The Class Action Chronicle

Skadden

Winter 2014

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

The Winter 2014 edition focuses on rulings issued between August 16, 2014, and November 15, 2014, and begins with a short article regarding recent challenges to class action settlements.

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COURTS MAY BE TAKING A CLOSER LOOK AT CLASS SETTLEMENTS

A recurring problem in the settlement of class actions is the payment of attorneys' fees to class counsel that are significantly out of proportion to the compensation actually claimed by real members of the class. In one common settlement scenario, the defendant is required to pay a set amount into a fund, from which claims would be paid to class members who submit a claim. The class counsel then might claim entitlement to some percentage of the entire fund — regardless of the claims rate by class members, which is often quite low. The result is sometimes a fee that exceeds the value of the entire recovery actually paid to class members, forcing class counsel, the court, and even the defendant (because it wants the litigation over and done with) to defend the fee despite the discrepancy. Although courts for a long time have largely gone along with such settlements — even facilitating them by approving settlement agreements that define fees before a single claim is made — recent decisions suggest that this permissive attitude may be shifting.

Two recent decisions by the U.S. Court of Appeals for the Seventh Circuit invalidating class settlements illustrate the problem of disproportionate fee awards. Most recently, in *Pearson v. NBTY, Inc.*, Nos. 14-1198, 14-1227, 14-1245, 14-1389, 2014 U.S. App. LEXIS 21874 (7th Cir. Nov. 19, 2014), the Seventh Circuit invalidated what it described as a "selfish" $5.6 million settlement negotiated to ensure "meager" benefits to class members and maximum fees to attorneys. Judge James B. Zagel of the U.S. District Court for the Northern District of Illinois had approved a settlement of multiple class actions arising out of allegedly deceptive labeling of glucosamine supplements. The settlement created a $2 million class fund to compensate aggrieved class members, of which any residual amount would be remitted to the Orthopedic Research and Education Foundation as a *cy pres* payment. The settlement also provided for limited injunctive relief that required

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minor changes to the products' labeling. While the district court reduced the fee award to $1.9 million, it was still more than twice the amount of monetary benefit actually received by the injured class members. After all, only 30,245 claims were actually filed, yielding a class distribution of less than $900,000. The Seventh Circuit reversed the lower court's ruling, declaring that the settlement "disserves the class" by conferring only "meager" benefits to the class, while awarding class counsel with close to $2 million. *Id.* at *27-28. In so doing, the appellate court bemoaned what it saw as a cumbersome claims process — *i.e.*, "[t]he requirement of needlessly elaborate documentation, the threats of criminal prosecution, and the fact that a claimant might feel obliged to wade through the five other documents accessible from the opening screen of the website" — which "explain[s] why so few recipients of the postcard notice bothered to submit a claim." *Id.* at *15. Juxtaposing class counsel's "outlandish" fee award with the fact that only "one-fourth of one percent" of the class received "even modest compensation," the Seventh Circuit reversed the lower court's decision approving the settlement. *Id.* at *9, *28.[1]

As *Pearson* and other cases like it illustrate, the potential for heightened judicial scrutiny in the class settlement context is particularly acute in cases involving "claims-made" settlements — *i.e.*, where a class member must submit a claim to receive any piece of the proverbial settlement pie. In these cases, the amounts offered to class members often provide reasonable and fair compensation for their individual claims, yet those class members often do not submit claims for compensation. In some instances, the class members do not support or do not care about the claims; others simply do not want to bother with the claims process. The result is distribution of money to the allegedly injured class members that may be dwarfed by the fee paid to class counsel.

Recently, a few courts have sought to prevent disproportionate fee awards in consumer class settlements by deferring the calculation of fees until the claims process has run its course. Such an approach ensures that the compensation class counsel receives bears some relation to the benefit actually obtained by the class. This was the approach proposed by the U.S. Court of Appeals for the Third Circuit in *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013). In that case, the Third Circuit vacated approval of a class settlement that provided for a $35.5 million settlement fund, any undistributed part of which was to be paid to a charity on a *cy pres* basis. The trial court had approved the settlement, awarding class counsel $14 million in fees and expenses, even though only $3 million of the settlement fund was actually claimed by class members. In other words, the attorneys received nearly five times the amount that actually ended up in the aggrieved class members' hands. In vacating approval of the settlement, the Third Circuit emphasized that "the actual benefit provided to the class is an important consideration when determining attorneys' fees." *Id.* at 179 n.13. The court thus observed that the need to determine that "actual benefit" "may require [a district court] 'to delay a final assessment of the fee award [and] to withhold all or a substantial part of the fee until the distribution process is complete.'" *Id.* at 179 (quoting Federal Judicial Center, Manual for Complex Litigation § 21.71 (4th ed. 2008)).

Other courts have taken a similar approach to that espoused by the Third Circuit. *See, e.g., Stewart v. USA Tank Sales & Erection Co.*, No. 12-05136-CV-SW-DGK, 2014 WL 836212, at *8 (W.D. Mo. Mar. 4, 2014) ("The Court is also reluctant to approve any settlement which allows counsel to receive 100% of their fees before the settlement process is completed. Holding back a percentage of the attorney fee award until all class members have received their settlement checks gives class counsel a financial incentive to monitor the settlement process and quickly respond to any client concerns."). For example, in *In re Vioxx Products Liability Litigation*, No. 2:05-md-01657-EEF-DEK, ECF No. 64,784 (E.D. La. Jan. 2, 2014), Judge Eldon E. Fallon *sua sponte* decided to follow the *Baby Products* decision (without referencing that precedent) by deferring his decision on the attorneys' fee award in a consumer class settlement involving the drug Vioxx. The court declared that "the effect of th[e] proposed Class Settlement is to *limit*, rather than *guarantee*, the amount of attorneys' fees." *Id.* at 8 (emphases added). Judge Fallon stressed that he had not set attorneys' fees in the case and that he would not do so until all claims were submitted. Put simply, the court has strongly indicated that the fee award will be based on the total amount of actual payments to class members, not the amount of funds class members could receive if all members submitted a claim.

[1] As discussed in the most recent edition of the *Chronicle*, the Seventh Circuit raised similar concerns in *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014), which involved claims regarding allegedly defective windows that caused leaking. According to the Seventh Circuit, the settlement, which consisted of a fee of $11 million, was "inequitable — even scandalous." *Id.* at 721. While class counsel argued that the settlement was worth $90 million to the class, the Seventh Circuit noted that the defendant itself only estimated that the class would recover $22.5 million. As the Seventh Circuit explained, "the settlement did not specify an amount of money to be received by the class members as distinct from class counsel. Rather, it specified a procedure by which class members could claim damages" — a procedure that was "stacked against the class." *Id.* at 723-24. In particular, class members could submit a claim directly to the defendant with a maximum award of $750, or submit a claim to arbitration with a $6,000 damages cap. Importantly, out of the 225,000 notices that had been sent to class members, fewer than 1,300 claims had been filed before the district court approved the settlement. Those claims sought *less than $1.5 million*, "a long way from the $90 million that the district judge thought the class members likely to receive were the suit to be litigated." *Id.* at 726. The Seventh Circuit therefore invalidated the lawyer-driven settlement as one-sided.

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Not all courts have embraced the paradigm articulated in *Baby Products*. Indeed, some courts have resisted arguments that fee determinations should be deferred until the class member claims/payment process concludes. *See In re Certainteed Fiber Cement Siding Litig.*, MDL No. 2270, 2014 WL 1096030, at *24 (E.D. Pa. Mar. 20, 2014) (rejecting objectors' contention that the court should defer "some portion of the fee award until actual payouts to the class are known" where the agreement provided that the claims administrator would continue to accept claims from class members until the settlement fund was exhausted) (internal quotation marks and citation omitted); *Redman v. RadioShack Corp.*, No. 11 C 6741, 2014 WL 497438, at *11 n.2 (N.D. Ill. Feb. 7, 2014) (declining objectors' request to delay fee award until after vouchers were redeemed by class members), *rev'd*, 768 F.3d 622 (7th Cir. 2014); *see also Doherty v. Hertz Corp.*, No. 10-359 (NLH/KMW), 2014 WL 2916494, at *7 (D.N.J. June 25, 2014) ("[T]he law supports an award of reasonable attorney's fees to Class Counsel based on the gross settlement — the monies potentially available to be claimed — without regard to the amount actually claimed by Class Members.").

Although federal courts have not yet reached a consensus over the best method for mitigating disproportionate fee awards, there seems to be a growing sense that class settlements are ripe for some reforms. One possible solution to this problem would be to require proportionality between the fees generated from a settlement fund and the actual benefit realized by the aggrieved class members. Under that framework, plaintiffs' counsel would have a greater incentive to identify class members and ensure that they receive direct monetary benefits from a classwide settlement. At the same time, such an approach would ensure that class actions will not serve primarily to create windfalls for class counsel.

Notably, in 2011, the federal Advisory Committee on Rules of Civil Procedure formed a subcommittee to assess the need for amendments to Rule 23. In late 2014, the Rule 23 Subcommittee released a memorandum identifying the issues that it believes it should be charged with considering. The "front burner" issues listed in the memo include: (1) settlement class issues (*e.g.*, proper settlement approval criteria, the use of *cy pres*, certification of settlement classes and misbehavior by objectors); (2) issues classes and (3) class notice. The memo also notes the possibility that the subcommittee will weigh in on issues related to ascertainability, mootness and the role of the merits at class certification.

CLASS CERTIFICATION DECISIONS

Decisions Granting Motions to Strike/ Dismiss Class Claims

Coe v. Philips Oral Healthcare Inc., No. C13-518 MJP, 2014 WL 5162912 (W.D. Wash. Oct. 14, 2014), _appeal pending_.

Chief Judge Marsha J. Pechman of the U.S. District Court for the Western District of Washington granted the defendant's motion to deny certification of a nationwide class of purchasers of Sonicare toothbrushes seeking damages and equitable relief under the Washington Consumer Protection Act (WCPA). Defendant moved to preemptively deny class certification before plaintiffs moved for class certification, arguing that a nationwide consumer-protection class was not certifiable given material variations in state consumer-fraud laws. The court agreed with defendant, determining that each class member's claims were governed by the consumer-protection laws of his or her home state — not by the WCPA. In light of "[m]aterial differences between the various consumer protection laws" at issue, the court concluded that the predominance requirement of Rule 23(b)(3) could never be satisfied and therefore granted the motion to deny class certification.

Gedalia v. Whole Foods Market Services, Inc., No. 4:13-CV-3517, 2014 WL 5315030 (S.D. Tex. Sept. 30, 2014).

After granting the defendants' motion to dismiss, Judge Melinda Harmon of the U.S. District Court for the Southern District of Texas dismissed the plaintiffs' motion for class certification as moot. The plaintiffs were seeking relief based on alleged false and misleading statements on packaging and advertising of certain organic food products. The court noted that "Plaintiffs' claims encompass hundreds of different products," with some involving "local in-store representations that are not on actual product labels." Thus, the court reasoned, "Plaintiffs likely do not meet the substantially similar test or requirements for class certification on many of their claims. However, it is not necessary to resolve this issue [because] Plaintiffs' claims are dismissed."

Royal Mile Co. v. UPMC, No. 10-1609, 2014 WL 4187129 (W.D. Pa. Aug. 21, 2014).

In this case, purchasers of health insurance coverage (including small groups and individuals) brought a putative class action against insurers and providers of health care services, alleging that the defendants engaged in anti-

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competitive conduct in violation of the Sherman Act and tortiously interfered with existing and prospective business relations in violation of Pennsylvania common law. The defendants opposed the plaintiffs' motion for leave to file a third amended complaint, arguing in part that plaintiffs could not assert plausible class claims. Chief Judge Joy Flowers Conti of the U.S. District Court for the Western District of Pennsylvania granted the motion in part and denied it in part. First, the court agreed with the defendants that predominance was lacking given that plaintiffs sought to combine in a single class disparate groups of consumers with unique injuries and underwriting characteristics. The court also resolved that a narrower class of customers who "would have switched their insurance coverage" to a competitor but for the alleged conduct was not ascertainable with objective data or records. However, because a class of customers who actually switched to another plan might be ascertainable based on "records of customers that were switched," the court permitted plaintiffs an opportunity to file an amended complaint with respect to this category of customers.

Decisions Denying Motions to Strike/ Dismiss Class Claims

***Sparkle Hill, Inc. v. Invecor, LLC*, No. 13-4172 (NLH/AMD), 2014 WL 4755490 (D.N.J. Sept. 23, 2014).**

Judge Noel L. Hillman of the U.S. District Court for the District of New Jersey granted in part and denied in part the defendant's motion to dismiss the plaintiff's class complaint alleging violations of the Telephone Consumer Protection Act (TCPA), the New Jersey "Junk Fax Statute" and the New Jersey Consumer Fraud Act related to the plaintiff's receipt of unsolicited faxes. The court rejected the defendant's position that the plaintiff's TCPA claims could not proceed as a class action. While New Jersey state courts had held that class action suits are not superior means of adjudicating TCPA suits, the court held that the TCPA provided for a federal cause of action, and federal law controlled the class certification question. Because federal law did not prohibit the maintenance of a TCPA class action, the plaintiff's class allegations as to the TCPA could not be dismissed at the pleading stage.

***Salam v. Lifewatch, Inc.*, No. 13 CV 9305, 2014 WL 4960947 (N.D. Ill. Sept. 22, 2014).**

Judge Charles Ronald Norgle of the U.S. District Court for the Northern District of Illinois denied the defendant's motion to strike the class allegations in a putative class action brought on behalf of individuals who claimed that Lifewatch violated the Telephone Consumer Protection Act by making automated phone calls to individuals without prior express consent. Lifewatch argued that the class could not be certified because it was an unascertainable "fail-safe class," and, in any event, did not satisfy the prerequisites of Rule 23. The court rejected the first of those arguments, as it found that it could solve the alleged "fail-safe" class problem by refining the class definition at the later certification stage rather than by striking the allegations altogether. With respect to the defendant's second argument, the court declined to determine the merits of certification at such an early stage, when the parties had not yet engaged in any class discovery.

***Machowicz v. Kaspersky Lab, Inc.*, No. 14 C 1394, 2014 WL 4683258 (N.D. Ill. Sept. 19, 2014).**

Judge James F. Holderman of the U.S. District Court for the Northern District of Illinois denied the defendant's motion to strike the class allegations in a putative class action against computer security software developer Kaspersky Lab, Inc. The named plaintiff filed a complaint on behalf of herself and other similarly situated consumers, alleging that Kaspersky purposefully engineered its free security scanning program to "invariably and falsely report security threats," thereby inducing customers to pay for Kaspersky's computer security software. The defendant subsequently moved to strike the class allegations, arguing that the proposed class could not be certified under Rule 23 because common issues of fact would not predominate over questions affecting individual class members. Specifically, Kaspersky asserted that one of the software vulnerabilities at issue posed a legitimate security concern for users with older operating systems, but did not pose a threat to users with "newer" operating systems. The court acknowledged that this argument may have some merit with respect to the particular vulnerability in question but nonetheless found it possible that common questions would predominate because a number of the plaintiff's other allegations did not hinge on the setup of each class member's computer. Ultimately, the court concluded that it was too early to definitively rule on the issue of class certification and promised to revisit Kaspersky's objections to the class allegations at the class certification stage.

***McPeak v. S-L Distribution Co.*, No. 12-348 (RBK/KMW), 2014 WL 4388562 (D.N.J. Sept. 5, 2014).**

Judge Robert B. Kugler of the U.S. District Court for the District of New Jersey denied a motion to strike class allegations in a lawsuit claiming that a Distributor Agreement constituted a franchise under the meaning of the New Jersey Franchise Practices Act, and that the defendant violated the statute by terminating the agreement. The court noted that it may only grant a motion to strike class allegations prior to discovery "if the inappropriateness of class treatment is evident from the face of the complaint and from incontrovertible facts." As to predominance, the court noted that the Third Circuit had specifically cautioned against striking class allegations prior to discovery on the

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basis of predominance, because such a consideration would often require a court to "venture into the territory of a claim's merits." The court also concluded that membership in the class, which was defined as "all individuals or entities that operated out of a warehouse in the State of New Jersey who were party to a Distributor Agreement with Snyder's-Lance Distribution, Inc. on November 1, 2011," could be ascertained through objective methods, such as the defendant's records.

Wallace v. XTO Energy, Inc., No. 4:13-cv-00608 KGB, 2014 WL 4202536 (E.D. Ark. Aug. 22, 2014).

Judge Kristine G. Baker of the U.S. District Court for the Eastern District of Arkansas denied the defendants' motions to dismiss and to strike class allegations in a suit for underpayment of royalties against the defendants XTO Energy and Exxon Mobil Corporation. The plaintiffs alleged that the defendants employed a variety of deceptive and fraudulent accounting practices to reduce royalty payments owed to class members under their oil and gas leases with the defendants. With respect to the class allegations, the court found that the plaintiffs had adequately alleged facts sufficient to support all of the requirements for class certification under Rule 23. First, the court found that the three proposed subclasses satisfied Rule 23's implicit ascertainability requirement, because the class members could eventually be identified by objective data, such as information that the defendants could obtain regarding the royalty owners it paid and public records identifying any other oil or gas leases. With respect to numerosity, the court found sufficient the plaintiffs' allegations that "members of the class [were] so numerous and geographically dispersed that joinder of all members [would have been] impracticable"; that the defendants operated "a large number of gas wells … with at least one, and frequently many more, royalty and excess royalty owners for each well"; and that the defendants had "within [their] possession or control records that identify all persons to whom they have paid royalties and excess royalties." Finally, the court found that the plaintiffs had adequately established that common questions of law or fact regarding the treatment of gross proceeds leases would predominate over individualized concerns. Accordingly, the court refused to dismiss the class allegations for failure to state a claim. The court did, however, warn that it would require greater specificity from the plaintiffs at the class certification stage.

Decisions Rejecting/Denying Class Certification

EQT Production Co. v. Adair, 764 F.3d 347 (4th Cir. 2014).

The U.S. Court of Appeals for the Fourth Circuit (Wilkinson, Keenan and Diaz, JJ.) vacated the district court's ruling certifying classes of plaintiffs alleging that two coalbed methane (CBM) producers had unlawfully deprived class members of royalty payments from the production of CBM. The Fourth Circuit first determined that the lower court abused its discretion in certifying classes asserting CBM ownership claims. According to the appellate court, the district court erred in failing to analyze whether classes asserting CBM ownership claims were ascertainable without extensive and individualized fact-finding. As the Fourth Circuit explained, identifying the proposed ownership classes was fraught with individualized issues surrounding outdated ownership schedules, heirship, intestacy and defects in title. The Fourth Circuit also concluded that the district court did not undertake a sufficiently rigorous analysis with respect to commonality — for example, by failing to consider applicable Virginia law and whether it necessitated a deed-by-deed examination of CBM ownership. The Fourth Circuit also identified a number of errors plaguing the certification of claims relating to the defendants' alleged underpayment of royalties. Most notably, the appellate court explained that the district court failed to properly analyze the purportedly "uniform" wrongdoing in the context of the "broader litigation." In so doing, the Fourth Circuit explained, the lower court placed too much emphasis on the number of supposedly common royalty practices, without considering the significance of the disparate practices identified by the defendants.

Grandalski v. Quest Diagnostics Inc., 767 F.3d 175 (3d Cir. 2014).

This nationwide putative class action concerned allegations that the defendant, a medical testing company, routinely overbilled patients in violation of state consumer fraud laws. The U.S. Court of Appeals for the Third Circuit (Rendell, Chagares and Jordan, JJ.) upheld the denial of certification. Judge Rendell explained that it was reasonable for the district court to consider whether the classes posed "intractable management problems" by considering state law at the class certification stage. While the appellate court found the lower court's analysis of the choice of law issue to be flawed, the Third Circuit ultimately reached the same conclusion. The court concluded that the plaintiffs' home states, in which they received and relied on the defendant's alleged fraud, had the "most significant relationship" to the plaintiffs' consumer fraud claims, and thus the court would be required to consider the laws of each of the plaintiffs' home states at trial. Because the appellants failed to provide a sufficient analysis describing how these state laws might be grouped to apply to the facts of the case, Judge Rendell affirmed the district court's denial of class certification as to the state law consumer fraud claims. Likewise, the Third Circuit affirmed the lower court's findings that individual inquiries would be required to determine whether an alleged overbilling constituted unjust enrichment for each class member, thus precluding a finding of predominance. Lastly, the plaintiffs had also proposed a class of all persons

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who had received written demands from debt collectors retained by the defendant, alleging violations of the Fair Debt Collection Practices Act, but the lower court denied certification of this class, as the named plaintiff had not received a written demand from debt collectors. The Third Circuit affirmed the denial of certification of this class as well, and affirmed a grant of summary judgment on a named appellant's individual claim under New York General Business Law § 349 for failure to produce evidence of any pecuniary harm.

Germain v. Bank of America, N.A., No. 13-cv-676-bbc, 2014 WL 5802018 (W.D. Wis. Nov. 7, 2014).

Judge Barbara B. Crabb of the U.S. District Court for the Western District of Wisconsin denied class certification in a putative class action against Bank of America. The two named plaintiffs alleged that Bank of America violated the Fair Credit Reporting Act (FCRA) by obtaining their consumer reports without a permissible purpose after the plaintiffs had discharged their mortgages with the defendant in bankruptcy. After the plaintiffs filed their motion for class certification, the defendant filed a motion for summary judgment, arguing that the bank had a legal purpose for each review it made of the named plaintiffs' consumer reports and, for that reason, had not violated the named plaintiffs' rights under the FCRA. The court recognized that generally, courts decline to decide motions for summary judgment before ruling on a motion for class certification. In this case, however, the court found that the named plaintiffs had failed to show that Bank of America ever obtained their consumer reports without a legal purpose and that summary judgment therefore should be granted in the defendant's favor. In light of that ruling, the court found that the putative class lacked adequate class representatives and therefore failed to satisfy the prerequisites to class certification set forth in Rule 23(a). Moreover, the court noted that even if proper class representatives were identified, the nature of their claims made it unlikely that common questions of fact would predominate over individualized questions. Accordingly, the court granted the defendant's motion for summary judgment, denied the plaintiffs' motion for class certification and directed the clerk of court to close the case.

Barton v. RCI, LLC, No. 10-cv-03657 (PGS), 2014 WL 5762214 (D.N.J. Nov. 5, 2014).

The plaintiff's second motion for class certification arose from the defendant RCI's operation of a program that allowed timeshare owners to exchange their timeshare for a variety of services, including airline tickets, through a points program. The defendant, after allegedly realizing it was losing money on the redemption of points for airline tickets, unilaterally imposed a cap of 60,000 points that could be used annually to purchase airline tickets; the plaintiff claimed that the cap blocked putative class members from fully utilizing their points, as a single ticket had a valuation of 45,000 points. The plaintiff's first motion for class certification proposed a class of those residents who had more than 60,000 points and were therefore affected by the cap. The court denied certification after finding that the class was overbroad because many putative class members had never used the points program, and as such, did not suffer an ascertainable loss by being unable to redeem their points for airline tickets. The plaintiff's second motion for certification involved a slight narrowing of the class definition to include only those customers who had at least one point exchange in excess of 55,000 points prior to the date of the cap. Judge Peter G. Sheridan of the U.S. District Court for the District of New Jersey denied the plaintiff's second motion for class certification, saying there was no change of circumstances that warranted a review of the class certification decision.

Langendorf v. Skinnygirl Cocktails, LLC, No. 11 CV 7060, 2014 WL 5487670 (N.D. Ill. Oct. 30, 2014).

Judge Manish S. Shah of the U.S. District Court for the Northern District of Illinois denied the plaintiff's motion for class certification in a putative class action against Skinnygirl Cocktails, LLC and Beam Global Spirits and Wine, Inc., makers and promoters of Skinnygirl Margaritas, a pre-mixed alcoholic beverage. The named plaintiff, Amy Langendorf, alleged that because the beverage contains the non-natural preservative sodium benzoate, the text "all natural," which appears on the label, is false and misleading. Seeking to represent an Illinois-wide class of purchasers of the product, Langendorf sued under (1) the Illinois Consumer Fraud and Deceptive Business Practices Act; (2) Illinois statutes concerning express and implied warranties; and (3) breach-of-contract, unjust enrichment and promissory estoppel theories. As a preliminary matter, the court found that the putative class was not sufficiently ascertainable because the plaintiff had failed to offer a method by which the court could identify who had purchased the beverage within the class period. The court also concluded that the named plaintiff did not satisfy the adequacy of representation and predominance requirements. With respect to the adequacy of representation factor, the court noted that Langendorf's father had a close professional relationship with Langendorf's lead counsel and indeed had recommended lead counsel when Langendorf was considering filing her case. This relationship raised genuine conflict of interest concerns, which precluded counsel from adequately representing the proposed class. Finally, the court held that Langendorf had not carried her burden of demonstrating predominance because class members would have to show that they relied on the "all natural" text on the label and would not have purchased Skinnygirl Margaritas had they known that the label was false.

***Breitman v. Xerox Education Services, LLC*,**
No. 12 Civ. 6583(PAC), 2014 WL 5364103
(S.D.N.Y. Oct. 22, 2014).

In this action alleging violations of New York General Business Law Section 349 and breach of contract, Judge Paul A. Crotty of the U.S. District Court for the Southern District of New York denied class certification because the plaintiff failed to satisfy Rule 23's predominance requirement. The plaintiff alleged that the defendants misapplied payments that the plaintiff made toward her student loan and that the defendants failed to apply certain benefits for which the plaintiff was entitled. The plaintiff sought to certify two classes: the Checkmate II Class and the Benefits Class. The court first held that the plaintiff had satisfied Rule 23's standing, numerosity, commonality and typicality requirements of. In both classes, however, the court held that the plaintiff failed to satisfy the predominance requirement by failing to show that common issues predominated over individual issues. The Checkmate II Class failed the predominance requirement because, among other issues, individualized inquiries would be necessary to determine "which class members provided instructions regarding prepayments, which class members sought to advance their next due date, and which set of contract terms applied to each class member." The Benefits Class similarly failed to satisfy the predominance requirement because individualized inquires would be necessary to determine each class member's eligibility for the relevant benefits.

***Gomez v. Kroll Factual Data, Inc.*,**
No. 13-cv-0445-WJM-KMT, 2014 WL 5395099
(D. Colo. Oct. 22, 2014).

Judge William J. Martínez of the U.S. District Court for the District of Colorado denied reconsideration of his order refusing to certify a class of consumers seeking statutory damages for violations of the Fair Credit Reporting Act (FCRA) (reported in the Summer 2014 *Class Action Chronicle*, at 8). The court rejected a newly filed expert submission, finding that it was not "new evidence" because it could have been filed with the class certification briefing. The court also rejected the plaintiff's submission of new authority for the proposition that a plaintiff can recover statutory damages without evidence of actual damages if he has proved a willful FCRA violation, because the plaintiff made that argument unsuccessfully in his certification briefing, and his "claim still requires proof that the consumer reports are inaccurate," which would entail individualized inquiries precluding certification. The court also noted that the plaintiff's "tactical decision to not conduct discovery" precluded reliance on the certification of an FCRA class in *Ramirez v. Trans Union, LLC*, No. 12-cv-00632-JSC, 2014 WL 3734525 (N.D. Cal. July 24, 2014) (reported in the Fall 2014 *Class Action Chronicle*, at 11), and that in any event "the individualized inquiry of this type of discovery is precisely why the Court determined that Plaintiff could not meet his Rule 23 burden and denied the Class Certification Motion."

***Kulig v. Midland Funding, LLC*, No. 13 Civ. 4715(PKC),**
2014 WL 5017817 (S.D.N.Y. Sept. 26, 2014).

In this Fair Debt Collection Practices Act and New York General Business Law case, Judge P. Kevin Castel of the U.S. District Court for the Southern District of New York denied class certification because the plaintiff failed to demonstrate that her current counsel would adequately represent the interests of the class. The plaintiff, a credit card holder, alleged that the defendants systematically litigated time-barred debt collections lawsuits against her and hundreds of New York residents. Judge Castel found that the plaintiff demonstrated her counsel's qualifications but that the plaintiff failed to show under Rule 23(g)(1)(B) that her counsel had the "ability to fairly and adequately represent the interests of the class." In violation of New York Rules of Professional Conduct Rule 1.4(a), the plaintiff's counsel failed to inform the plaintiff of settlement offers made by the defendants. The court found this violation particularly damaging to the plaintiff's motion because settlement offers are "perhaps the single most significant point of contact between class counsel and a class representative throughout the pendency of the action." As a result, the court denied class certification without analyzing the remaining provisions of Rule 23.

C.C. ex rel. A.C. v. School Board of Broward County,
***Florida*, No. 10-60032-CIV, 2014 WL 4771751**
(S.D. Fla. Sept. 24, 2014).

The plaintiffs, parents of a minor with autism spectrum disorder (ASD), brought class claims against the School Board of Broward County, Florida, alleging violations of the Individuals with Disabilities Education Act (IDEA) and the Rehabilitation Act, as well as related individual claims stemming from their frustrations with their lack of meaningful participation in developing an Individualized Education Plan for their child and denials of their requests for applied behavioral analysis (ABA) therapy. Judge Kenneth A. Marra of the U.S. District Court for the Southern District of Florida, considered the plaintiffs' motion for class certification and the defendant's motion for summary judgment on these claims. Judge Marra granted the defendant's motion for summary judgment on the plaintiffs' individual Section 1983 claims based on Eleventh Circuit precedent that Section 1983 actions for denial of rights conferred by the IDEA are barred, but denied the defendant's motion as to the plaintiffs' IDEA and Rehabilitation Act claims. The court denied without prejudice the plaintiffs' motion for class certification,

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holding that the proposed class was overly broad. As the court pointed out, the plaintiffs' proposed class would include all children who had been diagnosed with ASD and were enrolled at any level in the Broward County School District, which would include many members without claims, as many class members may have no interest in receiving ABA therapy. The court declined to address any other arguments, leaving it to the plaintiffs to attempt to narrow their class definition before further proceedings.

Carlin v. Davidson Fink LLP, No. 13-CV-6062(JS)(GRB), 2014 WL 4826248 (E.D.N.Y. Sept. 23, 2014).

In this Fair Debt Collection Practices Act (FDCPA) case, Judge Joanna Seybert of the U.S. District Court for the Eastern District of New York denied without prejudice the plaintiff's premature motion for class certification. The plaintiff, a real property owner, commenced this putative class action alleging that the defendant violated Section 1692g(a) of the FDCPA by failing to accurately state in a written notice to the consumer the amount of alleged debt owed. The plaintiff moved for class certification "only to avoid having the putative class action claims mooted by a potential offer of judgment for full relief made pursuant to [Rule] 68." Additionally, the plaintiff requested that the court delay ruling on the motion while the parties conducted discovery. The court stated, however, that it could not certify a class until it undergoes a "rigorous" analysis of the Rule 23 prerequisites. The plaintiff acknowledged that the court could not undertake such an analysis at this time. The court also noted that there was nothing to be gained from holding open indefinitely a premature motion for class certification.

Minniti v. Eilers, No. 14-cv-22294, 2014 WL 4923006 (S.D. Fla. Sept. 23, 2014).

The plaintiff moved for class certification of its claims against the defendants for allegedly sending unsolicited advertising faxes in violation of the Telephone Consumer Protection Act. Three days after filing the complaint, the plaintiff filed a motion for class certification, requesting that the court defer ruling on the motion until class discovery could be completed in an attempt to avoid the possibility of having the class action dismissed for mootness in the event the defendants served a Rule 68 offer of judgment. Courts are divided over whether an offer of judgment made to a named plaintiff in a class action moots the entire case; the Eleventh Circuit had not yet ruled on the issue, though district courts within the Circuit had ruled on both sides. Judge Beth Bloom of the U.S. District Court for the Southern District of Florida denied the plaintiff's motion for class certification, finding that it was not supported by any factors or legal argument. While the court acknowledged the plaintiff's concern about the possibility that the defendants may make an offer of judgment and that the Eleventh Circuit may decide that such an offer would moot her claim, Judge Bloom concluded that "the court is not inclined to rule on possibilities" and must rule on the motion as presented.

Doe v. City of Harvey, No. 12 CV 1094, 2014 WL 4724381 (N.D. Ill. Sept. 22, 2014).

Judge Sharon Johnson Coleman of the U.S. District Court for the Northern District of Illinois denied the plaintiffs' motion for class certification in a putative class action against the City of Harvey, Illinois, and its police department for allegedly maintaining a policy of discrimination against female victims of sexual assault in violation of Section 1983 and the Equal Protection Clause of the U.S. Constitution. The class complaint alleged that following the report of any sexual assault on a woman, detectives from the Harvey Police Department were required to administer a sexual assault evidence collection kit and submit the kit for testing. Detectives, however, were granted wide discretion regarding their investigatory strategies. According to the complaint, because of this discretion, some evidence collection kits were never administered, some kits were never sent for testing, and some victims did not receive prompt follow-up after their kits were sent for testing. The plaintiffs contended that these failures, along with the general lack of instruction and training in dealing with victims of sexual assault, represented Harvey's lack of care toward victims of sexual assault. The plaintiffs sought to certify a class for injunctive relief under Rule 23(b)(2) and for damages under Rule 23(b)(3). The plaintiffs additionally asserted that the action could be maintained under Rule 23(c)(4) for each of the class issues alleged. The court, however, did not reach the questions raised under Rules 23(b) and 23(c) because it determined that the class could not satisfy the commonality prerequisite set forth in Rule 23(a). Citing the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the court stated that the plaintiffs could not satisfy the commonality requirement unless they identified "a common mode of exercising discretion that pervade[d]" across all detectives' individual practices and had the purpose of discriminating. Because each detective exercised his or her own discretion in submitting evidence collection kits for testing, and because the plaintiffs had not sufficiently established that each detective had a discriminatory purpose, the court concluded that the class could not satisfy the threshold requirements for Rule 23 certification.

Elers v. Online Information Services, Inc., No. 2:14-cv-284-FtM-29DNF, 2014 WL 4495199 (M.D. Fla. Sept. 12, 2014).

The plaintiff filed a class action complaint and motion for class certification claiming that the defendant Online Information Services' debt collection practices violated the

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Florida Consumer Collection Practices Act, the Fair Credit Reporting Act, and the Florida Deceptive and Unfair Trade Practices Act. Judge John E. Steele of the U.S. District Court for the Middle District of Florida denied the plaintiff's motion for class certification after finding a "complete absence of factual allegations" in the plaintiff's complaint. Not only did the plaintiff's complaint fail to plausibly state entitlement to relief as required under Rule 8(a) and *Twombly*, but the lack of any factual pleadings also made it impossible to determine whether the requirements of Rule 23 were met. As such, the court denied the motion without prejudice and ordered the plaintiff to file an amended complaint within 14 days.

Bank v. Caribbean Cruise Line, Inc., No. 12-CV-5572, 2014 WL 4258932 (E.D.N.Y. Aug. 27, 2014).

In this Telephone Consumer Protection Act case, Judge John Gleeson of the U.S. District Court for the Eastern District of New York denied the plaintiff's motion for class certification because Rule 23(a)'s adequacy requirement was not satisfied insofar as the plaintiff sought to serve as both the class representative and the class counsel. The court held that this would create an impermissible conflict of interest because the plaintiff's duty to represent the interests of the class would conflict with his personal interest in obtaining legal fees.

In re Park Central Global Litigation, No. 3:09-cv-765-M, 2014 WL 4261950 (N.D. Tex. Aug. 25, 2014).

Judge Barbara M.G. Lynn of the U.S. District Court for the Northern District of Texas denied the plaintiffs' motion to certify a class of investors who lost their investment in a hedge fund. The plaintiffs sought certification under Rule 23(b)(1)(B) or, in the alternative, Rule 23(b)(3). The court found that the plaintiffs had not shown that the potential class size of 112-130 would render joinder impractical. Thus, the plaintiffs failed the numerosity prong of Rule 23(a). The court also held that Rule 23(b)(1) was not applicable because "Defendants' assets are not a limited fund" within the definition typically contemplated. As to Rule 23(b)(3), the court held that predominance was not satisfied because "this case raises pervasive individual questions pertaining to the content of information received, reliance, and damages, such that class treatment would be inappropriate."

Bashista v. St. Joseph Hospital System, No. 14-10001, 2014 WL 4206891 (E.D. Mich. Aug. 22, 2014).

Judge Gershwin A. Drain of the U.S. District Court for the Eastern District of Michigan rejected a putative class action case brought by a woman who alleged breach-of-contract, discrimination and various other claims based on the assertion that she was improperly fired from her job at the defendant hospital because she refused to get a flu shot. In an order dismissing the action in its entirety, the court also noted that the plaintiff's complaint included a request for class certification. According to the court, while it was "hard to discern" who the plaintiff believed was in the class, the plaintiff "appear[ed] to be representing any employee in the United States whose employer encourages them to take a flu shot." The court rejected the proposed class outright, noting that given the unclear "description of the class, it is impossible to determine who would be a member."

Hurt v. Shelby County Board of Education, No. 2:13-CV-230-VEH, 2014 WL 4269113 (N.D. Ala. Aug. 21, 2014).

Judge Virginia Emerson Hopkins of the U.S. District Court for the Northern District of Alabama, denied class certification of a putative class of female students who attended school in the Shelby County public school system during a 25-year period that the defendant Shelby County Board of Education employed the defendant teacher and school bus driver Mr. Acker and were either "injured, sexually harassed, abused or molested by Dan Acker or who witnessed such conduct or who was exposed to a sexually hostile educational environment" as a result of such conduct. The court found that the requirements of Rule 23(a) were not satisfied because the class was not sufficiently ascertainable. The definition employed conclusory language to identify class members, creating an impermissible "fail safe" whereby class eligibility would depend on a finding that a plaintiff had a viable claim against Mr. Acker. Additionally, the court held that the class lacked commonality and typicality because the class members' contentions against the defendants varied widely.

In re Paulsboro Derailment Cases, No. 12-7586 (RBK/KMW), 2014 WL 4162790 (D.N.J. Aug. 20, 2014).

Judge Robert B. Kugler of the U.S. District Court for the District of New Jersey denied the plaintiffs' motion to certify a class of individuals and businesses who sustained economic losses as a result of the derailment of a train, release of toxic chemicals, and subsequent evacuation of a New Jersey town. The plaintiffs proposed two subclasses (the second of which was divided into two further sub-classes) alleging various types of economic damages — economic loss from evacuation and economic loss from loss of income, one subclass of which consisted of businesses. Judge Kugler found that each of the proposed classes of individuals were ascertainable, as class members would have some documentation of their expenses or income loss, but found no administratively feasible method to determine which businesses were class members. The court also held that the "business income loss sub-class" failed to satisfy Rule 23(a)'s requirements of numerosity

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and commonality, viewed in conjunction with Rule 23(b)(3)'s requirement of predominance. As to the sub-classes composed of individuals, the court found that the plaintiffs failed to produce "concrete evidence" of numerosity, and relied on recent Third Circuit case law for the proposition that "common sense and speculation" do not satisfy the burden of proof under Rule 23(a).

Decisions Permitting/Granting Class Certification

Jimenez v. Allstate Insurance Co., 765 F.3d 1161 (9th Cir. 2014).

The U.S. Court of Appeals for the Ninth Circuit (Gould and Smith, JJ., and Korman, senior district judge sitting by designation) affirmed the district court's certification of a class of Allstate employees who alleged that Allstate had a practice or unofficial policy of requiring employees to work unpaid overtime in violation of California law. Allstate challenged the order under Rule 23, contending that the common questions identified would not resolve classwide liability, and argued that the district court's approval of statistical modeling among class members to determine liability violated due process and conflicted with *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). The Ninth Circuit held that the class met Rule 23(a)(2)'s commonality requirement because each of the three common questions identified would resolve an element of an "off-the-clock claim" under California law. Given this "close connection," the Ninth Circuit deemed these common questions "precisely the kind … that Rule 23(a)(2) and *Dukes* require." The Ninth Circuit rejected Allstate's second argument regarding the use of statistical modeling, holding that "statistical sampling and representative testimony are acceptable ways to determine liability so long as the use of these techniques is not expanded into the realm of damages." Finally, the Ninth Circuit rejected Allstate's due process claims because "the district court was careful to preserve Allstate's opportunity to raise any individualized defense it might have at the damages phase."

In re Urethane Antitrust Litigation, 768 F.3d 1245 (10th Cir. 2014).

The U.S. Court of Appeals for the Tenth Circuit (Lucero, Murphy and Bacharach, JJ.) affirmed the lower court's denial of the defendant Dow Chemical's post-trial motion to decertify a class of consumers claiming that Dow conspired with other manufacturers to fix prices for certain polyurethane chemical products, in violation of the Sherman Act. The Tenth Circuit rejected the defendant's contention that it should have been permitted to use individualized proceedings to demonstrate that not all class members were injured by the alleged conspiracy, because "[u]nder the prevailing view, price-fixing affects all market participants, creating an inference of classwide impact even when prices are individually negotiated," and "courts have regarded the existence of a conspiracy as the overriding issue even when the market involves diversity in products, marketing, and prices." The district court reasonably concluded that two common questions regarding the existence of a conspiracy and the existence of impact "drove the litigation and generated common answers that determined liability in a single stroke." The Tenth Circuit also rejected Dow's challenges to the use of extrapolation techniques to prove classwide impact and damages because Dow's motion challenging the expert's damage models was filed late. Moreover, because Dow waited until after trial to raise the issue, the expert had already testified that "nearly all class members had been impacted or overcharged" during the pertinent period so that "the district court knew from the actual trial that common issues of damages had predominated."

Dozier v. Haveman, No. 2:14-cv-12455, 2014 WL 5483008 (E.D. Mich. Oct. 29, 2014).

Judge Laurie J. Michelson of the U.S. District Court for the Eastern District of Michigan certified a Rule 23(b)(2) class of Medicaid beneficiaries who received notice that their health plan had been terminated, allegedly in violation of federal law because Michigan's Medicaid agency did not also determine if the beneficiaries would be eligible for other Medicaid programs. The court decided that the class action survived Michigan's attempt to moot it (by approving the named plaintiffs' applications for a different Medicaid plan after the class certification motion was filed, and then doing the same for other potential class representatives who sought to intervene). The named plaintiffs were adequate class representatives, even though Michigan *had* mooted their *individual* claims, because they had vigorously represented the proposed class and were represented by competent class counsel. The court disagreed with Michigan's argument that individualized eligibility determinations would be required because the proposed class definition was limited to individuals who were eligible for other Medicaid programs, and decided instead that the class definition could be limited to individuals who received the allegedly inadequate notice, consistent with the plaintiffs' liability theory.

Cohen v. Trump, Nos. 13-cv-2519-GPC-WVG, 10-cv-0940-GPC-WVG, 2014 WL 5454460 (S.D. Cal. Oct. 27, 2014), 23(f) *pet. pending*.

Judge Gonzalo P. Curiel of the U.S. District Court for the Southern District of California certified a nationwide class of purchasers of Trump University classes asserting a RICO Act claim for misrepresentations regarding, *inter alia*, Donald Trump's role and involvement in the program and that it was a "university." Judge Curiel found the class was sufficiently numerous and shared common questions

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as to the misrepresentations made, who made them and whether the representations were misleading. The court rejected the defendant's argument that the named plaintiff's claims were subject to "unique defenses" related to reliance and the application of statute of limitations that rendered him atypical of the proposed class. Because defendants argued that these same defenses would apply to many of the proposed class members' claims, they could not be classified as "unique" to the named plaintiff. Further, the court concluded that the defenses did not defeat predominance with respect to the class generally. The court explained that individualized inquiries as to class member reliance were unnecessary because the uniform marketing meant "reliance can be established on a class-wide basis where the behavior of plaintiffs and class members cannot be explained in any way other than reliance upon the defendant's conduct." In addition, the court was "not convinced" that the inquiry into whether the class members' claims were time-barred would "require individualized determinations."

Gold v. Midland Credit Management, Inc., No. 13-cv-02019-BLF, 2014 WL 5026270 (N.D. Cal. Oct. 7, 2014).

The plaintiff sought certification of a "hybrid" Rule 23(b)(2) and (b)(3) class of California consumers who received an allegedly misleading debt collection letter, claiming violations of federal and state debt collection protection laws and seeking statutory damages and declaratory relief. Judge Beth Labson Freeman of the U.S. District Court for the Northern District of California held that the class was ascertainable, even though the defendants' records did not differentiate between consumer and business records, because the class members could be determined through names on accounts and/or credit card statements, and that commonality was satisfied because the class members suffered the same alleged injury in receiving the same letter. Judge Freeman thus certified a Rule 23(b)(3) class, rejecting the defendants' argument that each class member's financial obligations were individual issues precluding certification, because "the legality of the underlying letter sent by Defendants is a question of law that is subject to class wide disposition." However, the court refused to certify a Rule 23(b)(2) class because the defendants had ceased using the form letter, making declaratory relief unnecessary.

Mullins v. Direct Digital, LLC, No. 13 CV 1829, 2014 WL 5461903 (N.D. Ill. Sept. 30, 2014).

Judge Charles Ronald Norgle of the U.S. District Court for the Northern District of Illinois granted in part and denied in part the plaintiff's renewed motion for class certification in a consumer-fraud class action arising under the Illinois Consumer Fraud and Deceptive Business Practices Act and similar consumer protection laws in nine other states. The complaint accused Direct Digital of fraudulently claiming that its Instaflex Joint Support product could help "relieve discomfort" and improve flexibility and mobility when, in reality, the product was nothing more than a sugar pill. The plaintiff sought certification of consumers in all of the states or, alternatively, a subclass of Illinois consumers, each within the time period of the applicable statute of limitations. The court certified the multistate class. It found that the class was ascertainable because it was objectively limited to individuals who purchased Instaflex for personal use during the class period. In addition, the court determined that the action would involve questions common to the entire class: whether the ingredients of Instaflex provided any health benefits and whether Instaflex's labeling deceived the public consumer. The court further found that adequacy was met notwithstanding "Plaintiff's tenuous relationship with one member of class counsel" because class counsel was well qualified. Turning to Rule 23(b), the court found the class could not be certified for injunctive relief under Rule 23(b)(2), as monetary damages would be sufficient to afford relief to the class members. Certification under Rule 23(b)(3), however, was appropriate because the question whether the advertisements on Instaflex's label were false was common and predominated over other issues.

Davidson v. Henkel Corp., No. 12-cv-14103, 2014 WL 4851759 (E.D. Mich. Sept. 29, 2014).

Judge Gershwin A. Drain of the U.S. District Court for the Eastern District of Michigan certified, under Rule 23(b)(3), a class of retirees alleging Employee Retirement Income Security Act claims based on the defendants' failure to withhold payroll taxes on the prospective class members' retirement benefits. In so doing, the court rejected the defendants' argument that the proposed class — which was defined to include retirees who "were subject to Defendants' Error" and "whose benefits were reduced by the correction of the error imposed" — was not objectively ascertainable. According to the court, the defendants themselves had identified 49 individuals during discovery to whom they had sent a letter stating that taxes had not been withheld and whose future benefits would be adjusted. As a result, there was no issue in objectively identifying the class. The court also rejected the defendants' numerosity argument, finding that 49 class members from across the country was sufficient for class treatment. With respect to predominance, the court acknowledged that, under the plaintiffs' theory, individual inquiries would be required to determine whether each proposed class member was financially injured as a result of the defendants' improper failure to withhold taxes — which would raise problems for class certification under *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). The court held, however, that if it concluded that the defen-

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dants had engaged in wrongdoing, it had the "authority to fashion a remedy" that would "make the Plaintiffs whole regarding Defendants' purported failure to properly apply" the applicable tax withholding rule, such as reformation or disgorgement. According to the court, any individualized issues relating to damages would be ancillary to a classwide finding that the defendants were at fault and a classwide remedy aimed at correcting the defendants' overall alleged mismanagement of the retirement fund. Finally, the court held that individualized issues of reliance did not preclude class certification because the court "may properly infer that Plaintiff and the Class detrimentally relied on [the defendants] to properly" withhold taxes for benefits as required by law.

***In re Chinese-Manufactured Drywall Products Liability Litigation*, MDL No. 2047, 2014 WL 4809520 (E.D. La. Sept. 26, 2014).**

Judge Eldon E. Fallon of the U.S. District Court for the Eastern District of Louisiana certified a class of plaintiffs alleging property damages from defective drywall. Plaintiffs in the case had already obtained a default judgment against the defendants. The court noted that the default judgment "greatly simplified" the class certification analysis because "the Court has already found sufficient facts to establish the causation issue associated with these types of claims." Accordingly, "all that is required is an assessment of damages." Because plaintiffs "establish[ed] a formulaic method to determine class-wide property damages as required by the Rule 23(b)(3) predominance requirement," the court held that class certification was appropriate.

***Lilly v. Jamba Juice Co.*, No. 13-cv-02998-JST, 2014 WL 4652283 (N.D. Cal. Sept. 18, 2014).**

Judge Jon S. Tigar of the U.S. District Court for the Northern District of California granted in part and denied in part the plaintiffs' motion to certify a class of consumers in California seeking relief under various California consumer protection statutes for purchases of five Jamba Juice Smoothie Kit products that were allegedly mislabeled as "All Natural." Judge Tigar first held that the ascertainability concerns raised by the defendants did not preclude certification. Although class members were unlikely to have kept receipts, notice could be provided to those consumers who could be identified through retailer membership programs and to others through targeted Internet and print media campaigns. The court also rejected the defendants' argument that class member identification is necessary at the certification stage because they were entitled to assert individual challenges and defenses to each claim. According to the court, such a due process concern was misplaced because the plaintiffs could "establish, with admissible evidence, that Defendants' challenged labeling practices violated the law" and the "total damages to which the Class is entitled," after which the defendants could challenge whom to pay and in what amount. Judge Tigar also rejected the defendants' argument that the plaintiffs were unrepresentative and atypical because they testified to sometimes consuming other products that contain the same allegedly unnatural ingredients. However, the court certified the class only for the purpose of determining liability, concluding that any inquiry into the proper value of restitution or disgorgement remedies would entail individualized inquiries.

***Ebin v. Kangadis Family Management LLC*, No. 14-cv-1324(JSR), 2014 WL 4638700 (S.D.N.Y. Sept. 18, 2014).**

Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York granted class certification in this putative consumer class action arising out of the defendants' alleged practice of selling containers of "100% Pure Olive Oil" that actually contained a substance known as "olive-pomace oil." The plaintiffs asserted six causes of action including breach of warranty, negligent misrepresentation and fraud. The defendants, officers and principals of the olive oil distributor, challenged class certification on two grounds. First, the defendants argued that the plaintiffs failed to satisfy Rule 23's ascertainability requirement because of the difficulty in identifying all class members. The court, however, quickly dismissed this argument by noting that individual notice only needs to be given to those class members who can be identified through reasonable effort. Second, the defendants argued that predominance and commonality were not satisfied because a nationwide class would implicate fifty states' differing laws on fraud and negligent misrepresentation. Although the court acknowledged variations in the law, the court rejected this argument because it is "inconceivable that any individual would not have relied on the tin's labeling," and therefore under these facts there would be little variation in adjudication of liability.

***Simpson v. Safeguard Properties, LLC*, No. 13 CV 2453, 2014 WL 4652336 (N.D. Ill. Sept. 17, 2014).**

Judge Joan B. Gottschall of the U.S. District Court for the Northern District of Illinois certified a class action involving alleged violations of the Fair Debt Collection Practices Act (FDCPA) by the defendant, Safeguard Properties. The named plaintiff alleged that Safeguard violated the FDCPA by failing to include required notices in hangers left on borrowers' doors. The hangers contained information urging delinquent borrowers to contact Safeguard Properties in connection with their mortgages, but did not identify Safeguard as a representative of the mortgage holder.

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The proposed class included all Illinois residents whom Safeguard had contacted within the previous year using a standard door hanger. The court found that the proposed class satisfied the commonality, typicality and adequacy requirements because the claims of all class members revolved around whether Safeguard's practices violated the FDCPA, and, "[i]n FDCPA cases, the emphasis is on the uniform acts of the defendant toward each individual and not the uniform position of the individual plaintiffs." In addition, the court found that the class satisfied the predominance requirement of Rule 23(b)(3), focusing on the defendant's "uniform contact" with class members, which trumped any individual issues of fact.

Spears v. First American eAppraiseIT, No. 5-08-CV-00868-RMW, 2014 WL 4647679 (N.D. Cal. Sept. 16, 2014).

Judge Ronald M. Whyte of the U.S. District Court for the Northern District of California denied the defendant's motion to decertify a class of consumers who received home loans from Washington Mutual Bank, FA using appraisals obtained from eAppraiseIT (EA), alleging violations of the Real Estate Settlement Procedures Act (RESPA) arising from a purported EA agreement to provide inflated home appraisals in exchange for business referrals. Rejecting EA's argument that determining which loans were subject to RESPA would "swallow the litigation," the court held that "the class-wide issue central to liability — an agreement to exchange referrals for inflated appraisals resulting in inflation in the aggregate — still predominate[d]." Moreover, the court held the class was ascertainable, noting that "asking a claimant to disclose, under penalty of perjury, the intended use for his or her loan funds" would suffice "in most cases" to determine the applicability of RESPA and thus class member eligibility. Regarding damages, the court questioned whether the plaintiffs could "rely on extrapolation to determine aggregate damages if aggregate damages were made part of the initial liability phase." As a result, the court bifurcated the common liability issue from damages to avoid prejudice to EA and promote judicial economy.

Edwards v. National Milk Producers Federation, No. C 11-04766 JSW, 2014 WL 4643639 (N.D. Cal. Sept. 16, 2014), 23*(f) pet. pending*.

Judge Jeffrey S. White of the U.S. District Court for the Northern District of California granted in part and denied in part a motion to certify a class of all consumers who indirectly purchased milk products in certain states, in an action alleging a nationwide conspiracy to limit the production of raw milk and increase its price through premature "herd retirements." The court did not certify the class from West Virginia, as there was no plaintiff from that state. As to the other classes, the court found the plaintiffs met their burden on numerosity based on evidence that the class has approximately 46 million members, that the plaintiffs are adequate class representatives, and that common questions predominate, noting that the key common question was whether the defendants violated the state indirect purchaser antitrust laws. The court rejected the defendants' challenge to the plaintiffs' ability to demonstrate damages by a reliable method using common proof, because any such failure would go to the weight of the evidence, not admissibility. The court also held that the plaintiffs had shown they could prove damages linked to their theory of liability because they were alleging a nationwide conspiracy by the defendants, and their damages model was "capable of calculating the allegedly inflated prices that class members paid in each class state as a result of the nationwide conspiracy."

Zyburo v. NCSPlus, Inc., No. 12-CV-6677, 2014 WL 4536932 (S.D.N.Y. Sept. 15, 2014), 23*(f) pet. pending*.

Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York granted class certification in this Telephone Consumer Protection Act (TCPA) case. The plaintiff alleged that the defendant, a collection agency, repeatedly called his cellphone without his consent using an automated dialing system even after he requested the defendant place him on their do-not-call list. According to the plaintiff, the defendant called over 145,000 unique, identifiable cellular telephone numbers during the class period. The defendant disputed class certification on two main grounds. First, the defendant argued that the named plaintiff failed to meet the adequacy requirement of Rule 23(a) because he was not sufficiently familiar with the facts of the case. The court disagreed, holding that the adequacy requirement was satisfied because the named plaintiff, a sophisticated businessman, had shown himself to be a fully capable lead plaintiff with no fundamental conflicts between himself and the class. Second, the defendant argued that the plaintiff failed to meet the Rule 23 requirements of commonality, typicality, predominance and ascertainability because many of the proposed class members provided the underlying creditor (a medical office) with their phone number, thus giving the defendant implied consent to call to collect debt. The court disagreed, however, because: (1) the defendant was unable to provide records showing which class members had given implied consent; and (2) implied consent was, in any event, insufficient where the TCPA only provided an exception for express consent.

***Ades v. Omni Hotels Management Corp.*, No. 2:13-cv-02468-CAS(MANx), 2014 WL 4627271 (C.D. Cal. Sept. 8, 2014).**

Judge Christina A. Snyder of the U.S. District Court for the Central District of California certified a class of individuals who called Omni's toll-free phone number and provided personal information without being warned that their calls were being recorded in violation of the California Invasion of Privacy Act (CIPA). The court found the class was ascertainable, noting that if Omni has evidence that certain claimants' calls were not recorded or not placed in California, Omni could offer the evidence to disqualify class members. The court rejected Omni's contention that the plaintiffs could not prove injury on a classwide basis since some callers assumed their calls would be recorded and thus were not harmed, because the only "harm" required is the "unauthorized recording." Judge Snyder likewise found that individual consent issues would not overwhelm the common issues, particularly because "[d]espite extensive discovery, Omni has not produced evidence that a single person meeting the class definition actually consented to a call being recorded[.]" The court also rejected Omni's contention that CIPA's $5,000 statutory damage minimum per violation provided adequate incentives for individual lawsuits, and that when aggregated, these damages would be grossly excessive in violation of the Due Process Clause as not appropriately considered in the class certification analysis.

***Nieberding v. Barrette Outdoor Living, Inc.*, No. 12-CV-2353-DDC-TJJ, 2014 WL 4408928 (D. Kan. Sept. 8, 2014), 23*(f) pet. granted*.**

Judge Daniel D. Crabtree of the U.S. District Court for the District of Kansas granted in part and denied in part the plaintiffs' motion for certification of a class of purchasers of outdoor railing products with allegedly defective plastic brackets. The court rejected the defendants' ascertainability argument because the plaintiffs asserted that they could provide proof of purchase through receipts or photos. Further, the court held that the issue of whether the brackets were defective when sold was common to the class, and rejected the defendants' arguments about the lack of defects as misdirected merits arguments inappropriate at the class certification stage. The court also held that the notice requirement for the Kansas implied warranty statute was satisfied for the entire class by the plaintiffs' notice, and that the putative class could prove causation by showing that an objective, reasonable person would have been harmed by the omission, satisfying predominance. Because class members paid different prices for the allegedly defective railing product, however, the court certified the class only for purposes of liability, severing the plaintiffs' request for damages for determination at a later date.

***Alexander v. Coast Professional Inc.*, No. 12-1461, 2014 WL 4413598 (E.D. Pa. Sept. 5, 2014).**

This case involved alleged violations of the Higher Education Act, 20 U.S.C. § 1078-6, et seq., which provides that students with defaulted federally-insured student loans may not be required to make monthly payments of "more than is reasonable and affordable based on the borrower's total financial circumstances." The plaintiff contended that the defendant loan servicer did not take her total financial circumstances into account in setting her monthly payments, and proposed a class definition that included all residents of Pennsylvania with Federal Family Education Loan Program (FFELP) and/or Direct Loans serviced by Coast Professional Inc. that were in default, not previously rehabilitated and otherwise qualified for rehabilitation who did not pursue an offer of balance in full or settlement in full payment. Judge Nitza I. Quiñones Alejandro of the U.S. District Court for the Eastern District of Pennsylvania granted class certification, holding that the proposed class was sufficiently ascertainable, as it could likely be identified in a review of company records. The court also found that the class satisfied Rule 23(a)(3)'s typicality requirement; although the plaintiff had a FFELP loan and sought to include Direct loan borrowers in her class, "a named plaintiff that purchases only one type of product satisfies the typicality requirement if the alleged misrepresentations or omissions apply uniformly across the different product types."

***Stemple v. QC Holdings, Inc.*, No. 12-cv-01997-BAS(WVG), 2014 WL 4409817 (S.D. Cal. Sept. 5, 2014).**

The plaintiff sought to certify a class of individuals automatically dialed by the defendant without their consent because they were listed as employers or contacts on payday loan applications by third parties, in violation of the Telephone Consumer Protection Act. Judge Cynthia Bashant of the U.S. District Court for the Southern District of California found the class ascertainable based on contact information provided in the applications, because changes in telephone numbers could be determined during class notification, and amended the class definition *sua sponte* to exclude any loan applicants themselves. The court certified the class under Rule 23(b)(3) because common questions regarding express prior consent by a third-party contact in a loan application predominated over any individual factual scenarios. However, because the plaintiff sought individualized monetary claims and not solely injunctive relief, the court refused to certify a Rule 23(b)(2) class.

***Wilson v. Gordon*, No. 3-14-1492, 2014 WL 4347585 (M.D. Tenn. Sept. 2, 2014).**

Judge Todd J. Campbell of the U.S. District Court for the Middle District of Tennessee certified a class of individu-

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als who applied for the state's Medicaid program and did not receive an eligibility determination in the time set by regulations for alleged due process violations. The defendants argued that the class lacked commonality because whether Tennessee acted in a timely manner in adjudicating a class member's eligibility application would depend on individualized circumstances. The court disagreed but limited the class to all individuals who applied for the state's Medicaid program and did not receive either an eligibility determination or a fair hearing within the time set by the regulations (the plaintiffs had proposed a "timely manner"), because the regulations entitled each class member to a fair hearing if they had not received an eligibility determination within a specified time. In addition, even though the named plaintiffs' claims were moot because they had been administratively resolved after the class certification motion was filed, the court found that the named plaintiffs were adequate class representatives under the exception to the mootness doctrine for claims that are capable of repetition, yet evading review insofar as the plaintiffs were required to reapply for Medicaid benefits annually.

***Schwartz v. Avis Rent a Car System, LLC,* No. 11-4052 (JLL), 2014 WL 4272018 (D.N.J. Aug. 28, 2014).**

Judge Jose L. Linares of the U.S. District Court for the District of New Jersey granted the plaintiff's motion to certify a Rule 23(b)(3) class of Avis Preferred members bringing claims for violations of the New Jersey Consumer Fraud Act (NJCFA), breach of contract, and breach of the covenant of good faith and fair dealing arising from an additional fee charged as part of the defendants' car rental "Travel Partner Program." Prior to determining whether the plaintiff met the requirements for Rule 23 certification, the court first determined that the proposed class definition was "readily discernible, clear, and precise" because the defendants had records of proposed class members' contact information and amount of the fees at issue charged. The court next found that predominance was satisfied for the plaintiff's statutory and common-law claims. For example, the court concluded that the plaintiff could prove both his claims for violation of the NJCFA and for breach of contract by pointing to common evidence — i.e., the standard form contract that Avis used with each of its customers over the class period. Furthermore, the court found that the causality element of the plaintiff's NJCFA claim could be shown through common evidence given the testimony of the plaintiff's expert, who opined that the additional fee charged by Avis was "not knowable" to a significant number of the potential class members. In so doing, the court noted that the defendants' expert merely "criticize[d]" plaintiff's expert analysis without "present[ing] his own empirical data as a counterargument."

***Perry v. Equity Residential Management, LLC,* No. 12-10779-RWZ, 2014 WL 4198850 (D. Mass. Aug. 26, 2014).**

Judge Rya W. Zobel of the U.S. District Court for the District of Massachusetts certified a class of tenants who were charged three fees by their landlord at commencement of the lease, in alleged violation of Massachusetts' security deposit law. The named plaintiffs did not pay one of the three fees, but the court found they had standing to challenge it nonetheless because although it had a different name, it was fundamentally identical to one of the fees they had paid. However, the court determined that the named plaintiffs lacked standing to challenge a fourth fee charged by the landlord, because it was materially different from any of the fees they had paid. (The court simultaneously granted summary judgment in favor of the named plaintiffs, concluding that the fees violated the security deposit law.)

Other Class Action Decisions

***Mabary v. Home Town Bank,* N.A., No. 13-20211, 2014 WL 5801352 (5th Cir. Nov. 5, 2014).**

The U.S. Court of Appeals for the Fifth Circuit (Higginbotham, Jolly and Southwick, JJ.) reversed the district court's dismissal of the consumer's putative class action alleging that the bank violated the Electronic Funds Transfer Act (EFTA) by failing to post an external notice of fees on its ATM machines. While the suit was pending, Congress amended the EFTA to eliminate the external notice requirement. The district court therefore dismissed both the plaintiff's individual claim and the class claim since a class could not be certified to vindicate a defunct statutory right. On appeal, the Fifth Circuit held that the repeal did not apply retroactively and therefore the district court's basis for dismissing the individual and class claim was invalid. In response to the bank's counter argument that its previous offer to settle should moot the plaintiff's claims under Rule 12(b)(1), the Fifth Circuit held that the bank could not "pick off" a named plaintiff by mooting her individual claim before the court has an opportunity to rule on the question of class certification.

***Claxton v. Kum & Go, L.C.*, No. 6:14-cv-03385-MDH, 2014 WL 4854692 (W.D. Mo. Sept. 30, 2014).**

Judge Douglas Harpool of the U.S. District Court for the Western District of Missouri granted the plaintiff's motion to strike the defendant Kum & Go's offer of judgment in a putative class action alleging that Kum & Go sold its consumers unleaded gasoline that improperly contained diesel fuel. After removing the action to federal court, but before the court ruled on class certification, Kum & Go served an offer of judgment in which it agreed to resolve the named plaintiff's claims but did not address the claims of the

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absent putative class members. The plaintiff subsequently moved to strike the offer, arguing that where a plaintiff brings a class action pursuant to Rule 23 and the court has not yet ruled on class certification, an offer of judgment as to the named plaintiff is improper. In ruling on the motion to strike, the court acknowledged two primary concerns that arise when a defendant makes an offer of judgment prior to class certification. First, the court noted that if the offer of judgment satisfies the individual claim of the putative class representative, questions may arise as to whether a live controversy continues to exist between the representative and the defendant or whether the case has been rendered moot. Although the Eighth Circuit has not yet ruled on whether a tender and rejection of an offer of judgment prior to a request for class certification moots a class action suit, the court found it unnecessary to resolve that question because settled Eighth Circuit precedent at the time dictated that an offer of judgment did not moot an individual plaintiff's claim unless damages were absolutely determinate and the offer satisfied the plaintiff's "entire demand for injuries and costs of the suit." Here, because the complaint included a claim for punitive damages that could not be determined at the time Kum & Go presented its offer of judgment, the court found that the offer of judgment would not moot the action. The court's second concern, however, was that the precertification offer of judgment would place the named plaintiff in a position where his financial interests conflicted with those of the putative class. In light of this conflict-of-interest concern, the court struck the offer of judgment but permitted Kum & Go to file a subsequent offer of judgment following the decision on class certification.

Reyes v. S.J. Services, Inc., No. 12-11715-DPW, 2014 U.S. Dist. LEXIS 132683 (D. Mass. Sept. 22, 2014), *appeal pending*.

In connection with ruling on pre-certification summary judgment cross-motions on a wage-act claim, Judge Douglas P. Woodlock of the U.S. District Court for the District of Massachusetts granted a motion to strike a Rule 68 offer of judgment made to the plaintiffs before class certification. The court agreed with *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004), that using Rule 68 offers to pick off proposed class actions "threatens to undermine the class action procedure" and — at least in the wage-and-hour context — "would frustrate the objectives of wage act statutes and the purpose of collective action provisions." The court determined that the logic of *Weiss* required striking Rule 68 offers both once a class-certification motion was pending and "at early precertification stages of aggregate litigation as well."

Christian v. Generation Mortgage Co., No. 12 C 5336, 2014 WL 4494860 (N.D. Ill. Sept. 12, 2014).

Judge John J. Tharp, Jr. of the U.S. District Court for the Northern District of Illinois denied the plaintiffs' motion for reconsideration of his prior order denying the plaintiffs' request for discovery of classwide statistical data from thousands of individual loan files. The thrust of the plaintiffs' allegations was that the defendant offered less favorable loan terms to African Americans and single women. The plaintiffs claimed they needed the data to prove commonality, proposing to conduct a statistical analysis comparing the loan terms offered to members of these two groups with terms offered to other borrowers. The defendant argued that the discovery was too burdensome. In its initial order, the court concluded that the plaintiffs' proposed regression analysis would not suffice to prove commonality because a statistical disparity in the loan terms received would not say anything about the cause of that disparity, relying on *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In their motion for reconsideration, the plaintiffs claimed that their statistical analysis would control for all alternative causes of discrimination. The court rejected that argument, pointing to the plaintiffs' prior concessions that their study would determine only discriminatory effect, not cause. And "[i]f, as the plaintiffs maintain, there is no evidence — other than statistical evidence of a disparate impact — to show that [the defendant's] brokers exercised their pricing discretion in a common manner, that is a reason to stop the plaintiffs at the gates, not to permit them to inflict enormous costs by engaging in discovery that is bound to prove futile."

Family Health Chiropractic, Inc. v. MD On-Line Solutions, Inc., No. 5:14CV995, 2014 WL 4322552 (N.D. Ohio Aug. 29, 2014).

Judge John R. Adams of the U.S. District Court for the Northern District of Ohio denied a motion to dismiss a putative class action for lack of standing after the defendants made a Rule 68 offer of judgment to the named plaintiff prior to class certification. Even though the Sixth Circuit has not ruled on the question whether a class action may become moot through an offer of judgment, the court reasoned that dicta in *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567 (6th Cir. 2009), suggests that the Sixth Circuit would look closely at offers of judgment made to "pick off" a named plaintiff to avoid "the onslaught" of a class action. The court agreed with decisions finding that an offer of judgment does not moot the named plaintiffs' claims as long as the plaintiffs had not been dilatory in bringing their certification motion. The court reasoned that to hold otherwise forces plaintiffs to file their certification motions at the earliest possible date, possibly before completing class-related discovery, and allows defendants to essentially opt out of Rule 23. Further, Rule 68 permits defendants to recover their costs from plaintiffs who

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recover less than what was offered in the offer of judgment. Consequently, the court reasoned that it would pit the self-interests of named plaintiffs, who would be subject to that cost-shifting provision, against the interests of the class as a whole, which would not be subject to that provision.

***APB Associates, Inc. v. Bronco's Saloon, Inc.*, No. 09-14959, 2014 WL 4145344 (E.D. Mich. Aug. 20, 2014), *appeal pending*.**

Judge Sean F. Cox of the U.S. District Court for the Eastern District of Michigan dismissed a putative Telephone Consumer Protection Act class action because the five defendants had made Rule 68 offers of judgment that offered the individual plaintiff all of the relief it sought (including statutory treble damages for willful behavior and an injunction). The court reasoned that an unaccepted Rule 68 offer of judgment that fully satisfies the individual relief sought moots the claim, and therefore dismissed the action. (The court had denied class certification, and the Sixth Circuit denied review, thus avoiding the issue of the impact of offers of judgment in the pre-certification context.)

CLASS ACTION FAIRNESS ACT (CAFA) DECISIONS

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

***Romulus v. CVS Pharmacy, Inc.*, 770 F.3d 67 (1st Cir. 2014).**

The U.S. Court of Appeals for the First Circuit (Lynch, C.J., Torruella and Howard, JJ.) held that CVS timely removed a putative class action involving allegedly unpaid meal breaks. This was CVS's second attempt to remove the action, and it was premised on CVS receiving an email from the plaintiffs identifying the number of unpaid meal breaks at issue based on data CVS had provided to the plaintiffs. The district court determined that the second removal was not timely because CVS could have identified those meal breaks from its own records within 30 days of first receiving the complaint. The First Circuit disagreed. It explained that the time for removing a case begins when a defendant can "easily" ascertain the matter in controversy "by simple calculation" in a paper received from the plaintiff. The complaint, the court explained, did not do that — it lacked essential facts, and therefore CVS was not obligated to remove the case within 30 days of receiving the complaint. Because the 30-day deadline for removing did not start when CVS received the complaint, CVS could remove within 30 days of receiving an "other paper" from the plaintiffs from which it could determine that the case was removable. Previous decisions in the *Romulus* case were reported in the Summer 2014 and Fall 2014 issues of the *Class Action Chronicle*.

***Myrick v. WellPoint, Inc.*, 764 F.3d 662 (7th Cir. 2014).**

Writing for a unanimous three-judge panel (Bauer, Easterbrook and Williams, JJ.), Judge Frank H. Easterbrook of the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's denial of the plaintiffs' motion to remand a proposed class action pursuant to CAFA's "home state" exception. The class complaint, originally filed in Illinois state court, alleged that the plaintiffs' health insurance company had committed various violations of the Illinois Consumer Fraud and Deceptive Business Practices Act. The defendants removed the action to federal court under CAFA. The plaintiffs subsequently moved to remand pursuant to 28 U.S.C. § 1332(d)(4), which states that a federal court shall "decline to exercise" CAFA jurisdiction if at least two-thirds of the proposed class members are citizens of the state in which the suit commenced and at least one defendant from which "significant relief" is sought is a citizen of the same state. All parties agreed that the defendant insurance company was a citizen of Illinois and that it sold the insurance policies in question only to individuals who represented that they "reside" in Illinois. The district court, however, distinguished "residence" from "citizenship," which, for purposes of diversity jurisdiction, is determined by an individual's domicile. In addition, the district judge noted that Illinois employers could purchase group plans that might cover out-of-state employees. Thus, according to the district judge, the plaintiffs had failed to establish sufficient facts warranting application of the home state exception. The Seventh Circuit affirmed. The court held that the party relying on the home state exception — in this case, the plaintiffs — bears the burden of proving that the exception applies. Here, the court found that the plaintiffs had failed to produce any evidence that would allow the court to determine the class members' citizenships on the date the case was removed. Accordingly, the district court properly declined to apply the home state exception and allowed the case to proceed in federal court.

***Cedar Lodge Plantation, LLC v. CSHV Fairway View I, LLC*, 768 F.3d 425 (5th Cir. 2014).**

The U.S. Court of Appeals for the Fifth Circuit (Jolly, Jones and Higginson, JJ.) reversed the district court's order granting the plaintiffs' motion to remand. In a matter of

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first impression, the court addressed whether the plaintiffs could defeat removal by amending their complaint to add a local defendant after removal. Interpreting the "local controversy" exception of CAFA, the Fifth Circuit held that the exception "depends on the pleadings at the time the class action is removed, not on an amended complaint filed after removal." Thus, the Fifth Circuit reversed the district court.

Doyle v. OneWest Bank, FSB, 764 F.3d 1097 (9th Cir Aug. 22, 2014) (_per curiam_).

A unanimous panel of the U.S. Court of Appeals for the Ninth Circuit (Reinhardt, Wardlaw, and Callahan, JJ.) reversed the district court's decision to grant the plaintiff's motion to remand under 28 U.S.C. § 1332(d)(3). Two plaintiffs initiated a putative class action in California state court, and one of the defendants removed the action to federal court under CAFA. The parties subsequently stipulated to severing the claims of one of the plaintiffs and transferring them to federal court in Arizona. The remaining plaintiff in the proposed class action then filed a second amended complaint, and subsequently filed a motion to remand, invoking one of the exceptions under CAFA. The district court granted the motion, but the appellate court reversed. The Ninth Circuit held that the lower court improperly determined the citizenship of the plaintiff class as reflected in the amended complaint because "[f]or the purpose of considering the applicability of the exceptions to CAFA jurisdiction, the District Court should have determined the citizenship of the proposed plaintiff class based on [the] complaint as of the date the case became removable." In other words, the district court should have assessed the propriety of CAFA jurisdiction when the defendant removed the case to federal court — not when the amended complaint was filed. The Ninth Circuit remanded the action to the district court to determine whether any of the CAFA exceptions applied to the complaint at the time of removal.

Williams v. American Honda Finance Corp., No. 14-12859-LTS, 2014 WL 5494914 (D. Mass. Oct. 30, 2014).

Judge Leo T. Sorokin of the U.S. District Court for the District of Massachusetts held that a putative consumer-protection class action was timely removed, denying a motion to remand to state court. The plaintiff had argued that removal was untimely because the defendant had waited more than 30 days after service of the complaint. But the court concluded that the complaint did not plead sufficient facts to permit the defendant's easy calculation of the matter-in-controversy, even though the defendant calculated the matter-in-controversy using facts in the complaint and information in its records. In reaching its decision, the district court relied on _Romulus v. CVS Pharmacy, Inc._, 770 F.3d 67 (1st Cir. 2014), the recent First Circuit ruling that adopted a bright-line test for removals that focuses on only the facts alleged in the complaint. (The First Circuit's opinion in _Romulus_ is discussed on Page 17 of this issue.)

Lester v. Exxon Mobil Corp., No. 14-1824, 2014 WL 5393506 (E.D. La. Oct. 23, 2014), _appeal pending_.

Judge Eldon E. Fallon of the U.S. District Court for the Eastern District of Louisiana denied the plaintiffs' motion to remand in two personal injury cases arising from alleged exposure to radioactive materials. The plaintiffs argued that the two cases did not constitute a "mass action" because they were not attempting to try the claims of 100 or more plaintiffs. The court was not persuaded by this argument, reasoning that even though the separate actions were filed prior to CAFA — and CAFA is not retroactive — the cases became one "mass action" under CAFA when the plaintiffs moved to consolidate the actions. As part of its analysis, the court rejected the plaintiffs' argument that consolidating claims did not amount to a proposal to try the claims jointly in a single trial. The court explained that "the requirement of a proposal for joint trial cannot be read to require literally that all 100 or more plaintiffs eventually be tried at the same time before one jury. Such a requirement not only is contrary to the plain language of the statute, but also would be entirely impractical."

Stafford v. Whole Foods Market California, Inc., No. 4:14CV00420 JLH, 2014 WL 4755988 (E.D. Ark. Sept. 24, 2014).

Judge J. Leon Holmes of the U.S. District Court for the Eastern District of Arkansas denied the plaintiff's motion to remand to state court. The plaintiff initially filed a putative class action in the Circuit Court of Pulaski County, Arkansas, asserting claims against Whole Foods for violation of the Arkansas Deceptive Trade Practices Act, unjust enrichment, breach of implied warranty of merchantability, breach of express warranty, and negligence by allegedly labeling certain of its products as "All Natural" or "Organic" that were not. Whole Foods removed the action to federal court based on CAFA jurisdiction traditional, diversity jurisdiction under 28 U.S.C. § 1332(a), and federal question jurisdiction. The court held that jurisdiction existed under CAFA because the complaint alleged that each class member may have had damages up to $74,999.99 and the class numbered in the thousands. Thus, CAFA's $5 million threshold was satisfied. The court also considered the named plaintiff's stipulation that aggregate damages would not exceed $5 million but concluded that this stipulation could not bind the class as a whole because the class had not yet been certified.

***Goodner v. Clayton Homes, Inc.*, No. 4:12-CV-4001, 2014 WL 4722748 (W.D. Ark. Sept. 23, 2014).**

Judge Susan O. Hickey of the U.S. District Court for the Western District of Arkansas denied the plaintiffs' motion to remand, holding that the defendant's removal under CAFA was proper. The complaint sought damages for violations of the Arkansas Deceptive Trade Practices Act and the Arkansas Unfair Practices Act, as well as unjust enrichment and constructive fraud, arising out of an alleged kickback scheme between two companies owned by the defendant. The plaintiffs argued that the federal court lacked subject matter jurisdiction because the amount in controversy did not exceed $5 million. The court, however, found that the defendant had met its burden to establish that a fact finder *could* legally award damages in excess of $5 million in light of the request for punitive damages and attorneys' fees.

***Doss v. American Family Home Insurance Co.*, No. 4:14-cv-04007, 2014 WL 4682066 (W.D. Ark. Sept. 19, 2014).**

Judge Susan O. Hickey of the U.S. District Court for the Western District of Arkansas denied the plaintiffs' motion to remand, holding that the defendant had satisfied CAFA's $5 million amount-in-controversy requirement. The plaintiffs filed a class action complaint in Arkansas state court asserting breach of contract and unjust enrichment claims. The defendant removed to federal court, and the plaintiffs subsequently moved to remand, arguing that the amount in controversy did not exceed $5 million and CAFA therefore did not allow removal. The court disagreed. First, the court rejected the plaintiffs' argument that the defendant's compensatory damages model was flawed because it extrapolated the named plaintiffs' data to all potential class members. As the court noted, "[u]sing the named [p]laintiffs as typical class members and multiplying their claims by the number of persons estimated in a class is precisely how courts generally determine the estimated amount in controversy." Second, the court held that Arkansas law potentially would entitle the plaintiffs to statutory and punitive damages, thereby further increasing the amount in controversy. And finally, the court noted that if the plaintiffs succeeded on the merits, they would be entitled to statutory attorneys' fees, which may count toward the amount in controversy for purposes of CAFA jurisdiction.

***Stewart v. Ruston Louisiana Hospital Co.*, No. 3:14-0083, 2014 WL 4678606 (W.D. La. Sept. 19, 2014).**

Judge Robert G. James of the U.S. District Court for the Western District of Louisiana affirmed a magistrate's judge's order denying the plaintiffs' motion to remand. The case revolved around the defendants' allegedly improper practices in medical bill collections. The court affirmed the denial for two reasons: (1) the plaintiffs failed to show that two-thirds of the class members were citizens of Louisiana; and (2) a class action had been filed asserting similar claims within the three-year period defined in 28 U.S.C. § 1332(d)(4)(ii). An earlier decision in this case was reported in the Fall 2014 *Class Action Chronicle*, at 18.

Decisions Granting Motion to Remand/ Finding No CAFA Jurisdiction

***Porter v. MetroPCS Communications Inc.*, No. 14-14239, 2014 WL 5933661 (11th Cir. Nov. 14, 2014) (*per curiam*).**

A unanimous panel of the U.S. Court of Appeals for the Eleventh Circuit (Carnes, C.J., Wilson and Jordan, JJ.) granted the defendant's petition for permission to appeal and affirmed the district court's grant of the plaintiff's motion to remand to state court after the defendant removed pursuant to CAFA. The plaintiff filed his putative class action in Florida state court, alleging that the defendant overcharged Florida customers purchasing Samsung Galaxy Indulge cellphones by charging tax based on each phone's pre-rebate price and alleging false advertising and violation of the Florida Unfair and Deceptive Trade Practices Act for the misleading use of the term "no contract" in its advertising. Attempting to use evidence of the company's total revenues in Florida during the class period to establish the minimum amount in controversy, the defendant removed the putative class action to the U.S. District Court for the Southern District of Florida. On appeal, the Eleventh Circuit held that the defendant failed to establish the minimum amount in controversy because the defendant's revenue included not only revenue realized from service agreements that may be rescinded as a result of litigation, but also revenue from the sale of devices and accessories, requiring the court to engage in "hopeless speculation" to determine actual damages.

***Smith v. Medtronic, Inc.*, No. 4:14-CV-01636-CEJ, 2014 WL 5489301 (E.D. Mo. Oct. 30, 2014); *Hendrich v. Medtronic, Inc.*, No. 4:14CV01635 AGF, 2014 WL 5783013 (E.D. Mo. Nov. 5, 2014), *pet. for permission to appeal pending*.**

Judges Carol E. Jackson and Audrey G. Fleissig of the U.S. District Court for the Eastern District of Missouri granted the plaintiffs' motions to remand for reasons similar to those set forth in Judge E. Richard Webber's decision in *Anders v. Medtronic, Inc.*, No. 4:14CV01637 ERW, 2014 WL 5320391 (E.D. Mo. Oct. 17, 2014). (The *Anders* opinion is discussed on Page 20 of this issue.) As in *Anders*, the courts in *Smith* and *Hendrich* found that the parties in the three cases against Medtronic had not implicitly or explicitly proposed a joint trial, and therefore

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could not assert jurisdiction under CAFA's "mass action" provision. In *Smith*, Judge Jackson further concluded that the defendants' notice of removal was untimely. Unlike the court in *Anders*, the *Smith* court found that because the plaintiffs' statements in opposition to the defendants' pending motion to dismiss did not constitute a proposal for a joint trial, and thus provided no basis for CAFA removal in the first place, the defendants could not use those statements as a trigger to start the clock for filing their notice of removal. Because the defendants had not filed their notice of removal within 30 days of the filing of the complaint, the *Smith* court found their attempt at removal untimely under CAFA. In *Hendrich*, on the other hand, Judge Fleissig declined to address the timeliness issue altogether in light of her conclusion that CAFA did not, in any event, provide a basis for the defendants' removal.

Sabina v. J.P. Morgan Chase Bank NA, Nos. 2:14-cv-160-JDL, 2:14-cv-177-JDL, 2:14-cv-189-JDL, 2:14-cv-227-JDL, 2014 WL 5489447 (D. Me. Oct. 29, 2014).

Judge Jon D. Levy of the U.S. District Court for the District of Maine remanded four putative class actions to state court. The cases alleged that the defendant banks had not complied with a state consumer protection law requiring that mortgage lenders notify borrowers within 30 days of a mortgage release's recording. Under that law, damages were limited to $500 plus attorneys' fees and costs. Although the plaintiffs alleged only that the size of the class was in the hundreds, one bank argued the potential class size was the total number of mortgages released by the banks since the law's 2011 enactment, and that number, when multiplied by $500, would exceed CAFA's $5 million matter-in-controversy threshold even without accounting for attorneys' fees. The court found that the defendant banks had not satisfied their burden of proof to a reasonable probability, explaining that the banks did not provide data or a methodology to determine what percentage of their borrowers were not properly notified.

Palkovic v. Countrywide Home Loans, Inc., No. 5:14-CV-102, 2014 WL 5449687 (N.D. W. Va. Oct. 24, 2014).

Chief Judge John Preston Bailey of the U.S. District Court for the Northern District of West Virginia granted the plaintiffs' motion to remand a putative class action asserting violations of West Virginia law. The plaintiffs brought suit on behalf of individuals who obtained mortgage loans that were closed by persons not admitted to the practice of law in West Virginia or by persons not under the direct supervision of a lawyer admitted to the practice of law in West Virginia. The defendants removed the class action under CAFA, but the plaintiffs moved to remand, arguing that neither CAFA's numerosity threshold (requiring a proposed class of at least 100) nor its $5 million jurisdictional threshold had been met. The court rejected the defendants' contention that the language in the plaintiffs' complaint had necessarily implicated all 4,264 loans originated by the defendants during the specified time period for properties in West Virginia. Instead, the court found that the plaintiffs' class action was limited to those loans closed by persons not authorized to practice law in West Virginia. Apart from the three named plaintiffs, the court lacked sufficient evidence to estimate the number of loans at issue. Since the court could not speculate as to size of the class sought to be represented by the plaintiffs — and a defendant seeking removal bears the burden of demonstrating that jurisdiction would be proper — the court held that the defendants had failed to establish that CAFA's numerosity and amount-in-controversy requirements had been met.

Anders v. Medtronic, Inc., No. 4:14CV01637 ERW, 2014 WL 5320391 (E.D. Mo. Oct. 17, 2014), _pet. for leave to appeal denied_.

Judge E. Richard Webber of the U.S. District Court for the Eastern District of Missouri granted the plaintiffs' motion to remand, holding that the defendants could not remove the action under CAFA's "mass action" provision. The plaintiffs originally filed their complaint in Missouri state court alleging injuries that resulted from defects in a medical device designed and manufactured by the defendants. Approximately two months later, the defendants removed the case to federal court based on their contention that the plaintiffs implicitly indicated their desire to have their case tried together with two other similar cases, thereby permitting removal under CAFA's "mass action" provision. The *Anders* plaintiffs sought remand, claiming that they had never requested a joint trial and that the defendants' removal was untimely. The court found in favor of the defendants on the timeliness issue but concluded that there was no basis to conclude that the *Anders* plaintiffs had requested a joint trial, precluding removal.

Hoffman v. Barlean's Organic Oils, LLC, No. 14-3770 (CCC), 2014 WL 4979583 (D.N.J. Oct. 6, 2014).

Judge Claire C. Cecchi of the U.S. District Court for the District of New Jersey granted the plaintiff's motion to remand a putative class action brought under the New Jersey Consumer Fraud Act (NJCFA). The gravamen of the plaintiff's suit was that the defendant engaged in deceptive marketing with respect to its "omega fatty acid dietary supplement." While the plaintiff contended that the amount in controversy was less than the $5 million threshold amount under CAFA, the defendant contended that the company was subject to civil penalties of over $17 million under the NJCFA. The court sided with the plaintiff,

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relying on New Jersey precedent holding that civil penalties under the NJCFA are only available to the attorney general — not private claimants. As a result, the defendant failed to establish to a legal certainty that CAFA's jurisdictional threshold was satisfied, warranting remand of the action to state court.

Time Insurance Co. v. AstraZeneca AB, No. 14-4149, 2014 WL 4933025 (E.D. Pa. Oct. 1, 2014).

Judge Gerald A. McHugh of the U.S. District Court for the Eastern District of Pennsylvania remanded an antitrust action, finding that it did not satisfy the requirements for a "mass action" under CAFA. The plaintiff health insurance companies initiated the lawsuit against AstraZeneca and several generic brand manufacturers of the drug Nexium. The state law antitrust claims arose from alleged "reverse payment settlement agreements" entered into between AstraZeneca and the three generic manufacturers under which AstraZeneca provided compensation in exchange for stipulations that the Nexium patents it held were valid and that the generic manufacturers would not enter into the market until the patents had expired. The defendants argued that the present action, which contained 90 plaintiffs, qualified as a "mass action" when combined with a nearly identical lawsuit also filed in Pennsylvania state court and removed to federal court. The court rejected this theory of CAFA jurisdiction because the plaintiffs had not filed a motion to consolidate the two lawsuits and "in no way proposed that their case should be tried jointly with" the other action.

Whaley v. Bay View Law Group, PC, No. CV 114-050, 2014 WL 4926458 (S.D. Ga. Sept. 30, 2014).

Judge J. Randal Hall of the U.S. District Court for the Southern District of Georgia remanded a putative class action arising out of the defendants' allegedly unlawful debt collection practices. The court ruled that the defendants did not prove by a preponderance of the evidence that the amount in controversy was greater than $5 million. According to the defendants, the amount in controversy should not be limited to the fees charged to the 384 class members — a number set forth in the plaintiff's complaint — but should also include fees charged to 190 other consumers. However, as the court explained, the defendants admitted that their 190 figure was merely an estimate; they did "not have access to the information necessary to provide the Court with a more accurate global estimate of putative class members." Without more specific evidence from the defendants, the court limited its calculations to the 384 class members identified by the plaintiff. The court also declined to include attorneys' fees in calculating the amount in controversy, finding that the plaintiff had not pursued claims under a statutory cause of action that provided for the recovery of attorneys' fees, a prerequisite for having fees considered as part of the amount in controversy for purposes of CAFA.

Halperin v. International Web Services, LLC, No. 13 C 8573, 2014 WL 4913528 (N.D. Ill. Sept. 30, 2014).

Judge Gary Feinerman of the U.S. District Court for the Northern District of Illinois refused to exercise CAFA jurisdiction over supplemental state law claims where the complaint failed to properly allege the citizenship of either defendant. The plaintiff originally filed a putative class action in federal court alleging violations of the Computer Fraud and Abuse Act, the Electronic Communications Privacy Act, the Illinois Consumer Fraud and Deceptive Business Practices Act, and the Illinois Computer Tampering Act. The court dismissed the plaintiff's federal claims for failure to state a claim upon which relief could be granted. The plaintiff subsequently argued that the court should retain jurisdiction over the state law claims pursuant to CAFA. Rejecting that argument, the court found that the plaintiff had not met its burden to prove that CAFA applied because it had not properly pled the citizenship of the two defendants, both of which were limited liability companies. Although the plaintiff's complaint indicated the state laws under which the defendants were organized as well as their principal places of business, the court noted that according to well-settled precedent, an LLC's citizenship is not determined by principal place of business or state of incorporation, but by the citizenship of each of its individual members. Because the plaintiff failed to allege the identity and citizenship of the defendants' members, it did not adequately plead jurisdiction under CAFA.

Simmons v. Ambit Energy Holdings, LLC, No. 13-CV-6240 (JMF), 2014 WL 5026252 (S.D.N.Y. Sept. 30, 2014).

In this putative class action, Judge Jesse M. Furman of the U.S. District Court for the Southern District of New York granted the defendants' motion to dismiss for lack of subject matter jurisdiction on the ground that the "local controversy exception" to CAFA mandated dismissal. The plaintiffs, citizens and residents of New York, alleged that the defendants, an electric and natural gas supplier, overstated the amount that the plaintiffs' incumbent providers would have charged them during that year. The defendants had allegedly promised the plaintiffs that their 12-month energy costs would be at least 1 percent less than what the plaintiffs' existing utility provider would have charged. Although the plaintiffs invoked the court's jurisdiction pursuant to CAFA, the defendants argued that a statutory exception to CAFA jurisdiction applied because the case consisted of primarily local, intrastate matters. The court agreed, holding that the four requirements

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enumerated in 28 U.S.C. § 1332(d)(4)(A) for the "local controversy exception" applied.

***Eminence Investors, LLLP v. Bank of New York Mellon*, No. 1:13-cv-02025-AWI-MJS (PC), 2014 WL 2567172 (E.D. Cal. Sept. 26, 2014), *pet. for permission to appeal pending*.**

Judge Anthony W. Ishii of the U.S. District Court for the Eastern District of California granted the plaintiffs' motion to remand their class action, finding that the defendant's removal was untimely. The plaintiffs had initiated the lawsuit against the defendant and two California residents. After dismissal of the two California defendants, complete diversity existed, but the defendant did not remove the case. The plaintiffs then filed an amended complaint, adding class allegations on behalf of more than 100 individuals holding bonds of a certain face value, and the defendant removed the action pursuant to CAFA within 30 days of the filing of the amended complaint. The defendant argued that the general rule that the removal period runs "once the defendant receives enough facts to remove on any basis" did not apply since CAFA is a "special removal statute that restarts the thirty-day clock" for removal. The court found that "the Ninth Circuit has declined to broaden CAFA jurisdiction beyond the plain language of the statute," and because "CAFA cannot be read to provide a renewed thirty-day removal window following an amendment that alleges a class action," the removal was untimely.

***Jovic v. L-3 Services, Inc.*, No. 10 C 5197, 2014 WL 4748614 (N.D. Ill. Sept. 24, 2014).**

Judge John Z. Lee of the U.S. District Court for the Northern District of Illinois granted in part and denied in part the defendants' motion to dismiss for lack of subject matter jurisdiction in a case involving various international and state law claims. The plaintiffs filed a putative class action complaint in Illinois federal court asserting a total of 10 claims against the defendants. The first eight counts alleged that the defendants violated the Geneva Convention and other sources of international law, including customary international law. The remaining two counts alleged violations of Illinois and Virginia law and federal common law. The defendants moved to dismiss the action for lack of subject matter jurisdiction. In response, the plaintiffs argued that the court had jurisdiction under both CAFA and the Alien Tort Statute (ATS). The court first concluded that the ATS did not provide a basis for jurisdiction over the international law claims because the plaintiffs had not pled sufficient facts to overcome the presumption against the statute's extraterritorial application. The court then went on to find that CAFA did not independently confer jurisdiction over the international law claims, stating that the presumption against extraterritoriality applied with equal force to every statute Congress enacts, including CAFA. Accordingly, the court dismissed the claims arising under international law for want of subject matter jurisdiction. The court maintained jurisdiction over the plaintiffs' state law claims, however, since those claims satisfied each of CAFA's jurisdictional requirements.

***Caldwell v. Abbott Laboratories*, No. 3:13-cv-00561-BAJ-SCR, 2014 WL 4726271 (M.D. La. Sept. 23, 2014).**

Chief Judge Brian A. Jackson of the U.S. District Court for the Middle District of Louisiana remanded this case, involving claims by the State of Louisiana that a pharmaceutical manufacturer improperly promoted medications. The defendant sought removal on CAFA "mass action" grounds, as well as diversity and federal question grounds. As to the CAFA argument, the court concluded that "[t]he only named plaintiff in this removed action is the State of Louisiana. Therefore, defendant has not established subject matter jurisdiction based on a mass action theory under CAFA." The order also rejected the defendant's argument that diversity jurisdiction was proper under 28 U.S.C. § 1332(a) because the people of Louisiana were the real party in interest. The court explained that "[d]iversity does not exist here because the only named plaintiff, the State, is not a citizen under the diversity statute."

***Eagles Nest, LLC v. Moy Toy, LLC*, No. 2:14-00010, 2014 WL 4655277 (M.D. Tenn. Sept. 16, 2014).**

Judge Kevin H. Sharp of the U.S. District Court for the Middle District of Tennessee remanded a putative class action seeking a declaratory judgment against a resort developer on behalf of all property owners in a resort community. The court determined that it could apply CAFA's discretionary exception to federal-court jurisdiction, which is available when between one-third and two-thirds of the proposed class members and the primary defendants are citizens of the state in which the class action was filed. As to the plaintiff class, the plaintiffs showed that approximately half of the class listed a Tennessee residence as their address of record on both the county tax assessor's and home owners' association rolls. In addition, the primary defendants — Tennessee limited liability companies with Florida members — were Tennessee citizens for CAFA jurisdiction purposes, which treats unincorporated associations as citizens of the state of organization and the state of the principal place of business. The court found that the totality of the circumstances supported declining jurisdiction and remanding the case to state court, reasoning that the claims depended on the interpretation of restrictions relating to property in a single state, there was no indication that the complaint was pled to avoid federal jurisdiction, and the case had been filed in the state court of the county where the property was located.

Holstein v. Sears Holdings Corp., No. 2:14-21166, 2014 WL 4467696 (S.D. W. Va. Sept. 9, 2014).

Judge John T. Copenhaver, Jr. of the U.S. District Court for the Southern District of West Virginia granted the plaintiff's uncontested motion to remand a putative class action alleging that the defendants violated the West Virginia Wage Payment and Collection Act (WPCA). In support of remand, the plaintiff argued that the amount in controversy element had not been satisfied because he had only intended the class to include employees who had been *involuntarily* terminated by the defendants during the applicable class period rather than *all* of the employees that had been terminated during that period. The defendants accepted the plaintiff's representation by stipulation. Multiplying the maximum number of involuntarily terminated employees by the average gross paycheck of $360 and then tripling the damages — as provided for in the WPCA — yielded $3,348,000, which fell below the $5 million amount-in-controversy threshold, even if attorneys' fees were added.

Jordan v. Nationstar Mortgage, LLC, No. 2:14-CV-0175-TOR, 2014 WL 4443284 (E.D. Wash. Sept. 9, 2014).

Judge Thomas O. Rice of the U.S. District Court for the Eastern District of Washington granted remand of a class action seeking relief under state law and the federal Fair Debt Collection Practices Act (FDCPA). Although the plaintiff had always included an FDCPA claim, she did not assert claims on behalf of a class until her second amended complaint, after which the defendant sought to remove under CAFA. The court found that the removal was untimely because the defendant could have removed, but did not, when the complaint was first filed because the FDCPA claim created federal question jurisdiction. The court rejected the defendant's contention that the later assertion of class claims provided a "second opportunity" to remove on CAFA grounds, effectively restarting the removal time clock. The court also awarded attorneys' fees and costs to the plaintiff.

Simon v. Blue Cross, Blue Shield of Kansas City, No. 14-0587-CV-W-ODS, 2014 WL 4425734 (W.D. Mo. Sept. 9, 2014).

Judge Ortrie D. Smith of the U.S. District Court for the Western District of Missouri exercised his discretion to decline jurisdiction pursuant to CAFA's discretionary exception in an action involving alleged violations of the Missouri Merchandising Practices Act. Although the court determined that the defendant had satisfied CAFA's basic requirements, it found that the action nonetheless should not proceed in federal court. Applying the factors enumerated in the discretionary exception (which applies where the significant defendants and between one-third and two-thirds of the class are citizens of the forum state), the court first reasoned that the class action did not implicate any real interstate issues, as the suit involved alleged violations of Missouri law by a single Missouri defendant. The insurance programs at issue were only offered to citizens of five counties and were therefore not the product of a "nationwide" marketing campaign. The court next concluded that Missouri law would govern the claims of the vast majority of class members, which also weighed in favor of remand. The court also recognized that, with over 60 percent of the class from Missouri and the defendant's Missouri headquarters, there was a strong nexus between Missouri and the class members, the harm and the defendant. As part of its analysis, the court also compared the number of class members from Missouri with the number of class members from Kansas (the other state at issue) and concluded that "the number of Missouri class members is substantially greater than the number of Kansas class members, and a significant number of class members are concentrated in Missouri." Taking all of these factors together, the court determined that the suit should be remanded to state court.

Holt v. Ford Motor Co., No. 4:14-cv-4030, 2014 WL 4199783 (W.D. Ark. Aug. 22, 2014), _pet. for permission to appeal denied_.

Judge Susan O. Hickey of the U.S. District Court for the Western District of Arkansas granted the plaintiff's motion to remand, holding that the defendant's removal under CAFA was untimely. On April 24, 2012, the plaintiff filed a class action complaint in Arkansas state court alleging that Ford Motor Company had "distributed, sold, leased, serviced, and/or warranted to or for citizens of Arkansas hundreds, if not thousands, of … Ford Focus vehicles" with suspension defects that caused "uneven and/or premature tire wear and handling concerns." The proposed class consisted of "any owner or lessee of a model year 2005 to 2011 Ford Focus model vehicle registered in Arkansas, who is a citizen of Arkansas." In the complaint, the plaintiff stipulated that the class would not seek damages in excess of $5 million. At the time the complaint was filed, Eighth Circuit authority held that damages stipulations of this type effectively precluded removal under CAFA. Accordingly, Ford did not remove the case at that time. Several months later, in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), the U.S. Supreme Court held that a plaintiff's stipulation limiting damages to less than $5 million does not prevent removal under CAFA. Ford soon thereafter deposed the plaintiff and learned that he had paid $360 for replacement tires, which, if extrapolated to all putative class members, placed the potential class recovery above CAFA's $5 million threshold. Ford then filed a notice of removal asserting that the federal court had jurisdiction pur-

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suant to CAFA. The court granted the motion to remand, holding that Ford's notice of removal was untimely because it could have removed when the complaint was originally filed. According to the court, at the time the complaint was originally filed, Eighth Circuit law did not bar removal in cases involving damages stipulations and, thus, Ford could have removed at that time.

Other CAFA Decisions

Redman v. RadioShack Corp., 768 F.3d 622 (7th Cir. 2014).

Writing for a unanimous three-judge panel (Wood, C.J., Posner and Hamilton, JJ.), Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit reversed the district court's approval of a class settlement in a class action alleging that the defendant RadioShack violated the Fair and Accurate Credit Transactions Act by printing receipts that showed the expiration dates of customers' credit and debit cards. Pursuant to the settlement agreement, RadioShack arranged to pay class counsel approximately $1 million in attorneys' fees along with administrative costs of approximately $2.28 million, and provided class members with approximately $830,000 worth of vouchers that they could use to purchase goods from RadioShack. The district court approved this settlement without engaging in a specific analysis as to whether the fee award was proportional to the "value to class members of the coupons that are redeemed," as is required under CAFA's coupon settlement provision. The Seventh Circuit explained that CAFA does not necessarily impose a rigid requirement that the fee award be postponed until the coupons' redemption period expires. Nonetheless, if the parties seek approval of a class coupon settlement prior to the coupons' expiration date, lower courts may not simply speculate as to the coupons' ultimate value, but rather must obtain an estimate from a qualified expert. The Seventh Circuit thus remanded the case to the district court with instructions to reassess "the division of the spoils between class counsel and class members" in light of CAFA's coupon provisions.

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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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