, No. 1:12-CV-01029, 2013 WL 2455941 (W.D. Ark. June 5, 2013).**

Judge Susan O. Hickey of the U.S. District Court for the Western District of Arkansas denied the plaintiff's motion to remand under CAFA. The plaintiff filed an action in Arkansas state court, alleging that Frito-Lay deceptively marketed several of its products, including Tostitos and SunChips. The defendants removed the case to federal court, claiming jurisdiction under CAFA. In considering the plaintiff's motion to remand to state court, the district court noted that the only issue was "whether Defendants have submitted sufficient evidence showing that the amount in controversy exceeds $5 million." The defendants submitted evidence that Frito-Lay's revenues from sales of its products and combined net profits in Arkansas were greater than $5 million in both 2010 and 2011. Although the plaintiff argued that these sales figures accounted for sales to distributors and retailers rather than sales to consumers, the court found that "a fact-finder could easily conclude that Frito-Lay's supplier/retailer sales of over $5 million for both 2010 and 2011 translated to over $5 million in individual consumer sales during the same period." Moreover, because the plaintiff could not show to a legal certainty that the amount in controversy was $5 million or less, the defendants had sufficiently demonstrated that the court had jurisdiction under CAFA.

***In Touch Concepts, Inc. v. Cellco Partnership*, No. 13-1419(PKC), 2013 WL 2455923 (S.D.N.Y. June 4, 2013).**

Judge P. Kevin Castel of the U.S. District Court for the Southern District of New York held that the plaintiff's amendment of its complaint to omit class claims after the defendants had removed to federal court pursuant to CAFA did not deprive the court of subject-matter jurisdiction. The plaintiff alleged various contract and tort claims predicated on the defendants' purported scheme to increase cellphone account activations on behalf of a proposed class. The court first noted that subject-matter jurisdiction is determined based on circumstances at the time of filing and that subsequent events — such as the change of a party's citizenship — does not deprive a federal court of jurisdiction. The court then turned to the U.S. Court of Appeals for the Seventh Circuit's decision in *In re Burlington Northern Santa Fe Railway Co.*, 606 F.3d 379, 381 (7th Cir. 2010) (*per curiam*), holding that post-removal amendment of a complaint does not destroy CAFA jurisdiction. In addition to the time-of-filing precept, Judge Castel noted the Seventh Circuit's concern that a plaintiff suing in federal court could "amend away jurisdiction … to avoid anticipated adverse rulings." Finally, Judge Castel noted that the U.S. Courts of Appeal for the Sixth, Ninth and Eleventh Circuits all upheld jurisdiction predicated on CAFA in the face of changes to circumstances after removal. The court adopted this reasoning and held that it retained jurisdiction over those claims originally asserted as class claims that then technically become individual claims. Because the court concluded that it retained original jurisdiction over these claims, it determined that it would exercise supplemental jurisdiction over certain of the state-law causes of action, but not others.

***Smith v. Honeywell International Inc.*, No. 10-3345 ES, 2013 WL 2181277 (D.N.J. May 20, 2013).**

Judge Esther Salas of the U.S. District Court for the District Court of New Jersey adopted the magistrate judge's report and recommendation, finding that jurisdiction under CAFA existed where the plaintiffs sought certification of two classes for medical monitoring and property value diminution as a result of hazardous substance exposure from the defendants' chromium ore processing generators. On June 29, 2010, the defendants removed the action to federal court pursuant to CAFA. The plaintiffs did not move to remand, but the court nonetheless considered whether it had jurisdiction under 28 U.S.C. § 1332(d)(4)(A)(i)(II). The court determined that the "local controversy" exception of CAFA did not apply, accepting the defendants' argument that the "[p]laintiffs could not credibly argue that *two-thirds* of the tens of thousands of persons who have *ever* lived, worked, or gone to school for six months within the range of the many [defendantss sites] in Jersey City over a 115-year period, or who currently own *any* property in the class, are New Jersey citizens." Likewise, the court determined that the "home-state" exception of CAFA did not apply for reasons similar to that of the "local controversy" exception — namely, that the plaintiffs did not have facts to support the requirement that two-thirds of the plaintiffs are citizens of the state in which the action was originally filed.

***Smith v. Manhattan Club Timeshare Association, Inc.*, No 12-6363(PKC), 2013 WL 1955882 (S.D.N.Y. May 10, 2013).**

Judge P. Kevin Castel of the U.S. District Court for the Southern District of New York granted the defendants' motion to dismiss and denied the plaintiff's motion to remand, finding that the defendants had established jurisdiction pursuant to CAFA and that the plaintiff failed to invoke one of the statute's exceptions. Two years prior to this case, several plaintiffs brought a putative class action alleging that they were wrongfully induced into purchasing an ownership interest in the defendants' timeshare club. Judge Castel dismissed that suit and no appeal was taken. Shortly afterward, the named plaintiff in this case — who was a co-owner of the timeshare interest with the named plaintiff in the prior case — brought an action in state court alleging the same claims. The defendants removed the case to federal court and moved to dismiss on the basis of *res judicata*.

As a threshold matter, Judge Castel assessed whether the case was properly removed under CAFA such that the court had subject matter jurisdiction. The plaintiff conceded that the numerosity and minimal diversity requirements of CAFA were satisfied and challenged only whether the defendants had met CAFA's $5 million amount-in-controversy requirement. The court determined that the defendants satisfied the requirement because their computer records showed that the total ownership sales sold to the putative class exceeded $330 million. Moreover, the complaint alleged damages of $31 million for real estate taxes paid in 2012 alone. The court rejected the plaintiff's arguments that affirmative defenses, settlements and difficulty proving damages would reduce the amount in controversy below the $5 million threshold. The plaintiff then argued for application of one of the exceptions to CAFA, either because greater than one-third of putative class members were citizens of New York (the "home-state" exception), or because greater than one-third but less than two-thirds of putative class members were citizens of the state in which the action was originally filed (the "discretionary" exception). Judge Castel declined to apply either exception because the plaintiff only "believed" that the putative class members were primarily citizens of New York. Moreover, even if the plaintiff's belief were strong enough to create a presumption that either exception applied, the court found that the defendants rebutted it by virtue of their membership records, which showed that only 20.7 percent of their members are New York citizens.

***Fielder v. Penn Station, Inc.*, No. 1:12CV2166, 2013 WL 1869618 (N.D. Ohio May 3, 2013).**

Judge Christopher A. Boyko of the U.S. District Court for the Northern District of Ohio denied a motion to remand a putative class action against a merchant, Penn Station, and its credit card processor for negligence in connection with a data breach. The court found that the defendants had demonstrated, by a preponderance of the evidence, that the matter in controversy exceeded the statutory $5 million threshold by offering evidence of the cost of the relief sought by the plaintiff for each class member (credit monitoring services) and of the number of individuals in the plaintiff's proposed class (individuals "who were customers of Penn Station stores from February 1, 2012 through June 1, 2012 and completed a credit card or debit card transaction with Defendants").

Decisions Granting Motion to Remand

***Hurst v. Nissan North America, Inc.*, 511 F. App'x 584 (8th Cir. May 31, 2013).**

The U.S. Court of Appeals for the Eighth Circuit (Loken, Melloy and Shepherd, JJ.) affirmed *per curiam* the district court's order granting the plaintiff's motion to remand under CAFA. The plaintiff brought a statewide class action lawsuit against Nissan in Missouri state court, alleging that certain cars manufactured by Nissan had defective dashboards. Nissan initially removed to federal court under CAFA, and the district court granted the plaintiff's motion to remand on the ground that the amount-in-controversy requirement was not satisfied. Nearly three years later, just weeks before trial, the plaintiff submitted proposed jury instructions for punitive damages. Nissan again removed

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the action to federal court, contending that CAFA's amount-in-controversy requirement was satisfied by the new request for punitive damages. Because punitive damages were not sought in the initial state court petition, however, the Eighth Circuit affirmed the district court's conclusion that such damages were legally unrecoverable under Missouri law. Thus, the case was not removable because "it was legally impossible for the class to recover more than $5,000,000." The court added that, "[o]n remand, should punitive damages find their way into the case for consideration by the jury (whether by formal amendment to the pleadings or otherwise), immediate removal would be timely and almost certainly proper."

***Scimone v. Carnival Corp.*, 720 F.3d 876 (11th Cir. 2013).**

The U.S. Court of Appeals for the Eleventh Circuit (Carnes, Hull and Marcus, JJ.) unanimously affirmed a ruling by the U.S. District Court for the Southern District of Florida that it lacked subject-matter jurisdiction under CAFA's mass-action provision in two separate suits involving 56 and 48 plaintiffs, respectively. Judge Stanley Marcus, writing for the panel, explained that CAFA barred removal unless the two cases were proposed to be tried jointly prior to removal. While Carnival argued that the plaintiffs implicitly proposed a joint trial by filing two largely identical suits, "common sense dictate[d]" that the plaintiffs' decision to divide themselves into two separate groups of less than 100 individuals demonstrated that they wanted to ensure that they would stay in state court and have separate trials. Judge Marcus also noted that "[e]very other court of appeals confronted with this question has come to the same conclusion: that plaintiffs have the ability to avoid § 1332(d)(11)(B)(i) jurisdiction by filing separate complaints naming less than 100 plaintiffs and by not moving for or otherwise proposing joint trial in the state court."

***Abraham v. St. Croix Renaissance Grp.*, L.L.L.P, 719 F.3d 270 (3d Cir. 2013).**

The U.S. Court of Appeals for the Third Circuit (Ambro, Smith and Chagares, JJ.) unanimously affirmed remand of a case brought by property owners allegedly exposed to toxic chemicals on the site of an aluminum refinery. Four hundred fifty-nine plaintiffs filed a lawsuit in state court against the defendant landowner, alleging public and private nuisance, intentional infliction of emotional distress, and negligent infliction of emotional distress. The defendant removed the civil action to the U.S. District Court for the District of the Virgin Islands, asserting that the case was a "mass action" under CAFA, but the district court and appellate court both found that a continuous release of hazardous substances from a single facility over a fixed period of time satisfied the single "event or occurrence" exclusion in CAFA's mass-action provision.

***Erie Insurance Exchange v. Erie Indemnity Co.*, 722 F.3d 154 (3d Cir. 2013).**

The U.S. Court of Appeals for the Third Circuit (Fuentes and Chagares, JJ.; Roth, J., dissenting) held that a suit brought by a reciprocal insurance exchange as *trustees ad litem* "on behalf of" all other members of the exchange in state court against its attorney-in-fact for allegedly misappropriating more than $300 million in fees was not a class action. The defendant removed the action to federal court pursuant to CAFA, contending that the words "on behalf of" converted the case into a class action. The plaintiffs moved to remand, and the U.S. District Court for the Western District of Pennsylvania granted the motion. The defendant appealed. The Third Circuit held that the action was not a "class action" over which CAFA could provide removal jurisdiction because the case was "brought under state rules that bear no resemblance to Rule 23 in that they allow for suits by entities, not a conglomerate of individuals." The court found that, under Pennsylvania law, suits by members of an insurance exchange on behalf of all members are properly understood as a suit by one entity.

***Zuckman v. Monster Beverage Corp.*, No. 12-1978 JDB, 2013 WL 3992932 (D.D.C. Aug. 6, 2013).**

Judge John D. Bates of the U.S. District Court for the District of Columbia remanded the plaintiff's case alleging violation of the District of Columbia Consumer Protection Procedures Act (DCCPPA) to state court after finding that it lacked subject matter jurisdiction under CAFA. The plaintiff argued that Monster failed to disclose and misrepresented the adverse health effects of its energy drinks. Monster removed the case, arguing that the court had diversity jurisdiction pursuant to 28 U.S.C. § 1332(a), or, alternatively, under CAFA. As to CAFA jurisdiction, the court held that the case did not qualify as a class action under CAFA because the plaintiff brought his case as a representative action under the private attorney general provision of the DCCPPA, did not refer to his claim as a class action, and did not seek to comply with any of the D.C. Superior Court's class action rules. Monster's argument that DCCPPA claims for damages on behalf of the public cannot be brought without invoking and complying with the requirements of class actions was a nonsequitur. What mattered for purposes of jurisdiction was whether the case was an "action filed under rule 23" or a state equivalent — *i.e.*, how the action was actually filed, rather than how it should have been filed to state a claim for all the relief sought.

***West Virginia ex rel. Morrisey v. Pfizer, Inc.*, No. 3:13-2546, 2013 U.S. Dist. LEXIS 69567 (S.D. W. Va. May 13, 2013), *pet. to appeal denied*.**

Judge Robert Chambers of the U.S. District Court for the Southern District of West Virginia granted the state's motion to remand a *parens patriae* suit brought by West Virginia

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asserting consumer-protection and antitrust claims. The lawsuit alleged that the defendants committed consumer fraud and violated West Virginia's consumer-protection statute by, *inter alia*, submitting false patent information and entering into an anticompetitive agreement to restrain trade. The defendants removed the case to federal court on substantial-federal-question grounds, as well as under CAFA. The court rejected the defendants' argument that the state's lawsuit qualified as a "class action" under CAFA. This was so, the court reasoned, because the suit was a *parens patriae* action rather than a lawsuit aimed at vindicating the rights of individual purchasers. In reaching this conclusion, the court relied heavily on the U.S. Court of Appeals for the Fourth Circuit's decision in *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169 (4th Cir. 2011), *cert denied*, 132 S. Ct. 761 (2011), in which the appellate court held that a *parens patriae* suit alleging consumer-fraud claims under West Virginia law was not a "class action" under CAFA because it was not brought under Rule 23 or a "similar statute or rule of judicial procedure." According to the district court, the defendants' attempts to distinguish *McGraw* were unavailing. While the claims at issue in *McGraw* were brought under the state's consumer-protection statute — and not the West Virginia Antitrust Act — that did not change the analysis because the procedural protections set forth in the antitrust statute still lacked the requirements of numerosity, commonality, typicality, and adequacy of representation — the touchstones of Rule 23.

***In re Darvocet, Darvon & Propoxyphene Products Liability Litigation*, No. 2:11-md-2226-DCR, 2013 WL 3872230 (E.D. Ky. July 25, 2013).**

Judge Danny C. Reeves of the U.S. District Court for the Eastern District of Kentucky concluded that seven product liability cases against McKesson Corp. were not "mass actions" for purposes of CAFA and remanded those cases to California state court. The plaintiffs had proposed having those cases coordinated "almost exclusively" for pretrial matters (such as discovery), which the court reasoned did not suggest that the plaintiffs were proposing that the seven cases be jointly tried, even though the plaintiffs had not expressly rejected a joint trial and had acknowledged the possibility of a joint decision on some liability issues. Consequently, the court determined that the seven cases were not "mass actions" for purposes of CAFA jurisdiction. Further, the possibility that the state court could decide to try the cases jointly on its own volition did not create CAFA jurisdiction because CAFA requires that plaintiffs actually request the joint trial before cases qualify as "mass actions." (The court also determined that it lacked federal question and traditional diversity jurisdiction.)

***Owens v. Dart Cherokee Basin Operating Co.*, No. 12-4157-JAR-JPO, 2013 WL 2237740 (D. Kan. May 21, 2013), *pet. to appeal denied*.**

Judge Julie Robinson of the U.S. District Court for the District of Kansas granted the plaintiff's motion to remand a royalty owners' class action suit seeking compensatory damages for breach of contract and unjust enrichment for alleged unpaid royalties. The defendants argued in the notice of removal that the amount in controversy was more than $8.2 million, thus satisfying CAFA's $5 million amount-in-controversy requirement, but failed to submit "any documentation or affidavits explaining how they reached this calculation." In opposing remand, the defendants offered the declaration of a defendant company's general counsel "quantify[ing] the damages at issue based on the allegations in the Petition, based on the claims, the class period and the number of leases." The court found that "the general and conclusory allegations of the Petition and Notice of Removal do not establish by a preponderance of the evidence that the amount in controversy exceeds $5 million" and refused to consider the declaration submitted in opposition to remand because "reference to factual allegations or evidence outside of the petition and notice of removal is not permitted to determine the amount in controversy." Finally, while noting that limited discovery may be permitted where "the defendant ha[s] no information from which to establish the amount of damages," Judge Robinson held that such discovery was not "justified" where the Petition had "enough detail regarding the basis of the claims … to enable Defendants to use their data to calculate an amount in controversy, albeit data and/or evidence they did not include in their Notice of Removal" as they were obligated to do under the law.

***Curts v. Waggin' Train, LLC*, No. 13-0252-CV-W-ODS, 2013 WL 2319358 (W.D. Mo. May 28, 2013).**

Judge Ortrie D. Smith of the U.S. District Court for the Western District of Missouri granted the plaintiff's motion to remand, finding that the defendants did not satisfy their burden of demonstrating jurisdiction under CAFA. The plaintiff filed an action in Missouri state court, alleging that the defendants falsely labeled and marketed their dog treats as healthy in violation of the Missouri Merchandising Practice Act. The defendants removed the case to federal court based on CAFA. While all of the parties were citizens of Missouri, the defendants argued that "[p]laintiff artificially has tried to limit the class to people who happened to be citizens of the State of Missouri on one particular day during [a] ten-year period — February 4, 2013 — in a ploy to avoid minimal diversity and, thus, federal jurisdiction." The court refused to broaden the class definition and concluded that the defendants could not establish minimal diversity of citizenship because: (1) the plaintiff was a Missouri citizen, (2) the proposed class was comprised exclusively of Missouri citizens, (3) the defendants were Missouri citizens, and (4) the plaintiff only asserted claims

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under Missouri law. The court reasoned that, although the plaintiff could not avoid CAFA jurisdiction by crafting her complaint to defeat the numerosity or amount-in-controversy requirements, she could define the class to include only Missouri citizens. Accordingly, the plaintiff's class definition "leaves the Court without jurisdiction."

***Heckemeyer v. NRT Missouri, LLC*, No. 4:12CV01532 AGF, 2013 WL 2250429 (E.D. Mo. May 22, 2013), *on appeal*.**

Judge Audrey G. Fleissig of the U.S. District Court for the Eastern District of Missouri granted the plaintiffs' motion to remand and found that jurisdiction did not exist under CAFA. The plaintiffs, citizens of Missouri, filed a complaint in Missouri state court against NRT Missouri, LLC (a real estate services firm) and its broker, alleging that they knowingly misrepresented the square footage of homes purchased by putative class members. The defendants removed the action to federal court, asserting jurisdiction under CAFA. The court concluded that the defendants had established the requirements of numerosity and amount in controversy, but had failed to establish diversity of citizenship. Under CAFA, "an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized." Although the court noted that the U.S. Court of Appeals for the Eighth Circuit has not addressed the question of whether an LLC is an "unincorporated association" under CAFA, the U.S. Court of Appeals for the Fourth Circuit has held that it is. The court found the Fourth Circuit's reasoning persuasive. Because the defendants could not show that NRT Missouri's principal place of business was not Missouri, all plaintiffs and defendants were citizens of Missouri for purposes of CAFA. Thus, the court concluded that jurisdiction under CAFA did not exist.

***Valle v. Popular Community Bank*, No. 12-9315(LLS), 2013 WL 4017165 (S.D.N.Y. Aug. 6, 2013).**

Judge Louis L. Stanton of the U.S. District Court for the Southern District of New York granted the plaintiffs' motion to remand their putative class action complaint in a case alleging that Popular charged excessive overdraft fees in violation of New York law. Judge Stanton first noted that diversity jurisdiction under CAFA was satisfied because the amount in controversy exceeded $5 million and because Popular was diverse from at least one plaintiff. The plaintiffs, however, asked the court to decline jurisdiction under the discretionary home-state exception. Judge Stanton agreed, holding that the plaintiffs pled New York law claims against a New York bank, 45 percent of whose customers are in New York. The court thus granted the plaintiffs' motion to remand so as not to impair the "ability of state courts to decide cases of chiefly local import or cases that concern traditional state regulation of the state's corporate creatures."

***Rodriguez v. Instagram, LLC*, No. C 12-06482 WHA, 2013 WL 3732883 (N.D. Cal. July 15, 2013).**

Judge William Alsup of the U.S. District Court for the Northern District of California dismissed the putative class action because the plaintiff failed to establish jurisdiction under CAFA. Judge Alsup found that although the plaintiff established the requisite minimal diversity under CAFA, the plaintiff's proposed class implicated the home-state controversy exception to CAFA because at least two-thirds of the class were citizens of the state in which the action was filed. While the plaintiff sought to amend the complaint to pursue a nationwide class, the court found that such an effort "would skirt around the home-state controversy exception," "contriving subject-matter jurisdiction where none previously existed." In denying the motion to amend, the court further observed that a nationwide class would likely involve application of the law of fifty states, which would be "unmanageable." Given this and "many Rule 23 problems" at issue, the court held that amendment would be futile.

***Calkins v. Google, Inc.*, No. 13-CV-00760-JST, 2013 WL 3556042 (N.D. Cal. July 12, 2013), *on appeal*.**

The plaintiff moved to remand his putative class action alleging state-law claims arising from the unauthorized recording of telemarking calls in violation of California Penal Code Section 632. Judge Jon Tigar of the U.S. District Court for the Northern District of California initially held that the action was properly removed under CAFA because the defendant satisfied its burden to demonstrate the amount in controversy was at least $5 million, where the statutory damages for each call recorded without the consumer's consent was $5,000, and defendant TeleTech submitted a declaration "admitt[ing] to recording over 1,000 phone calls in California." Judge Tigar also rejected the plaintiff's arguments that the removal was untimely, finding that: (i) the complaint did not state the amount of damages or number of class members on its face and thus "the ground for removal under CAFA was not revealed affirmatively in the FAC" and 28 U.S.C. § 1446(b)(1)'s 30-day deadline was not triggered; and (ii) the fact that the defendants had possession of reports of the calls did not put them on notice of removability under 28 U.S.C. § 1446(b)(3) because that section only applies to "a document received from another person or party in connection with the litigation," not documents already in the defendant's possession. However, Judge Tigar ultimately granted the plaintiff's motion to remand because the action fell within CAFA's local controversy exception. According to the court, the plaintiff showed that more than two-thirds of the proposed class members were likely California citizens, as was defendant Google (on whose behalf the calls were made), and that, even though the calls were made as part of a nationwide campaign, there were no questions of national importance because "only a 'handful' of states have statu[t]es similar to Section 632" and thus the controversy was "truly local."

***Henry v. Michaels Stores, Inc.*, No. 1:13-CV-831, 2013 WL 2208070 (N.D. Ohio May 20, 2013).**

Judge James S. Gwin of the U.S. District Court for the Northern District of Ohio remanded a putative class action against a merchant for alleged violations of Ohio's consumer protection laws because the merchant's removal was untimely. The case had been pending for more than a year in state court (including with rulings on a motion to dismiss and discovery motions) before removal, and the complaint disclaimed damages exceeding CAFA's $5 million threshold. The court determined that the merchant could have removed the case when it was filed notwithstanding the complaint's damages disclaimer because under *Smith v. Nationwide Property & Casualty Insurance Co.*, 505 F.3d 401 (6th Cir. 2007), a defendant can remove a complaint with a damages disclaimer if it "could show that it is probable that the actual amount in controversy exceeds the jurisdictional threshold." However, the court held that the removal was untimely. According to the court, the U.S. Supreme Court's recent decision in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), did not constitute an "other paper" for purposes of the removal statute (which allows a defendant to remove a case when it receives "a copy of an amended pleading, motion, order or other paper" showing federal jurisdiction exists), and therefore the merchant could not use it as a basis for a timely removal of the putative class action to federal court.

***General Credit Acceptance Co. v. Deaver*, No. 4:13CV00524 ERW, 2013 WL 2420392 (E.D. Mo. June 3, 2013), *pet. to appeal denied*.**

Judge E. Richard Webber of the U.S. District Court for the Eastern District of Missouri granted the defendant's motion to remand. The plaintiff sued the defendant in Missouri state court for breach of a retail installment contract, and the defendant filed a consumer class action counterclaim. The plaintiff voluntarily dismissed its contract claim and sought removal to federal court under CAFA, and the defendant filed a motion to remand. The court granted the motion, noting that "[i]t is well-established law that a plaintiff cannot remove an action to federal court on the basis that a counterclaim permits removal." The court also noted that three circuits — the Fourth, Seventh and Ninth — have held that this general rule applies to removal under CAFA. The court held that the plaintiff "chose the state forum, and is therefore bound by its choice, and may not remove the case."

CAFA Settlement Ruling

***In re HP Inkjet Printer Litigation*, 716 F.3d 1173 (9th Cir. 2013).**

The U.S. Court of Appeals for the Ninth Circuit (Gould and Smith, JJ.; Berzon, J. dissenting.) reversed an attorneys' fee award as part of a global settlement of three consumer class actions alleging unfair business practices because the lower court's calculation of the award did not properly include the value of coupons given as part of the relief in violation of CAFA. Judge Milan Smith, writing for the majority, emphasized the abuses CAFA was designed to eliminate, describing "one of the main purposes of CAFA" as "discouraging coupon settlements — particularly those where presumably valuable (but actually worthless) coupons form some part of the basis for an attorneys' fees award," and analyzed 28 U.S.C. § 1712, the provision of CAFA regulating coupon settlements, at length. The Court concluded that where a settlement provides relief only in the form of coupons, then the fee award must be based on redemption value of the coupons. Moreover, when the settlement provides "mixed" relief, such as injunctive relief, in addition to coupons, Section 1712 dictates that first "the court must determine a reasonable contingency fee based on the actual redemption value of the coupons awarded" and then "determine a reasonable lodestar amount to compensate class counsel for any non-coupon relief obtained," which "can be further adjusted upwards or downwards using an appropriate multiplier," and then add those calculations to arrive at an award.

Because the lower court's lodestar attorneys' fee award included an estimate of value of both injunctive and coupon relief, the Ninth Circuit held that "the district court abused its discretion where it made a rough estimate of the ultimate value of this settlement, and then awarded fees in exchange for obtaining coupon relief without considering the redemption value of the coupons." The court also noted that "the responsibility for this error lies principally with the parties" due to their structuring the settlement so that no coupons could issue until after entry of a final judgment, so that it was "impossible for the district court to calculate the redemption value of the coupons as required by § 1712(a)." Judge Marsha Berzon dissented, asserting, after statutory analysis, that the lower court's lodestar calculation of the entire settlement was appropriate under Section 1712.

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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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