Skadden

The Class Action Chronicle

This edition focuses on rulings issued between February 15, 2015, and May 15, 2015, and begins with excerpts from John Beisner's April 29, 2015, testimony before the U.S. House of Representatives Judiciary Committee regarding the Fairness in Class Action Litigation Act of 2015, which aims to address the problem of "no injury" class actions in federal courts.

The Fairness in Class Action Litigation Act of 2015

To: U.S. House of Representatives Committee on the Judiciary, Subcommittee on the Constitution and Civil Justice

By: John H. Beisner, Skadden, Arps, Slate, Meagher & Flom LLP

Date: April 29, 2015

Good afternoon Chairman Franks, Ranking Member Cohen and Members of the Subcommittee. Thank you for the opportunity to testify on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform (ILR). ILR is an affiliate of the U.S. Chamber of Commerce. The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting and defending America's free enterprise system. ILR is an affiliate of the Chamber dedicated to making our nation's overall civil legal system simpler, fairer, and faster for all participants.

My testimony[1] today focuses on the Fairness in Class Action Litigation Act of 2015 (FICALA or the Act), which was introduced in the House earlier this month. This legislation would put an end to "overbroad" or "no-injury" class actions, which have become increasingly prevalent in our federal courts. Generally speaking, an overbroad, no-injury class action is a lawsuit brought by a named plaintiff who allegedly experienced a problem with a product or service and then seeks to represent every other individual who purchased the product or paid for the service, *regardless of whether they experienced any problems with it*. At least in some courts, the law has developed to

[1] Click here to read the full testimony.

the point where one disgruntled customer – or, more likely, one enterprising plaintiff's lawyer – can distort the value of an idiosyncratic product defect by a multiple of many thousands, even though few others have had the same problem with that product.

Overbroad, no-injury class actions raise a number of serious concerns. For starters, many of these cases are based on the mistaken premise that under Rule 23(c)(4) – which governs issues classes – the court can get around the fact that many class members are not injured by certifying the question of liability as long as common questions predominate as to that issue alone, and leaving damages questions for another day. That was the case in *Butler v. Sears*, *Roebuck & Co.* and *Glazer v. Whirlpool Corp.* . . . . However, issues classes are inherently unfair to defendants because it is much easier for plaintiffs to secure a classwide verdict when the jury does not hear the actual facts of any individual plaintiff's claims – for example, in the washing-machine cases, one significant defense is that consumer misuse can cause the odor problems that form the core of the plaintiffs' complaints.[2] This approach also contravenes the Seventh Amendment, which bars a second jury from considering issues already decided by a prior jury in the same case. If the issues of injury and damages are left for later determination in individual proceedings, there has to be some way to instruct the juries in those subsequent proceedings not to redecide any issue decided by the first "liability" jury – a difficult task given the overlapping nature of the questions whether a product is defective and whether it injured the class member. To use the washing machine cases again as an example, even if there were a plaintiff verdict in the liability phase, a second jury might well question whether the mere propensity to develop odor is really a "defect" when the class member before it has never had a problem with his machine. In short, as one court explained, "the risk that a second jury would have to reconsider the liability issues decided by the first jury is too substantial to certify [an] issues class."[3]

Another problem with the issues-class approach embraced by the Sixth and Seventh Circuits is that it sanctions the use of a dubious procedure that no one actually wants to litigate. For plaintiffs, the promise of the class action device is significantly compromised because victory in the common phase does not generate any cash for their pockets; damages, if any, would only be awarded in follow-on proceedings, which would potentially have to be litigated on an individual basis, and often for small sums of money that would never cover the costs of trying the case. Defendants likewise will often prefer to settle such matters because doing so is substantially more cost effective than litigating a common phase and countless follow-on trials. These problems are magnified in cases, like the washing machine cases, in which the claimed defect has manifested for only a small number of class members because few putative class members would have claims that could actually qualify for compensation. Only a few recent decisions have recognized these problems. As one court put it, "allowing myriad individual damages claims to go forward [after a class trial on liability] hardly seems like a reasonable or efficient alternative, particularly in a case" with a low ceiling on each class member's potential damages.[4] Most courts, however, have not even attempted to address this concern.

A surprising development in the area of issues classes was Whirlpool's decision to eschew settlement and go to trial in the *Glazer* case, which resulted in a rare defense verdict. While some may argue that Whirlpool's victory vindicates the view that defendants can win issues trials, Whirlpool should not have had to take a litigation risk that many companies cannot afford simply because class certification was improvidently granted. It remains to be seen whether Whirlpool's victory will curb plaintiffs' counsel's interest in issues classes.

Beyond these problems, overbroad class actions also undermine the proper administration of justice and put a strain on our economy. Unlike Whirlpool, most defendants opt for settlement following class certification, regardless of the merits of the underlying claims. Indeed, it is well known that "[f]ollowing certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ."[5] As the Supreme Court has recognized, "even a small chance of a devastating loss" inherent in most decisions to certify a class produces an "in terrorem" effect that often forces settlement independent of the merits of a case.[6] In addition to existing pressures to settle substantively meritless claims, defendants are

[2] *See, e.g.*, *In re Paxil Litig.*, 212 F.R.D. 539, 547 (C.D. Cal. 2003) (refusing to certify class to resolve the purportedly "common" issue of general causation because such a trial would unfairly rob the defendant of the ability to present individualized "evidence rebutting the existence or cause of" the plaintiffs' alleged illnesses); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) (rejecting issues class that "would have allowed generic causation to be determined without regard to those characteristics and the individual's exposure" as unfair and inefficient).

[3] *In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 698-99 (N.D. Ga. 2008).

[4] *Rahman v. Mott's LLP*, No. 13-cv-03482-SI, 2014 WL 6815779, at *9 (N.D. Cal. Dec. 3, 2014).

[5] Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition).

[6] *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.") (citation omitted).

increasingly facing settlement pressures from wildly overbroad cases – in which only a fraction of class members are even conceivably affected by the alleged misconduct giving rise to the litigation. Classwide settlements in such cases indisputably result in overcompensation by sending free money to class members who would never be able to recover (or even think to bring suit) individually against the defendant.[7] In essence, overbroad class actions are nothing more than a mechanism for obtaining a windfall for uninjured class members and, more often, the attorneys who claim to represent their interests.

In reality, however, overcompensation is as much a problem for consumers as it is for business. As Judge Minor Wisdom once explained, damages paid in litigation to those consumers who are actually injured "are presumably incorporated into the price of the product and spread among" all purchasers.[8] But when compensation is potentially available to all consumers – injured and uninjured alike – manufacturers will act to include those costs in the price as well.[9] The result is that, "instead of spreading a concentrated loss over a large group, each [consumer] would cover his own [potential recovery] (plus the costs of litigation) by paying a higher price . . . in the first instance."[10] Echoing this same logic, Judge Easterbrook explained in a footnote in the Seventh Circuit's decision in *Bridgestone/Firestone* that allowing even modest compensation for uninjured class members could easily double a defendant's total liability for a product that rarely malfunctions and injures anyone, a result that "overcompensates buyers and leads to excess precautions" by manufacturers.[11] It is precisely this sort of economic distortion – which Judge Wisdom saw "little reason to adopt" – that the courts described above have encouraged by endorsing overbroad class actions.

The growing embrace of no-injury consumer class actions among certain federal courts raises serious legal and public-policy concerns. To reverse this trend, Congress should enact the Fairness in Class Action Litigation Act of 2015. Under that legislation, "[n]o Federal court shall certify any proposed class unless the party seeking to maintain a class action affirmatively demonstrates through admissible evidentiary proof that each proposed class member suffered an injury of the same type and extent as the injury of the named class representative or representatives."[12]

The legislation imposes a simple requirement: class actions are only allowed to proceed in federal court if all of the class members claim to have suffered the same type of injury as the named plaintiff. Thus, for example, if the named plaintiff brings a lawsuit claiming that his vehicle malfunctioned in a certain way, he or she cannot represent a class that includes everyone who purchased the same model vehicle regardless of whether or not it malfunctioned. The legislation also requires the named plaintiff to come forward with "admissible evidentiary proof" to satisfy this requirement – *i.e.*, expert and fact evidence. To obtain this evidence, plaintiffs would have at their disposal all of the usual discovery tools that the Federal Rules already provide. For example, to ascertain the extent of the alleged problem (if any), the plaintiff could propound discovery on the defendant seeking information regarding incidence of failure in testing or the number of complaints received regarding the claimed defect at issue in the litigation. The plaintiff could then rely on that information in demonstrating that he or she suffered the same type of injury as others in the proposed class.[13] Expert testimony would then be required to show that there is a uniform defect common across the class. Similarly, in a case involving allegedly deceptive labeling, the plaintiff would have to establish that all class members were exposed to the alleged misrepresentations and could do so by showing that all of the products in question contained the same supposed misstatement on the label – also a fact that could be gleaned during discovery. In any case, the plaintiff would remain free to revise the proposed class definition to attempt to conform it to whatever is learned during discovery, narrowing it as needed to ensure that any class is limited to individuals who sustained the same type and extent of injury as the plaintiff.

Adoption of the proposed legislation would not mark a radical change in federal class action law. After all, as already explained, federal and state courts had widely rejected these types of cases until recent years. In effect, FICALA would do no more than enforce the existing Rule 23 requirement of typicality – *i.e.*, that

[7] *See Supreme Laundry List*, Wall St. J., Oct. 9, 2012 ("Without the governor of common injury required by Wal-Mart, product liability suits and consumer class actions become the tool of plaintiffs['] lawyers who gin up massive claims in the hope that companies will settle.").

[8] *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1100 n.20 (5th Cir. 1991).

[9] *See id.*

[10] *Id.*; *see also, e.g.*, Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap. L. Rev. 201, 202 (2004) ("Class actions have had an economic impact as well. . . . Businesses spend millions of dollars each year to defend against the filing and even the threat of frivolous class action lawsuits. Those costs, which could otherwise be used to expand business, create jobs, and develop new products, instead are being passed on to consumers in the form of higher prices.") (internal quotation marks and citation omitted).

[11] *In re Bridgestone/Firestone, Inc.*, Tires Prods. Liab. Litig., 288 F.3d 1012, 1017 n.1 (7th Cir. 2002).

[12] Fairness in Class Action Litigation Act of 2015, H.R. 1927, 114th Cong. § 2 (2015).

[13] *Cf. In re Canon Cameras Litig.*, 237 F.R.D. 357, 359 (S.D.N.Y. 2006) (denying motion for class certification because plaintiffs "have not shown that more than a tiny fraction of the cameras in issue malfunctioned *for any reason*. Specifically, in response to defendants' showing that fewer than two-tenths of one percent of the cameras here in issue have been reported as having even arguably malfunctioned, plaintiffs have been unable to adduce any evidence to the contrary[.]").

the claims of the named class representative be representative of the claims of the absent class members. As previously explained, several federal courts have already interpreted Federal Rule of Civil Procedure 23's typicality requirement as precluding overbroad class actions; FICALA would ensure that the same rule would be applied consistently by all federal courts.

FICALA is also consistent with the Supreme Court's seminal commonality ruling in *Wal-Mart Stores, Inc. v. Dukes*.[14] There, the Supreme Court added heft to the long-glossed-over requirement of commonality under Rule 23(a) by holding that the key inquiry is not whether a question is "common" to the class, but rather whether the classwide proceeding will "'generate common *answers* apt to drive the resolution of the litigation.'"[15] While *Dukes* was primarily a decision about commonality, it noted that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."[16] The proposed legislation would merely effectuate what the Supreme Court implicitly recognized in *Dukes*. After all, the claims of a named plaintiff whose product actually malfunctioned as a result of the defendant's alleged conduct can hardly be "so interrelated [with those of the absent class members whose products performed satisfactorily] that the interests of the class members will be fairly and adequately protected in their absence."[17]

Because FICALA merely clarifies what the Supreme Court and certain other federal courts have already explicitly and implicitly recognized, the legislation would not signal a sea change in federal class action law. Rather, it would simply codify the requirement of typicality, forcing all federal courts to take this Rule 23 prerequisite seriously and delivering important benefits to the judicial system, our economy and American consumers.

I appreciate the Subcommittee allowing me to testify today, and I look forward to answering any questions that the Members of the Subcommittee may have.

Class Certification Decisions

In this issue of the *Chronicle*, we cover eight decisions granting motions to strike/dismiss class claims, four decisions denying such motions, 22 decisions denying class certification or reversing grants of class certification, 20 decisions granting or upholding class certification, 12 decisions denying motions to remand or reversing remand orders pursuant to the Class Action Fairness Act (CAFA), and five decisions granting motions to remand or finding no jurisdiction under CAFA.

Decisions Granting Motions to Strike/Dismiss Class Claims

***Boyer v. Diversified Consultants, Inc.*, No. 14-cv-12339, 2015 WL 1941335 (E.D. Mich. Apr. 20, 2015).** Judge Judith E. Levy of the U.S. District Court for the Eastern District of Michigan granted a motion to strike class allegations in a lawsuit alleging Telephone Consumer Protection Act (TCPA) violations but gave the plaintiffs leave to amend their complaint to revise the proposed class definitions. The complaint proposed two classes of people who had not provided their telephone number to the defendants as an authorized contact number and nonetheless had been contacted in some way (auto-dialed or received a prerecorded voice call). Given that the TCPA prohibits that very thing, the plaintiffs were in effect defining the class to include only individuals who had been subjected to a violation of the TCPA. The court held that this definition created an impermissible "fail safe" class. The court was unmoved by the plaintiffs' argument that the proposed classes were determined by objective criteria. However, the court gave the plaintiffs leave to amend the complaint and revise the class definition.

***Wright v. State Farm Fire & Casualty Co.*, No. 09-15055, 2015 WL 1737386 (E.D. Mich. Apr. 16, 2015).** Senior Judge Arthur J. Tarnow of the U.S. District Court for the Eastern District of Michigan granted the defendant insurance company's motion to strike class allegations in a lawsuit alleging that the defendant violated state law by failing to pay interest on claims to which it had not timely responded. The complaint proposed two classes: (1) policyholders denied interest to which they were allegedly entitled, and (2) all policyholders in the state (who would be seeking an injunction to ensure proper payment in the future). The court held that the plaintiffs had not identified any common questions to justify class certification for either proposed class. The court reasoned that many of the plaintiffs' purported common questions — such as whether the defendant had established companywide procedures to ensure that interest would be paid — were not elements of the plaintiffs' causes of action. Moreover, the plaintiffs' purported common "question" central to the class members' claim was "merely a statement (albeit an incomplete statement) of the duty imposed on [the d]efendant by" the law at issue, but the court explained that this did not sufficiently identify a common contention that would resolve an issue central to the validity of the claims.

[14] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

[15] *Id.* at 2551 (citation omitted).

[16] *Id.* at 2550-51 & n.5 (internal quotation marks and citation omitted).

[17] *Id.* (internal quotation marks and citation omitted).

***DuRocher v. National Collegiate Athletic Association*, No. 1:13-cv-01570-SEB-DML, 2015 WL 1505675 (S.D. Ind. Mar. 31, 2015).** Judge Sarah Evans Barker of the U.S. District Court for the Southern District of Indiana granted the defendants' motion to strike the class allegations in a complaint relating to alleged manufacturing and design defects in the Riddell football helmets issued by the National Collegiate Athletic Association. The plaintiffs sought to certify a class consisting of "[a]ll present or former members of a college football team in the United States, who, while wearing a helmet manufactured by [Riddell], participated in a college football game or practice from November 15, 2000 through the present and, while playing in such a game or practice, experienced a head impact." The plaintiffs alleged that the proposed class would "include hundreds if not thousands of persons who have developed or will develop mental or physical problems as a result of sustaining traumatic brain injuries, concussions or concussion-like symptoms while playing in a college football game or practice." Before discovery began, the defendants moved to strike the class allegations, arguing that: (1) personal injury product liability claims are inherently individual and state-law specific, thus precluding class certification, and (2) the proposed class members could only be ascertained through individual inquiry based on subjective criteria. For example, with respect to the plaintiffs' claims regarding the defendants' alleged failure to warn of the risks of head trauma, the court would have to consider what time period was being evaluated; what Riddell warnings each player received; what information the player already had from public knowledge, prior playing experience, team physicians and trainers, treating physicians, and his university or team members. In addition, with respect to the manufacturing and design defect claims, the court would have to consider individualized inquiries such as the condition, care, misuse and alteration of each player's helmet. The court would also review proximate cause related to each individual's concussion or head injury, which requires consideration of the specifics of the impact — magnitude, direction, duration, circumstances, etc. According to the defendants, the magnitude of these individual inquiries would destroy commonality, predominance and ascertainability, all of which the plaintiffs would be required to show in order to maintain their class allegations. The plaintiffs did not dispute these contentions but rather merely argued that they should be given an opportunity to conduct discovery and possibly to amend their class definition at a later date. The court, however, found the plaintiffs' arguments unpersuasive, as they failed to explain how discovery might enlighten the pursuit of class treatment or even what discovery they would seek. Thus, although granting a motion to strike class allegations prior to discovery is generally disfavored, the court found it appropriate in this case. Accordingly, the court granted the defendants' motion to strike the plaintiffs' class allegations.

***Kraetsch v. United Service Automobile Association*, No. 4:14-CV-264-CEJ, 2015 WL 1457015 (E.D. Mo. Mar. 30, 2015).** Judge Carol E. Jackson of the U.S. District Court for the Eastern District of Missouri granted a motion to strike the plaintiffs' allegations in a putative class action alleging that the United Service Automobile Association (USAA) breached a contract and vexatiously refused to pay an insurance claim arising from damages sustained when rainwater penetrated the defective artificial stucco that was installed on the plaintiffs' home. The plaintiffs sought to certify a class consisting of all (1) USAA policyholders (2) in Missouri (3) who installed artificial stucco on their homes, (4) whose stucco was negligently designed, installed or maintained, causing the policyholders to suffer water damage intrusion to their premises, (5) whose policies with USAA contain coverage provisions that were the same as or substantially similar to those in the plaintiffs' policy, (6) regardless of whether those policyholders ever filed claims with USAA. USAA moved to strike the class allegations, arguing that the proposed class could not be certified because it failed to satisfy the predominance requirement of Rule 23(b)(3). In response, the plaintiffs first argued that USAA should be judicially estopped from opposing class certification because it had removed the case from state to federal court under CAFA, thereby conceding that a class was ascertainable. The court rejected that argument, noting that "[i]n seeking removal, USAA merely asserted that this [c]ourt has jurisdiction under CAFA to determine *whether or not* a class exists. There is no inconsistency between that assertion and USAA's current position that the [c]ourt, in exercising its jurisdiction over the issue, should find that the putative class does not meet the requirements of Rule 23." The plaintiffs next argued that USAA was collaterally estopped from opposing class certification because several years prior, a Tennessee appellate court had affirmed a trial court's determination that, under Tennessee's law and procedures, USAA had breached its homeowners insurance policies with a class of Tennessee plaintiffs by denying coverage after defective stucco led to water damage at those plaintiffs' homes. The court rejected this second estoppel argument, as the putative class in this case was a group of Missouri insureds with policies governed by Missouri law, whereas the previous case involved a group of Tennessee insureds with claims based on Tennessee law. Thus, the issues before the court in this case were neither identical to the issues before the Tennessee court, nor actually raised, litigated and decided on the merits by the Tennessee court. The court thus turned to USAA's substantive arguments on its motion to strike. The court agreed with USAA that the class as defined did not, and could not, satisfy Rule 23's predominance requirement for at least two reasons. First, determining whether each member of the putative class had a valid claim against USAA would require individualized inquiries into, among other questions: (1) whether each class member paid his or her premiums to USAA on

time, if at all, (2) what kinds of water damage they suffered and whether that damage actually was caused by defective stucco, (3) whether the kinds of water damage caused by defective stucco are or are not excluded under the policy, which would depend on how the water damage occurred, and over what periods of time, and (4) whether USAA's denial of coverage in each instance constituted vexatious refusal to pay under Missouri law. Second, even if these questions could generate common answers, the court still would have to consider whether any other provisions of each policyholder's policy — or his or her own actions — would provide USAA sufficient reason to deny coverage for any defective-stucco-induced losses. Undertaking this individualized inquiry on a classwide basis for thousands of policyholders rendered this action "wholly unsuited for class resolution."

***Daisy, Inc. v. Pollo Operations, Inc.*, No. 2:14-cv-564-FtM-38CM, 2015 U.S. Dist. LEXIS 39265 (M.D. Fla. Mar. 27, 2015).** Judge Sheri Polster Chappell of the U.S. District Court for the Middle District of Florida granted the defendants' motion to dismiss the plaintiff's class action complaint for failure to satisfy Rule 8 of the Federal Rules of Civil Procedure. The plaintiff alleged that the company had violated the TCPA by sending it unsolicited faxes. The court first rejected the defendants' argument that the offer they had made to the plaintiff rendered the individual and class action claims moot because it would have given the plaintiff full recovery under the TCPA. The court determined that even though the offer would satisfy the plaintiff's recovery for the offending faxes specifically listed in its complaint, the offer would not provide full relief because the complaint alleged more violations than those specifically listed. The court held that without discovery into how many faxes the defendants had sent, it could not determine that the offer "completely moots the case." This turned out to be a moot point, however, because the court then determined that the plaintiff's class action claim failed on the pleadings with regard to numerosity. The court so concluded because the complaint provided no factual basis for the allegation "on information and belief" that 40 other businesses had also received faxes in violation of the TCPA. However, the court granted the plaintiff leave to amend the class complaint.

***Sebestyen v. Leikin, Ingber & Winters, P.C.*, No. 13-cv-15182, 2015 WL 1439881 (E.D. Mich. Mar. 27, 2015), appeal pending.** Judge Patrick J. Duggan of the U.S. District Court for the Eastern District of Michigan dismissed a putative Fair Debt Collection Practices Act (FDCPA) class action as moot and entered judgment for the named plaintiff in accordance with the terms of the defendants' Rule 68 offer of judgment. The named plaintiff argued that the Rule 68 offer did not provide her complete relief because it was conditioned on her granting a release of any claims against the defendants and against any current or former employee, owner or agent of the defendants. The court rejected this argument, noting that the statute of limitations on the claims had passed, which would preclude the plaintiff from filing another lawsuit based on the same facts against any parties not named in the suit, and the entry of judgment would extinguish any other claims she had against the defendants. The court further noted that under Sixth Circuit authority, uncertified class claims must be dismissed as moot if the named plaintiff's claims were mooted through a Rule 68 offer.

***Thigpen v. Florida Gas Transmission Co.*, No. 14-1415, 2015 WL 1292821 (E.D. La. Mar. 23, 2015).** Judge Carl J. Barbier of the U.S. District Court for the Eastern District of Louisiana granted an unopposed motion to strike the plaintiff's class allegations. The case arose from a ruptured pipeline that had exploded. The plaintiff filed its class action complaint on June 18, 2014, but never moved for class certification. Seven months after the filing of the initial complaint, the defendant moved to strike the class allegations on the ground that the plaintiff had not moved for class certification; the court's local rules require that a party seeking class treatment file a motion for class certification within 91 days of filing a class action complaint (or within 91 days of removal to the Eastern District). Because the deadline had lapsed by several months and because the plaintiff made no showing of good cause for the delay, Judge Barbier granted the defendant's motion and struck the class allegations.

***American Western Door & Trim v. Arch Specialty Insurance Co.*, No. CV 15-00153 BRO SPX, 2015 WL 1266787 (C.D. Cal. Mar. 18, 2015).** Judge Beverly Reid O'Connell of the U.S. District Court for the Central District of California granted, *inter alia*, a motion to strike class allegations in a case brought by a company doing business in the construction industry alleging, among other things, that the insurer did not meet its duty to defend against third-party claims because it negotiated settlements in every case rather than litigating. The court granted the defendant's motion, holding that striking class allegations prior to discovery was "appropriate … where the allegations make it obvious that classwide relief is not available," and that the plaintiff could not satisfy Rule 23(b) or show "that discovery is likely to produce substantiation of the class allegations." The court found that individualized questions would arise over which state's insurance law to apply to the nationwide class members' claims, particularly since "there are significant discrepancies in state law as to how these issues are decided." Moreover, demonstrating the pattern and practice of bad faith pleaded by the plaintiff "necessarily requires evaluating each individual insured's claim," and damages would need to be evaluated as to the amount of damage sustained individually as well. Thus, the court found the case inappropriate for class treatment under Rule 23(b)(3) and granted the motion to strike.

Decisions Denying Motions to Strike/Dismiss Class Claims

***Seidman v. Snack Factory, LLC,* No. 14-62547-CIV-COHN/SELTZER, 2015 U.S. Dist. LEXIS 38475 (S.D. Fla. Mar. 26, 2015).** Judge James I. Cohn of the U.S. District Court for the Southern District of Florida denied the defendant's motion to dismiss the plaintiffs' class action claims in a case alleging that the defendant mislabeled its pretzel crisp products as "all natural." The defendant argued that the court should reject the proposed nationwide class on the pleadings because different states' laws would apply, depending on where each class member purchased the food products. While the court found that such an argument may have merit, it concluded that it would be more appropriate to consider it at the class certification stage.

***Geary v. Green Tree Servicing, LLC,* No. 2:14-cv-00522, 2015 WL 1286347 (S.D. Ohio Mar. 20, 2015).** Judge Algenon L. Marbley of the U.S. District Court for the Southern District of Ohio denied the debt collector defendant's motion to strike class allegations in a lawsuit alleging that the defendant had violated the FDCPA. The complaint proposed a class of consumers who had received communications from the defendant that allegedly violated the FDCPA. The defendant argued that this would be an impermissible "fail safe" class because identifying who had received illegal communications was a merits determination. The court nonetheless declined to strike the class allegations, deeming it prudent to defer the class certification issue until after further discovery.

***Sayward v. Pepperidge Farm, Inc.*, No. 13-12770-GAO, 2015 WL 854761 (D. Mass. Feb. 27, 2015).** Judge George A. O'Toole, Jr. of the U.S. District Court for the District of Massachusetts denied a motion to strike class allegations in a lawsuit alleging Pepperidge Farm violated state employment laws by allegedly mischaracterizing employees as independent contractors. Pepperidge Farm argued that the plaintiffs could not satisfy Rule 23(b)'s predominance requirement because the mischaracterization claim required individualized assessment of each class member's work activities. The court concluded that because it was not completely implausible for the plaintiffs to satisfy the predominance requirement based on the facts alleged, it required a more developed factual record before deciding whether to certify the class, even though other courts had declined to certify classes for misclassification claims for this reason.

***Compressor Engineering Corp. v. Thomas,* No. 10-10059, 2015 WL 730081 (E.D. Mich. Feb. 19, 2015).** Judge Paul D. Borman of the U.S. District Court for the Eastern District of Michigan denied the defendant's motion to dismiss a putative TCPA class action, holding that the defendant's unaccepted Rule 68 offer did not provide the named plaintiff full relief because it did not include the injunctive relief requested in the operative complaint. Under Sixth Circuit authority, the court noted, a Rule 68 offer would only moot an action if it included every form of relief requested, unless the claim was so insubstantial that it failed to present a federal controversy. The court held that because the injunctive relief claim was neither wholly frivolous nor created solely to establish subject matter jurisdiction, the class action could continue.

Decisions Rejecting/Denying Class Certification

***Folks v. State Farm Mutual Automobile Insurance Co.,* No. 13-1446, 2015 WL 1903325 (10th Cir. Apr. 28, 2015).** A unanimous panel of the U.S. Court of Appeals for the Tenth Circuit (Matheson, Seymour and McHugh, JJ.) affirmed the district court's decision denying certification of a proposed class of insured pedestrians seeking classwide reformation and damages for State Farm insurance policies that did not extend enhanced personal injury protection to pedestrians. The district court had determined, *inter alia*, that final injunctive or declaratory relief was not appropriate respecting the class as a whole under Rule 23(b)(2) because determining "class-wide reformation and a date for the reformation required intensive and fact-dependent determinations for each class member." On appeal, however, the plaintiff did not challenge the denial of class certification on that basis, but instead sought a classwide declaration of the invalidity of State Farm's policy limitations and notice to class members that would "correct misleading statements by State Farm and enable [class members] to protect their rights." The panel held that the plaintiff abandoned, and thus waived, her arguments regarding reformation and damages by not challenging them on appeal, and that she forfeited her new arguments regarding corrective notice by not asserting them properly in the district court.

***Nola v. Exxon Mobil Corp.,* No. 13-439-JJB, 2015 WL 2338336 (M.D. La. May 13, 2015).** In this mass tort action, Judge James J. Brady of the U.S. District Court for the Middle District of Louisiana denied class certification in a case where the plaintiffs alleged injuries arising from roughly 145 different chemical leaks at a single refinery. The court agreed that the plaintiffs satisfied Rule 23(a)'s numerosity, commonality, typicality and adequacy requirements but held that predominance was lacking under Rule 23(b)(3). According to the court, a host of individualized inquires would be necessary to determine the defendant's liability to each proposed class member, including the amount of his or her exposure, which chemical he or she was exposed to, the extent of his or her alleged injury and other possible causes of his or her symptoms (such as a history of smoking). The court also declined to "bifurcate" the case and certify only the common questions, finding that predominance must be satisfied with respect to the case as a whole — not just specific issues.

***In re Blood Reagents Antitrust Litigation*, 783 F.3d 183 (3d Cir. 2015).** In this antitrust action, a unanimous panel of the U.S. Court of Appeals for the Third Circuit (Smith, Chagares and Scirica, JJ.) vacated and remanded the district court's certification of a class of individuals and entities who had purchased traditional blood reagents (which are used to test blood compatibility between donors and recipients) from the defendant. In support of their motion for class certification, the plaintiffs had relied in part on expert evidence for their antitrust impact analysis and damages model. The district court found that the expert evidence helped establish predominance, rejecting the defendant's objections regarding the reliability of the evidence. The district court reasoned that the expert testimony "could evolve" to become admissible evidence and therefore satisfied Rule 23. On appeal, the defendant argued that the district court had erred in accepting the expert testimony without having conducted a *Daubert* inquiry. The Third Circuit agreed, holding that "a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*." The court reached its holding based on the U.S. Supreme Court's ruling in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), determining that the district court's "could evolve" standard could not be reconciled with the Supreme Court's decision in *Comcast*. In particular, the Third Circuit emphasized the Supreme Court's command that courts conduct a "rigorous" class-certification analysis, which the Third Circuit determined required a *Daubert* inquiry of challenged expert evidence at the class-certification stage.

***Perrine v. Sega of America, Inc.*, No. 13-cv-01962-JD, 2015 WL 2227846 (N.D. Cal. May 12, 2015).** Purchasers of the video game "Aliens: Colonial Marines" sought to certify a nationwide class bringing claims for breach of warranty, fraud and violation of California consumer protection laws. The plaintiff alleged that the defendants deceived consumers by advertising the game as including superior technological features that were not actually available in the game. Judge James Donato of the U.S. District Court for the Northern District of California denied the motion because "ascertainability is a pipe dream here" and the predominance requirement of Rule 23(b)(3) could not be met. A classwide presumption of reliance did not apply because "[f]or the presumption to apply, everyone in the class must have been exposed, meaning that it is necessary for everyone in the class to have viewed the allegedly misleading advertising." The court rejected the plaintiff's suggestion of self-identifying affidavits provided by class members — stating that the consumer viewed a certain video or trailer prior to preordering the game — as "highly unreliable" and riddled with "subjective memory problem[s]." The court also noted that the defendants would have no records of who viewed what when, and that the plaintiff did not offer any document-based method of identifying this information. Thus, the court held, the class was not ascertainable, and the plaintiff also failed to satisfy any of the subsections of Rule 23(b).

***Shamblin v. Obama for America*, No. 8:13-cv-2428-T-33TBM, 2015 WL 1909765 (M.D. Fla. Apr. 27, 2015).** Judge Virginia M. Hernandez Covington of the U.S. District Court for the Middle District of Florida denied the plaintiff's motion for class certification on the ground that the plaintiff's claim under the TCPA would require individualized proof for each and every plaintiff. The plaintiff alleged that she had received two unsolicited telephone calls to her cellphone that were made with an auto-dialer and used prerecorded messages, in violation of the TCPA. She sought class certification of all persons in Florida who received similar phone calls from the defendants in September through November 2012 in support of President Barack Obama's re-election, and for whom the defendants' records did not show prior express consent for these calls. The district court found that commonality was lacking because individualized proof would be required to answer multiple significant questions, including whether the telephone number dialed was assigned to a cellphone at the time of the call and whether the subscriber had consented to be called. Similarly, the court also concluded that individual issues would predominate over common ones because "[i]ndividualized inquiries into consent (including where, how, and when)" would swamp a class proceeding. The court therefore denied class certification.

***Grodzitsky v. American Honda Motor Co.*, No. 2:12-CV-1142-SVW-PLA, 2015 WL 2208184 (C.D. Cal. Apr. 22, 2015).** Judge Stephen V. Wilson of the U.S. District Court for the Central District of California denied the plaintiffs' renewed motion for certification of a class of Honda vehicle owners asserting claims under California consumer protection laws arising from allegedly defective window regulators prone to premature and repeated failure. The court had previously denied an attempt to certify a nationwide class because the plaintiffs failed to establish whether the existence of a defect was capable of classwide resolution, given the variety of materials used in the window regulators in the numerous vehicles implicated in the class. The court also rejected the plaintiffs' attempt to apply California law to vehicle transactions occurring nationwide. In their renewed motion, the plaintiffs sought to certify owner and damages classes or subclasses of California purchasers/lessees, limited by the type of regulator and/or by vehicle platforms. The court found that the plaintiffs did not establish commonality because the common questions advanced by the plaintiffs as to Honda's duty and purported failure to disclose still "turn[ed] on proof of a common defect." After rejecting the plaintiffs' expert report purportedly establish-

ing a defect, the court found that the plaintiffs failed to show that any of the proposed class members suffered the same injury or that the question whether Honda sold class members a defective vehicle was provable on a classwide basis.

***Parker v. Bank of America, N.A.*, No. 11-CV-0520 (KBJ), 2015 WL 1737278 (D.D.C. Apr. 16, 2015), 23(f) pet. pending.** Judge Ketanji Brown Jackson of the U.S. District Court for the District of Columbia denied the plaintiff's motion for class certification for failing to satisfy the commonality requirement of Federal Rule of Civil Procedure 23(a). The plaintiff sought to certify a class of borrowers whose valid, binding mortgage modifications were not implemented by the bank in a timely fashion and who consequently experienced the acceleration of their full mortgage balance, derogatory credit reporting and/or late fees. The plaintiff asserted that the bank had a policy or practice of subjecting borrowers with valid modification contracts to additional scrutiny and of systematically breaching those contracts. The court held that the plaintiff failed to satisfy the commonality requirement because its policy or practice theory was insufficiently supported by the record. In its decision, the court emphasized that it was the plaintiff's burden to provide "significant proof" that such a policy existed; the plaintiff's evidence "based solely on snippets of deposition testimony" did not meet this burden.

***Foley v. Buckley's Great Steaks, Inc.*, No. 14-cv-063-LM, 2015 WL 1578881 (D.N.H. Apr. 9, 2015).** Judge Landya McCafferty of the U.S. District Court for the District of New Hampshire denied class certification in a lawsuit alleging that a restaurant violated the Fair and Accurate Credit Transactions Act (FACTA) by including credit card expiration dates on credit card receipts. The court concluded that the named plaintiff was an inadequate class representative because she had abdicated control over her case. Specifically, the named plaintiff testified that she had limited contact with class counsel, she had never seen the amended complaint and she did not know the terms of a settlement agreement submitted for court approval. The court also found that the litigation of individual claims would be superior to a class action for three reasons. First, the court ruled that the class would be difficult to ascertain because FACTA only applied to customers who used personal credit cards, rather than corporate cards, requiring individualized inquiries. Second, the court ruled that individual FACTA actions were not costly to bring, finding that the statute provides for recovery of costs and attorneys' fees, and in order to recover, a plaintiff only needed to show that he or she received a noncompliant receipt. Third, the court decided that the class representative's conduct, coupled with the proposed settlement, indicated that the lawsuit was primarily attorney-driven. On these grounds, the court denied class certification. However, the defendants had argued that "a class action is not superior to [individual litigation] because [of] the threat of 'annihilative' damages," but the court rejected that argument, denying class certification on the grounds just described.

***Imber-Gluck v. Google Inc.*, No. 5:14-cv-01070-RMW, 2015 WL 1522076 (N.D. Cal. Apr. 3, 2015).** Judge Ronald M. Whyte of the U.S. District Court for the Northern District of California refused to certify a class of individuals asserting state consumer protection claims arising from unauthorized purchases made by minor children while playing games downloaded from the Google Play store. Prior to the filing of the complaint, the Federal Trade Commission (FTC) investigated the same claims and reached a settlement requiring Google to provide full refunds to customers. The court found that the plaintiffs could not meet Rule 23's superiority requirement because the FTC settlement was already providing the relief sought in the class action — refunds of the in–app purchases — which meant that "pursuing a class action will actually result in a reduced recovery due to administrative costs and attorneys' fees." Judge Whyte found that allowing the class to proceed would substantially burden the court and the defendants by "largely duplicat[ing] the work of the 18 month FTC investigation," which already provided the class with a complete refund and an injunction. The court rejected the plaintiffs' contention that they may be entitled to punitive damages not recovered in the FTC settlement because recovery of such damages was doubtful, and "maintaining a class action for those class members who opt-out of the FTC refunds in order to pursue the possibility of punitive damages is not superior[.]"

***Martin v. LG Electronics USA, Inc.*, No. 14-cv-83-jdp, 2015 WL 1486517 (W.D. Wis. Mar. 31, 2015).** Judge James D. Peterson of the U.S. District Court for the Western District of Wisconsin denied in part and deferred in part the plaintiff's motion for class certification in a proposed class action alleging that defendants LG Electronics USA, Inc. and LG Electronics, Inc. conspired to sell a Blu-ray player that was bundled with obsolete software, which rendered the player useless without an upgrade. Seeking relief under the Wisconsin Deceptive Trade Practices Act, the plaintiff moved to certify various proposed classes consisting of: (1) all persons in Wisconsin who purchased the defendants' traditional or Super Multi Blue Blu-ray players bundled with the discontinued software in question at any time between February 8, 2008, and the date of an order granting class certification (the Wisconsin Classes), and (2) all persons in the United States who purchased the traditional or Super Multi Blue Blu-ray players between February 8, 2008, and the date of an order granting class certification (the National Classes). Before considering the appropriateness of class certification, the court found it necessary to address potential standing issues presented by the plaintiff's complaint, stating that the standing issue was "logically antecedent" to the certification question.

Although the plaintiff sought to assert claims on behalf of a nationwide class, the court noted that he lacked standing to assert claims under the laws of states where he did not reside and had suffered no injury. Similarly, the court noted that the plaintiff could not assert claims under Wisconsin law on behalf of other class members who had no connection to Wisconsin. Accordingly, the court declined to certify the plaintiff's proposed National Classes. With respect to the Wisconsin Classes, the court determined that the plaintiff had standing to represent their claims, but that the issue of class certification was premature because the parties had not had an opportunity to conduct discovery and had not fully briefed the question for the narrowed claims. The court thus dismissed the class certification motion without prejudice and allowed the plaintiff to renew his motion at a later date.

***Physicians Healthsource, Inc. v. Alma Lasers, Inc.*, No. 12 C 4978, 2015 WL 1538497 (N.D. Ill. Mar. 31, 2015), appeal pending.** Judge Charles P. Kocoras 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 brought under the TCPA against defendant Alma Lasers, Inc. (Alma), a developer and manufacturer of laser devices. Alma purchased contact information, including fax numbers, for medical professionals across the country to use in promoting seminars highlighting the benefits of its technology. The plaintiff, Physicians Healthsource, Inc. (Physicians), a corporate health care provider, alleged that it received faxes announcing a seminar hosted by Alma. Physicians brought suit against Alma, seeking to represent itself and all other persons who received faxes from Alma that did not comply with the TCPA. The court found that the class was not ascertainable in light of the lack of records proving which customers received the faxes at issue. For example, the court noted that Alma did not maintain a list of individuals that were solely contacted by fax. In addition, records showed only aggregate data of faxes sent and did not show individual fax numbers or dates. Absent a master list of fax numbers, the record contained no evidence to establish which customers were part of the proposed class. In addition, the court noted that Physicians itself could not "overcome the simple fact that it [was] not on any of the lists," making class certification improper. The court then went on to consider Physicians' standing to pursue its claims individually. Ultimately, the court determined that the lack of transmission records was fatal to Physicians' standing under the TCPA.

***Bridges v. Freese*, No. 3:13CV457TSL-JCG, 2015 WL 1401513 (S.D. Miss. Mar. 26, 2015).** In an action by former clients against their counsel regarding allocation of costs and fees, Judge Tom S. Lee of the U.S. District Court for the Southern District of Mississippi denied the plaintiffs' motion for class certification. Specifically, the court found that the plaintiffs had failed to satisfy Rule 23(a)'s requirements of numerosity and adequacy of representation. The plaintiffs failed to demonstrate that joinder was impracticable because their counsel had "filed separate individual actions on behalf of nearly one-third of all prospective class members." Further, the court found the class representatives to be inadequate because they lacked familiarity with the claims and their factual bases.

***Guzman v. Bridgepoint Education, Inc.*, No. 11-cv-69-BAS(WVG), 2015 WL 1396650 (S.D. Cal. Mar. 26, 2015), 23(f) pet. denied.** Judge Cynthia Bashant of the U.S. District Court for the Southern District of California denied certification of a proposed nationwide class of students enrolled in classes offered by Bridgepoint Education, Inc., alleging, inter alia, that the defendants "engaged in a pattern of improper and unlawful conduct in order to recruit students … through the use of standardized, misleading recruitment tactics." The court held that the plaintiff failed to demonstrate an identifiable and ascertainable class, given evidence suggesting that up to 96 percent of the proposed class was bound by arbitration provisions, some of which contained opt-out provisions. The court had previously granted a motion to compel arbitration in a related case (*Rosendahl v. Bridgepoint Education, Inc.*, No. 11-cv-61-BAS(WVG) (S.D. Cal. Jan. 11, 2011)) dealing with an arbitration provision identical to a subset of those presently at issue. The court reasoned that it would have to make a determination of the merit of each individual claim to determine whether students could participate as members of the class. This uncertainty regarding which students were bound by arbitration provisions and which opted out led the court to conclude that the proposed class was imprecise and not presently ascertainable. The court also suggested that the individual factual questions necessary to determine which students opted out of the arbitration provisions created a predominance problem that would likely bar certification under Rule 23(b)(3).

***NEI Contracting & Engineering, Inc. v. Hanson Aggregates Pacific Southwest, Inc.*, No. 12-cv-01685-BAS(JLB), 2015 WL 1309938 (S.D. Cal. Mar. 24, 2015), 23(f) pet. pending.** The plaintiff sought to certify a class of 12,551 contractors whose cellphone calls to the defendants to place orders for construction materials over a four-year period were recorded without their consent in violation of California Penal Code Section 632.7. Judge Cynthia Bashant of the U.S. District Court for the Southern District of California refused to certify the class, finding Rule 23(b)(3)'s predominance requirement was not met and rejecting the plaintiff's suggestion that the court should determine the adequacy of the defendants' warning that the call might be recorded under a "reasonable person" standard, "and not by analyzing each putative class member's subjective belief about whether they were being recorded." The court held that

the defendants provided sufficient notice of recording, and that the "vast majority" of the contractor customers were commercial companies that place numerous phone orders for the materials each year, many with long-standing business relationships with the defendants. The defendants introduced evidence that certain customers had actual knowledge their calls were being recorded and continued placing orders, thereby evidencing consent, which meant that "individual inquiries into whether each putative class member provided consent will be necessary."

***In re Actiq Sales & Marketing Practices Litigation*, No. 07-4492, 2015 WL 1312015 (E.D. Pa. Mar. 23, 2015), 23(f) pet. denied.** Chief Judge Petrese B. Tucker of the U.S. District Court for the Eastern District of Pennsylvania denied the plaintiffs' motion for class certification in this action alleging that the off-label prescription payments made by the plaintiffs, third-party payors (TPPs), to the defendant, the manufacturer of the cancer pain medication Actiq, were excessive and constituted unjust enrichment. The court held that Rule 23's predominance requirement was not met because the cause of action would require an individualized inquiry into each plaintiff's decision to provide coverage for Actiq. "[W]hether TPPs' payments for Actiq prescriptions resulted in unjust enrichment is a question resolved by examination into the actions not only of [the manufacturer], but also of individual TPPs and prescribing doctors." Furthermore, the court determined that a class action was not a superior method for adjudicating the case, in part because the court would need to apply the unjust enrichment law of each plaintiff's home state. Because the class action did not meet the predominance and superiority requirements of Rule 23(b)(3), the motion for class certification was denied.

***LeBlanc v. Exxon Mobil Corp.*, No. 14-201-SDD-RLB, 2015 WL 1221560 (M.D. La. Mar. 17, 2015).** Judge Shelly D. Dick of the U.S. District Court for the Middle District of Louisiana denied the plaintiffs' motion for class certification in a consumer class action lawsuit in which individual fuel purchasers alleged that Exxon's fuel contained elevated resin levels that were capable of causing damage to their vehicles. The court held that the plaintiffs failed to show predominance, superiority and that the class was ascertainable. According to the court, certification was inappropriate because resolution of proposed class members' claims would require an individualized inquiry as to whether each consumer actually purchased the fuel at issue, whether the fuel was effective, whether their vehicles were adversely affected by the fuel and the nature, extent and degree of any damage allegedly sustained. Further, the court noted that the proposed class definition was inappropriate because it was defined to include "purchasers of *defective* fuel," and therefore class membership could not be ascertained without deciding the merits of the case.

***Plaza 22, LLC v. Waste Management of Louisiana, LLC*, No. 13-618-SDD-SCR, 2015 WL 1120320 (M.D. La. Mar. 12, 2015).** In an antitrust complaint against a waste management company, Judge Shelly D. Dick of the U.S. District Court for the Middle District of Louisiana denied the plaintiffs' motion for class certification. There, purchasers of waste-hauling services alleged that the defendants engaged in unlawful business practices and anticompetitive behavior that resulted in the purchasers paying artificially high prices. First, Judge Dick held that the proposed class was not ascertainable because it was defined to include those purchasers who "were injured by" the defendants in violation of Louisiana law — and therefore required a merits determination. In addition, the court held that the plaintiffs failed to meet the commonality, typicality and predominance requirements for class certification because each purchaser's claim would turn on individualized facts. Specifically, the court noted that the defendants' contracts with different purchasers varied and individualized inquiries would be necessary to resolve the plaintiffs' claims of fraud and breach of good faith, as well as to calculate damages. The court also rejected the plaintiffs' argument that certification was required under Rule 23(b)(1) because separate actions would produce inconsistent adjudications. According to the court, Rule 23(b)(1) "seldom" applies in cases where the plaintiff seeks monetary damages.

***Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950(AT)(JCF), 2015 WL 1566722 (S.D.N.Y. Mar. 10, 2015).** Magistrate Judge James C. Francis, IV of the U.S. District Court for the Southern District of New York recommended that the plaintiffs' motion for class certification be denied for a proposed class of former employees alleging violations of Title VII of the Civil Rights Act of 1964 and the New York City Human Rights Law. The plaintiffs claimed that the members of the putative class were discriminated against in promotion and compensation on the basis of their gender. The court held that the plaintiffs met Rule 23(a)'s numerosity, commonality, typicality and adequacy requirements. However, Judge Francis ruled that the injunctive class should not be certified pursuant to Rule 23(b)(2) because the named plaintiffs were no longer employed by the defendant. Additionally, the court found that the predominance requirement of Rule 23(b)(3) was not satisfied because although the validity or bias of the defendant's employee performance measures is a common issue, "there are countless individualized factors that influence whether those performance measures cause legally cognizable injury."

***Gallego v. Northland Group, Inc.*, No. 14 Civ. 7115(AKH), 2015 WL 1954052 (S.D.N.Y. Apr. 27, 2015), appeal pending.** Judge Alvin K. Hellerstein of the U.S. District Court for the Southern District of New York denied certification for a proposed class of individuals who incurred financial obligations and allegedly received letters from the debt collector defendant in violation

of the FDCPA. The plaintiff alleged that the letters were illegal because the defendant offered three possible methods by which to pay the bill, along with a number to call with questions, but failed to identify a name to call. The court, however, held that a class action was neither the superior nor the fairer method for litigating the issues because due to statutory limits, each putative class member would only receive 17 cents if all of the estimated 100,000 members made claims. Furthermore, Judge Hellerstein recommended denying class certification because "certifying a class would do little more than turn [the defendant]'s settlement with [the plaintiff] into a general release of liability from all similarly situated plaintiffs at minimal extra cost while furthering a cottage industry among enterprising lawyers."

McCormick v. Halliburton Energy Services, Inc., **No. CIV-11-1272-M, 2015 WL 918767 (W.D. Okla. Mar. 3, 2015).** Chief Judge Vicki Miles-LaGrange of the U.S. District Court for the Western District of Oklahoma refused to certify a class of property owners seeking damages for private nuisance, public nuisance, negligence, trespass, strict liability and unjust enrichment based on Halliburton's purported failure to prevent ammonium perchlorate from seeping into groundwater affecting their properties. The court found that individualized issues predominated as to elements of each cause of action, such as each plaintiff's intended and actual use of his or her property, the extent of each property's contamination, and that the perchlorate at each property came from Halliburton and not from some other source. The court also held that "a trial on whether Halliburton released perchlorate into the groundwater, as well as the current and future scope and extent of that groundwater contamination, is unlikely to substantially aid resolution of the ultimate determination of Halliburton's liability" since it "would neither establish Halliburton's liability to any class member nor fix the level of damages awarded to any plaintiff," which meant "a vast array of mini-trials would be required for each class member if certification were granted."

Mirabella v. Vital Pharmaceuticals, Inc., **No. 12-62086-CIV-ZLOCH, 2015 U.S. Dist. LEXIS 43590 (S.D. Fla. Feb. 27, 2015).** Judge William J. Zloch of the U.S. District Court for the Southern District of Florida refused to certify a nationwide class of consumers on the ground that the class was not ascertainable. The plaintiff asserted consumer fraud and breach-of-warranty claims, alleging that the defendant concealed the dangerous side effects of its energy drink. The court found that class membership could not be verified in an administratively feasible manner. This was so, the court explained, because purchasers of the $3 drink were unlikely to retain receipts or other records of the purchase. Further weighing against ascertainability was the fact that the defendant conducted most of its sales through distributors, making it less likely that the defendant would have a record of purchasers, which could provide objective criteria for ascertaining class members.

Ratnayake v. Farmers Insurance Exchange, **No. 2:11-cv-01668-APG-CWH, 2015 WL 875432 (D. Nev. Feb. 27, 2015).** Judge Andrew P. Gordon of the U.S. District Court for the District of Nevada denied the plaintiff's motion to certify three subclasses asserting claims against Farmers for violating Nevada's insurance code. Specifically, the plaintiff alleged violation of the provision that prevents an insurer from including an anti-stacking provision — which forbids the customer from combining coverage limits from multiple policies — unless the insurer gives a sufficient discount on the purchase of multiple policies so that customers are not double-charged for the same risk. The court held that the proposed classes failed for multiple, independent reasons. First, the proposed classes were not ascertainable because determining whether each insured was given a discount and whether it was sufficient to allow anti-stacking would be a "fact-intensive undertaking." More importantly, the proposed class definitions created "fail-safe" classes because they included only insureds who had received "insufficient discounts under Nevada law." Second, individual issues predominated because the claims would require determinations about what discounts Farmers provided each insured, whether each discount was sufficient under Nevada law and the extent of damages suffered by each insured. Finally, Judge Gordon held that a class action would provide little advantage in light of the inability to determine the adequacy of discounts provided and extent of liability and damages on a classwide basis. Moreover, the Nevada Supreme Court had expressed a preference that claims involving the insurance code be brought before the Nevada Department of Insurance in the first instance. Having denied class certification with prejudice, the court held that it had no jurisdiction pursuant to CAFA and remanded the case to Nevada state court.

Decisions Permitting/Granting Class Certification

Brown v. Nucor Corp., **No. 13-1779, 2015 WL 2167646 (4th Cir. May 11, 2015).** A panel of the U.S. Court of Appeals for the Fourth Circuit (Gregory and Keenan, JJ., Agee, J. (dissenting)) held for the second time that the district court had erred in refusing to certify a class of black employees allegedly denied promotions on the basis of race in violation of Title VII. The Court of Appeals had previously remanded to the district court to certify the class, which the district court did. But Senior Judge C. Weston Houck of the U.S. District Court for the District of South Carolina then decertified the class in light of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), finding that given this Supreme Court precedent, the plaintiffs' statistical and anecdotal evidence was insufficient to show a general policy that caused the class injury. The plaintiffs appealed, and a divided

panel of the Fourth Circuit held that the decertification was improper largely because *Dukes* was distinguishable. First, the Court of Appeals noted that unlike the class in *Dukes* consisting of approximately 1.5 million members working at 3,400 stores, this litigation concerns a 100-member class working at a single steel plant. The court determined that "a more centralized, circumscribed environment generally increases the uniformity of shared injuries, the consistency with which managerial discretion is exercised, and the likelihood that one manager's promotions decisions will impact employees in other departments." The court also found that the plaintiffs' anecdotal evidence of discrimination here was "substantially more probative" than that in *Dukes*. Lastly, the court explained that where the *Dukes* plaintiffs had failed to show with specificity how the company's culture influenced individual employment decisions, the workers here had provided such substantial evidence of pervasive racism that it "strains the intellect to posit an equitable promotions systems set against that cultural backdrop." Based on this analysis, the court determined that the district court had abused its discretion in holding that the plaintiffs had not met the commonality requirement. The Fourth Circuit therefore vacated the district court's decision in part and ordered that the district court certify the class.

***Edwards v. Ford Motor Co.*, No. 13-55331, 2015 WL 847193 (9th Cir. Feb. 27, 2015).** A unanimous panel of the U.S. Court of Appeals for the Ninth Circuit (Graber and Wardlaw, JJ., and Mahan, district judge sitting by designation) overturned the district court's refusal to certify a class of Ford Freestyle owners seeking relief under California consumer protection laws, alleging that Ford failed to inform customers of a known defect that caused the Freestyles to accelerate unexpectedly. The Ninth Circuit rejected Ford's contention that the appeal was moot in light of Ford's implementation of a repair and reimbursement program, because the plaintiff sought additional relief beyond the "partial remedy" offered by Ford, including reimbursement of the money consumers spent on the Freestyles. The panel also found that the district court's "commonality and predominance holdings are irreconcilable," because the lower court found common issues in whether a defect existed and whether Ford had a duty to disclose the defect, but then held those questions were "individual." The Ninth Circuit noted that the plaintiff did not have to prove the existence of a defect to satisfy the predominance requirement, that while "[i]ndividual factors, such as driving conditions, may affect surging … they do not affect whether the Freestyle was sold with an ETC system defect," and moreover that "by providing classwide relief through its notice and repair program, Ford has acknowledged that a single class defect exists." The Ninth Circuit further rejected the district court's finding that materiality would require individualized proof because a reasonable person would find information about a known defect that poses an unreasonable safety hazard material, and reversed and remanded the action to the district court.

***Frey v. First National Bank Southwest*, No. 13-10375, 2015 WL 728066 (5th Cir. Feb. 20, 2015) (per curiam).** The plaintiffs alleged that the defendant bank failed to post a physical notice of an ATM fee on its ATM machines, as required by law. The defendant opposed certification, arguing that the class was not ascertainable and common issues did not predominate, but the trial court rejected both arguments. On appeal, the U.S. Court of Appeals for the Fifth Circuit (Benavides, Clement and Graves, JJ.) affirmed the trial court's decision, agreeing that class membership could be established through a simple administrative inquiry to determine whether each ATM user withdrew from a personal, as opposed to commercial, account. The Fifth Circuit also agreed that the predominance requirement was met because "proof of missing notice at the time a consumer used the ATM is sufficient to establish a claim," and therefore the named plaintiff need only present evidence of the "period of time in which the notice was missing" to prevail on behalf of every proposed class member who used the machine during that time.

***Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015).** A panel of the U.S. Court of Appeals for the Third Circuit (Smith, Rendell and Krause, JJ.) reversed the U.S. District Court for the Western District of Pennsylvania's denial of class certification in this putative class action brought by lessees of computers from a rent-to-own store alleging violation of the Electronic Communications Privacy Act, invasion of privacy, conspiracy, and aiding and abetting for installing and using software on leased computers allowing remote and surreptitious access and transmission of electronic communications and images. On appeal, the Third Circuit held that the district court had erred in finding that the proposed classes were not ascertainable, which is a "narrow" inquiry. The court explained that ascertainability requires only: (1) that a class be "defined with reference to objective criteria," and (2) that there is a "reliable and administratively feasible" method for assessing class membership. Applying this standard, the court reasoned that the owners and lessees of the company's computers, as well as the identity of those computers on which spyware had been activated, could be identified objectively through the company's records. The Third Circuit rejected the defendants' reliance on one of its prior rulings, *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), which held that ascertainability is necessarily lacking in consumer cases where proof of purchase and membership in the class rest entirely on class member affidavits rather than some objective evidence — *i.e.*, company sales records. According to the court, the plaintiffs had offered "multiple definitions of class members and simply argued that a form similar to those provided could be used to identify household members," which was "a far cry from an unverifiable

affidavit, or the absence of any methodology that can be used later to ascertain class members," which plagued the proposed class in *Carrera*. Although the defendants urged the Third Circuit to affirm on predominance grounds, the district court had only considered ascertainability and, thus, the Third Circuit was unwilling to address the argument. In a notable concurring opinion, Judge Rendell declared that "[o]ur heightened ascertainability requirement defies clarification. Additionally, it narrows the availability of class actions in a way that the drafters of Rule 23 could not have intended."

***Hirsch v. Jupiter Golf Club LLC*, No. 13-80456-CIV, 2015 WL 2254471 (S.D. Fla. May 13, 2015).** Judge Kenneth A. Marra of the U.S. District Court for the Southern District of Florida certified a class of people who alleged that they were denied refunds of the deposits that they had paid to purchase memberships to the Ritz-Carlton Golf Club & Spa in Jupiter, Florida. The plaintiffs alleged that following the sale of the club to a new owner, the defendants had not honored the refund provisions of the plaintiffs' original membership agreements. In opposing class certification, the defendants argued that the class claims lacked the requisite "commonality." The court rejected this argument, holding that the commonality requirement was satisfied by the common legal question of whether the defendants had breached the membership agreement — a form contract, which all class members had executed. In so doing, the court noted that form contracts "best facilitate[] class treatment." The court went on to find that the plaintiffs had satisfied the provisions of Rule 23(b)(3). In particular, the court concluded that common issues predominated, reasoning that "[t]he allegations of breach of contract center around a common question[,] whether [d]efendants breached the Membership Agreement," and that "[n]o individual questions threaten to overshadow" this fundamental question.

***Dei Rossi v. Whirlpool Corp.*, No. 2:12-cv-00125-TLN-CKD, 2015 WL 1932484 (E.D. Cal. Apr. 28, 2015), 23(f) pet. pending.** Judge Troy L. Nunley of the U.S. District Court for the Eastern District of California granted in part and denied in part the plaintiffs' motion to certify a 32-state and District of Columbia class and a California subclass of persons who purchased two models of refrigerators mislabeled as Energy Star-qualified, alleging breach of express warranty and violations of California consumer protection laws. The court held that the class was ascertainable because all class members purchased the same two models built to the same specifications as those tested by the Department of Energy. Rejecting the defendant's assertion that the class and subclass lacked commonality because the plaintiffs could not show "whether the Energy Star mark was material to a given class member's buying decision," the court found that the plaintiffs presented sufficient evidence, including consumer surveys and the defendant's own public statements, demonstrating that the Energy Star representation was material. Based on this evidence, Judge Nunley also held that a presumption of reliance was appropriate and that the California subclass' consumer protection claims therefore lent themselves to proof by common inquiry. However, Judge Nunley refused to certify a multistate class for the express warranty claim because there were material differences among the states' laws and each of those claims should be governed by the laws of the jurisdiction in which the transaction took place.

***Burrow v. Sybaris Clubs International, Inc.*, No. 13 C 2342, 2015 WL 1887930 (N.D. Ill. Apr. 24, 2015).** Judge Harry D. Leinenweber of the U.S. District Court for the Northern District of Illinois granted the plaintiff's motion for class certification in a class action involving alleged violations of state and federal wiretap laws. The plaintiff was a former employee of defendant Sybaris Clubs International, Inc., the owner of several "romantic getaway" resorts. The plaintiff alleged that the defendant recorded all inbound and outbound calls from the reservations desks without the consent of either the callers or the employees working the reservations desks. The plaintiff sought to represent a class, under Rule 23(b)(3), consisting of "[a]ll persons who made a telephone call into or out of the reservation telephone lines at Sybaris' five locations" between various date ranges, depending on the location. The defendant primarily argued that it obtained consent from its employees to record their phone calls, and that no class member had a viable claim because, under the Federal Wiretap Act and related state laws, one party's consent to recording is a defense to either party's claim. The court first determined that although there were some logistical issues presented in terms of ascertaining class members, those issues did not demonstrate that class members could not possibly be ascertained based on objective data. In addition, although the defendant argued that the question of consent was an individual question that would predominate over common questions, the court found that because the defendant relied on a theory of implied consent based on the "common knowledge" among its employees that calls were being recorded, the question of whether the employees consented to the recording would have a common, classwide answer.

***Soutter v. Equifax Information Services*, LLC, No. 3:10cv107, 2015 U.S. Dist. LEXIS 49995 (E.D. Va. Apr. 15, 2015), 23(f) pet. pending.** Senior Judge Robert E. Payne of the U.S. District Court for the Eastern District of Virginia certified a class action alleging that the defendant had violated Section 1681e(b) of the Fair Credit Reporting Act by misreporting the status of certain state court judgments. Following reversal and remand by the Fourth Circuit of an earlier class certification, the named plaintiff proposed a "materially different" class definition that narrowed the applicable time period, excluded circuit court

judgments and limited the class to consumers who had notified the defendant of the disposition of a judgment before the defendant published an inaccurate report. The court found that three common questions raised the most significant issues in the case and pertained to uniform conduct by the defendant: its credit reporting procedures, its knowledge and notice of defects in its systems, and the willfulness of its conduct.

***Coleman v. District of Columbia*, No. 13-1456 (EGS), 2015 U.S. Dist. LEXIS 48116 (D.D.C. Apr. 13, 2015).** Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia certified a class of roughly 34 D.C. residents in a suit challenging the constitutionality of the District's tax lien program. The original named plaintiff, a veteran who lost his home over a property tax bill, brought the suit on his own behalf and as a representative of all D.C. property owners who suffered a loss of excess equity to the law. Because the District had conceded that the plaintiffs otherwise satisfied Rule 23(a), the crux of the court's decision was its numerosity analysis. As to numerosity, the District raised several reasons, such as consent and *res judicata*, that certain individuals would have to be removed from the class. The court determined that these arguments were merits-related defenses that were inappropriate to consider at the class certification stage. The court also highlighted that the "core requirement" is that joinder be impracticable — not numerosity. The court then determined that joinder would be impracticable here due to the class members' unique vulnerability. Judge Sullivan inferred from the class definition and facts proffered by the plaintiffs that class members would suffer from financial vulnerability and difficulty managing their own affairs — making their claims uniquely unsuited for individual prosecution.

***Dunakin v. Quigley*, No. C14-0567JLR, 2015 WL 1619065 (W.D. Wash. Apr. 10, 2015), 23(f) pet. pending.** Judge James L. Robart of the U.S. District Court for the Western District of Washington granted the plaintiff's motion for class certification in a case alleging that the defendants failed to provide screenings and evaluations, specialized services, and notice of or planning for eventual community placement as required pursuant to the Nursing Home Reform Act. The court certified a class of "residents of Medicaid-certified, privately-operated nursing facilities in the State of Washington; and who are Medicaid recipients with an intellectual disability or related condition(s) such that they are eligible to be screened and assessed pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.122 et seq." The court rejected the defendants' argument that the plaintiff must demonstrate ascertainability, adopting the holdings of other circuit courts that "due to the unique characteristics of a Rule 23(b)(2) class, it is improper to require ascertainability[.]" Numerosity was sufficient based on the projected class size of 300 people, where individual suits by the putative class members would be impracticable, and the plaintiff did not need to establish the "precise number of class members" since he only sought declaratory and injunctive relief. In addition to the Rule 23(a) requirements, the plaintiff established that Rule 23(b)(2) certification was appropriate since injunctive or declaratory relief could be provided to members of the class "without engaging in a case-by-case analysis of the individual circumstances of each class member." On April 24, 2015, the defendants filed a petition for review by the Ninth Circuit.

***Toler v. Global College of Natural Medicine, Inc.*, No. 13-10433, 2015 WL 1611274 (E.D. Mich. Apr. 10, 2015).** Judge Terrence G. Berg of the U.S. District Court for the Eastern District of Michigan granted the plaintiff's unopposed motion for class certification in a lawsuit alleging that an online school did not refund all of its students' prepaid tuition when it abruptly closed. The court noted that the entry of default against the defendants, who had never responded to the complaint, would not alter the court's class certification analysis, as certification remained a necessary procedural requirement for the class to recover damages. The court then held that the proposed class satisfied Rule 23(a)'s commonality and typicality requirements because the class members' claims, including those of the named plaintiff, had arisen from the same course of standardized conduct — namely, the school's failure to either provide the education paid for or repay prepaid tuition after its closure. The court concluded that predominance had also been satisfied, as the overriding question remaining in the litigation was what damages the defendants caused through the school's closure, which was a question common to the class. In its analysis of the predominance requirement, the court also noted that there was no evidence that any members of the proposed class had an interest in individually controlling the prosecution of their claims and that the normal difficulties of managing a class action had been reduced because the defendants had defaulted and only the consideration of damages remained. For these same reasons, the court held that a class action was a superior method for adjudicating the litigation.

***Bridgeview Health Care Center v. Clark*, No. 09 C 5601, 2015 WL 1598115 (N.D. Ill. Apr. 8, 2015), appeal pending.** Magistrate Judge Maria Valdez of the U.S. District Court for the Northern District of Illinois denied the defendant's motion to decertify the class in an action invoking the TCPA. The plaintiffs alleged that the defendant hired Business to Business Solutions (B2B) to help advertise his medical equipment repair business by advertising to entities within 20 miles. B2B, however, sent faxes far beyond that. The plaintiffs claimed that the defendant was liable for statutory damages for each fax sent, regardless of whether he instructed B2B to send each fax on his behalf. Ultimately, the court determined that the defendant was responsible for the content and approval of the ads that were sent within the

20-mile radius but declined to find him liable for the faxes sent beyond that radius. The defendant moved to decertify the class pursuant to Rule 23(c)(1) and Rule 59, arguing that (1) he was not liable to the named plaintiffs because they resided outside the 20-mile radius, therefore destroying the typicality, commonality and adequacy requirements of Rule 23, and (2) the "actual" class (those within the 20-mile radius) was too small to satisfy Rule 23's numerosity requirement. The court rejected both of these arguments, holding that a district court need not decertify a class whenever it later appears that the named plaintiffs were not class members or were otherwise inappropriate class representatives, so long as the initial certification was proper. The court further rejected the defendant's numerosity argument, noting that the requirement is satisfied so long as the court finds that a class action would be more practicable than joinder — "number alone is not dispositive of this issue."

***Leiting-Hall v. Winterer*, No. 4:14-CV-3155, 2015 WL 1470459 (D. Neb. Mar. 31, 2015).** Judge John M. Gerrard of the U.S. District Court for the District of Nebraska adopted the findings and recommendation of Magistrate Judge Cheryl R. Zwart to grant class certification in a putative class action seeking injunctive and declaratory relief. The plaintiffs alleged that the Nebraska Department of Health and Human Services (DHHS) failed to timely process and manage Supplemental Nutrition Assistance Program (SNAP) applications and provide benefits to those eligible. The plaintiffs sought certification of a Rule 23(b)(2) class consisting of all Nebraska residents who, since January 1, 2012, had applied, were in the process of applying or would apply for initial and renewal SNAP benefits. DHHS argued that the class was not cohesive because many putative class members had suffered no harm. Judge Zwart, however, determined that in an action requesting injunctive relief, the key consideration was not whether class members had been harmed, but whether they had been "subject to the very practice or policy of the defendant that is being challenged in the law suit." Judge Zwart also rejected DHHS' arguments that many of the proposed class members lacked standing. As Judge Zwart noted, "[a] class may be comprised of members who have not yet suffered harm, but are exposed to the potential harm the class action suit is designed to remedy." Following a *de novo* review of Judge Zwart's proposed findings and recommendation, Judge Gerrard adopted them in their entirety.

Allen v. Similasan Corp., No. 12-cv-376 BAS (JLB), 2015 WL 1534005 (S.D. Cal. Mar. 30, 2015). The plaintiffs sought to certify a class of purchasers of allegedly ineffective ear, nose and eye homeopathic products produced, marketed and sold by the defendant, alleging, *inter alia*, violations of California consumer protection laws and the Magnuson-Moss Warranty Act. Judge Cynthia Bashant of the U.S. District Court for the Southern District of California granted in part and denied in part the plaintiffs' motion. In concluding that predominance was satisfied under Rule 23(b)(3), the court disagreed with the defendant's contention that "the question of what label information is 'material' to a 'reasonable consumer' is so variable as to make class treatment impossible and improper," finding that the efficacy representations were material because the defendant did not show that any consumer would purchase the products if there were no efficacy claims. However, the court denied class certification for any claims related to ancillary representations (*e.g.*, "Eye Doctor Recommended") beyond the representations of efficacy because there was no established relationship between these theories of liability and the damage calculation.

***Booth v. Appstack, Inc.*, No. C13-1533JLR, 2015 WL 1466247 (W.D. Wash. Mar. 30, 2015).** Judge James L. Robart of the U.S. District Court for the Western District of Washington granted in part and denied in part the plaintiffs' motion to certify a class of consumers alleging violations of the TCPA and violations of the Washington Automatic Dialing and Announcing Device Act (WADAD) and the Washington Consumer Protection Act. The court certified the nationwide class of consumers regarding the alleged TCPA violations, modifying the class definition to remove the requirement of a lack of prior consent and thereby avoid ascertainability problems associated with the prior fail-safe class definition. The court explained that removing this requirement eliminated "the need to identify which persons gave consent in order to determine the scope of the class, as well as the need to effectively determine liability in order to send class notice." Commonality was satisfied as the TCPA claims were premised on "the use of the same predictive dialer to robocall and play the same recorded message to various cell phone numbers." The court further found that the issue of consent was not a barrier to predominance because the defendant had no mechanism in place to obtain consent and offered no evidence that any class member had consented. The plaintiffs separately sought to certify a class of Washington businesses who received one or more telephone calls transmitted to a telephone number with a Washington state area code, bringing claims under the WADAD. The WADAD, however, does not apply to calls initiated and received outside the state of Washington. Since the defendant is a California company that retained a Utah vendor to dial calls, and the court deemed area code an insufficient proxy for the location where a call was received, the class was overbroad and contained members to which the WADAD did not apply, and thus could not be certified.

***Abdeljalil v. General Electric Capital Corp.*, No. 12cv2078 JAH (MDD), 2015 WL 1346850 (S.D. Cal. Mar. 26, 2015).** Judge John A. Houston of the U.S. District Court for the Southern District of California granted the plaintiff's motion for class certification pursuant to Rule

23(b)(3) of a nationwide class of consumers asserting claims against GE Capital Retail Bank for violations of the TCPA based on alleged telephone calls made without prior consent. The court allowed the plaintiff to narrow the class definition in a motion for class certification without amending the operative complaint and found that the class was sufficiently ascertainable, as class members could be objectively determined based on the defendant's business records and self-identification by class members. The class also met the typicality requirements, despite the defendant's argument that its policy requiring removal of a cellphone number once it was informed of its existence rendered the plaintiff atypical, since he could not remember whether he had told a representative that the number called was a cellphone number. The court noted that the existence of such a policy did not demonstrate that such a policy was implemented consistently. The class also satisfied the predominance requirement, accepting the plaintiff's argument that issues of consent to receive calls were subject to common proof. The court denied certification pursuant to Rule 23(b)(2), finding that certification was only proper under Rule 23(b)(3) as the plaintiff was primarily seeking individualized monetary damages and not solely injunctive relief.

***Rhodes v. Olson Associates, P.C.*, No. 14-cv-00919-CMA-MJW, 2015 WL 1136176 (D. Colo. Mar. 13, 2015).** Judge Christine M. Arguello of the U.S. District Court for the District of Colorado granted with modification the plaintiff's motion to certify a Rule 23(b)(3) class of persons for whom the defendant left a scripted voicemail message that violated the FDCPA. The court determined that the plaintiff satisfied the numerosity, commonality, typicality and adequacy requirements of Rule 23(a), rejecting the defendant's argument that the class was unascertainable because "several individuals would be required to review the applicable accounts" to determine which persons received the scripted messages, and the process was likely to take "several weeks." Analyzing the class under Rule 23(b)(3), the court held that the plaintiff met the predominance requirement because the scripted voicemail was the defendant's standardized policy and the claims of the proposed class members all rested on the question of whether the message violated the FDCPA. Finally, the court modified the class definition to more precisely track the distinctions between the statutory disclosure requirements for "initial communications" and "subsequent communications," because the court found that the current class definition impermissibly conflated the two.

***I.B. by & through Bohannon v. Facebook, Inc.*, No. 12-cv-01894-BLF, 2015 WL 1056178 (N.D. Cal. Mar. 10, 2015), 23(f) pet. pending.** Judge Beth Labson Freeman of the U.S. District Court for the Northern District of California granted in part and denied in part certification of a class of minors alleging that Facebook's representation that all online purchases through its website are final and nonrefundable violated California law governing contracts with minors. The court found the class ascertainable over Facebook's objection that it was overbroad because it included some minors who had a parent's consent to make a purchase and therefore would have no claim under the state law at issue. As the court explained, the relevant question is whether the court is able "to ascertain the class, not whether … class members have been aggrieved." Further, the court held that the class satisfied Rule 23(a)'s commonality and typicality requirements, despite the defendant's contentions that the injunctive relief sought would not benefit class members who are no longer minors and was against the interests of minors wishing to make online purchases. The court pointed out that the plaintiffs sought conformity to the law permitting minors to disaffirm contracts, not an end to sales to minors altogether, and further, that the law permitted disaffirmance "within a reasonable time" after reaching majority. The court also held that the plaintiffs readily satisfied Rule 23(b)(2) because the refund policy applied generally to the class. However, the court declined to certify the class restitution claims because the monetary relief sought was not incidental to injunctive relief, and the amount of restitution was dependent on the individual circumstances of each class member and "thus cannot be determined formulaically."

***Ebert v. General Mills, Inc.*, No. 13-3341 (DWF/JJK), 2015 WL 867994 (D. Minn. Feb. 27, 2015), 23(f) pet. granted.** Judge Donovan W. Frank of the U.S. District Court for the District of Minnesota granted class certification in a putative class action against General Mills, which alleged that General Mills had caused the chemical substance trichloroethylene to be released into the area surrounding a former company facility in Minneapolis, resulting in exposure to vapors in a nearby, largely residential neighborhood. The plaintiffs asserted entitlement to monetary relief for property damages and injunctive relief compelling remediation under several causes of action. The plaintiffs sought certification on two issues: (1) whether General Mills is liable to owners of the properties in the defined class area, and (2) whether injunctive relief is warranted to compel comprehensive remediation. General Mills disputed the adequacy, typicality and ascertainability elements of Rule 23(a) and all requirements under Rule 23(b), but the court rejected all of its arguments. For example, with respect to adequacy, General Mills argued that the class representatives could not protect the interests of absent members who had personal injury claims because they only sought recovery for property damage. The court disagreed, explaining that the plaintiffs had represented to the court that no one in the class presently has a personal injury and that *res judicata* would not bar relief for injuries that develop in the future. The court next concluded that the class was ascertainable because the geographical boundaries included in the class definition allowed it to identify the members of the

putative class. As to predominance, the court determined that the key issues of fact and law proposed for class treatment could be addressed through common proof given that General Mills' liability was based on its actions relating to its release of chemicals at a single source, into a geographically limited area and in the form of a single plume. In light of its findings concerning Rules 23(b)(2) and 23(b)(3), the court found it appropriate to bifurcate the action into two phases: the first phase addressing liability under Rule 23(b)(2) and the second phase addressing damages under Rule 23(b)(3), if General Mills was found liable.

***In re ConAgra Foods, Inc.*, No. CV 11-05379 MMM (AGRx), 2015 WL 1062756 (C.D. Cal. Feb. 23, 2015), 23(f) pet. granted.** Judge Margaret M. Morrow of the U.S. District Court for the Central District of California granted in part and denied in part the plaintiffs' amended motion for certification of classes of purchasers of Wesson Oils in 11 different states, alleging that the defendant deceptively and misleadingly marketed them as "100% Natural" when they were made from genetically modified organisms. First, the court rejected the defendant's contentions that the plaintiffs could not prove measurable damages because they could not show what they paid, noting that the plaintiffs' damages model could reflect the price paid by consumers in a particular state. The court also found that the plaintiffs' class was ascertainable and satisfied Rule 23(a)'s requirements despite the possibility that it included "purchasers who did not rely on the representation and/or were satisfied with the products" given the widespread exposure to the misrepresentations on the labeling. The court refused to certify a Rule 23(b)(2) injunctive relief class because the plaintiffs' speculative assertion that they "may consider" purchasing Wesson Oils in the future did not satisfy Article III's standing requirements of a "real and immediate threat of future injury." The court evaluated the plaintiffs' claims under various state laws under Rule 23(b)(3) and ultimately certified classes seeking relief under the consumer protection laws of California, Colorado, Florida, Illinois, New York, Ohio, Oregon, South Dakota and Texas, but not Indiana and Nebraska. The court also certified some class claims for breach of express and/or implied warranties and unjust enrichment where permitted by state law.

Other Class Action Decisions

***Walker v. Financial Recovery Services, Inc.*, No. 14-13769, 2015 U.S. App. LEXIS 4976 (11th Cir. Mar. 27, 2015) (per curiam).** Based on its recent Circuit precedent in Stein v. Buccaneers Limited Partnership, 772 F.3d 698 (11th Cir. 2014), a unanimous panel of the U.S. Court of Appeals for the Eleventh Circuit (Tjofalt, Wilson and Martin, JJ.) reversed and remanded the district court's order granting the defendant's motion to dismiss for lack of subject-matter jurisdiction. Before the plaintiff moved for class certification, the defendant, a debt collection company, had offered her $31,501, which would amount to $20,000 more than she had requested. Because no class action motion had been filed prior to the offer, Judge Robert N. Scola, Jr. of the U.S. District Court for the Southern District of Florida determined that the plaintiff should be treated as an individual plaintiff. He held that the offer resolved her claims and therefore rendered the lawsuit moot. In reversing the dismissal, the Eleventh Circuit reiterated its prior holding that a Rule 68 offer of full relief to the named plaintiff does not moot a class action, even if the offer precedes a motion for class certification.

***Rodman v. Safeway Inc.*, No. 11-cv-03003-JST, 2015 WL 2265972 (N.D. Cal. May 14, 2015).** Judge Jon S. Tigar of the U.S. District Court for the Northern District of California refused to decertify a nationwide class of Safeway customers bringing breach-of-contract claims arising from the alleged practice of charging customers a markup for items purchased using its online delivery service. After certification, the court granted summary judgment for the plaintiff, finding that Safeway breached its contract with customers to charge the same prices charged in stores. Safeway argued that the class should be decertified because the common issues of the contract's interpretation and breach were resolved, which meant individualized issues relating to Safeway's affirmative defenses predominated. The court noted that in certifying the class, it had already rejected Safeway's contention that its affirmative defenses of, inter alia, consent, waiver and estoppel were implicated because certain customers had learned of the additional charges and had continued to shop online. The court reiterated that it could make the legal determination whether shoppers who continued to use the service waived their rights to enforce the contract and create a subclass of those consumers if appropriate; thus, Safeway's request to decertify the class before the court resolved "the legal effect" of the affirmative defenses was premature.

***Town of Lexington v. Pharmacia Corp.*, No. 12-cv-11645, 2015 WL 1321448 (D. Mass. Mar. 24, 2015).** Judge Denise J. Casper of the U.S. District Court for the District of Massachusetts denied the plaintiff's motion, while its class certification motion was pending, to amend the proposed class definition in a lawsuit alleging product liability and consumer protection violations related to polychlorinated biphenyls (PCBs) manufactured by the defendants. In its complaint and class certification motion, the plaintiff sought certification of a class of all Massachusetts school districts that had a building with airborne PCB levels above the EPA-recommended public health levels. The defendants argued that this would be an unascertainable class, because school districts were not required to test for the airborne levels of the chemical, and the identity of class members would therefore be speculative. In response, the plaintiff moved to amend the class definition to encompass all Massachusetts school districts

that had a building built or renovated between 1950 and 1979 (the year use of PCBs was banned), excluding districts that had filed individual actions against the defendants and proposed limiting certification to only certain liability-related issues. The court held that the plaintiff's motion should be denied both because the motion was untimely and because amendment would be futile. As to the latter, the court concluded that the proposed class definition would in any event be overbroad because it did not reference the product allegedly causing the injury and therefore was not sufficiently related to the defendants' alleged wrongdoing. (The court also denied the original class certification motion, which was still pending, noting that the plaintiff had conceded that it should be denied.)

Class Action Fairness Act (CAFA) Decisions

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

***Hood v. Gilster-Mary Lee Corp.*, No. 15-1458, 2015 WL 1951924 (8th Cir. May 1, 2015).** A unanimous panel of the U.S. Court of Appeals for the Eighth Circuit (Loken, Colloton and Benton, JJ.) reversed the district court's decision and held that evidence of class members' last known addresses was insufficient to satisfy the plaintiffs' burden of showing that CAFA's local controversy exception applied. The plaintiffs, former and current employees of Gilster–Mary Lee Corporation, filed a class action lawsuit in Missouri state court, alleging that they suffered lung impairment, or potential future lung impairment, from exposure to butter-flavoring products, including diacetyl, used in Gilster's microwave popcorn packaging plant in Jasper, Missouri. The defendants removed the case to federal court under CAFA. The plaintiffs then moved to remand, arguing that the court should apply CAFA's local controversy exception, which requires remand when more than two-thirds of the class members are citizens of the state in which the action was originally filed. To establish the citizenship of the class members, the plaintiffs sent out affidavits to class members at their last known addresses and requested that they return them. Most class members did not respond. Accordingly, the plaintiffs relied on the last known addresses of those who did not respond as evidence of their citizenship. Citing other district court orders, the district court approved the plaintiffs' method of proving class members' citizenship and concluded, based on the last known addresses of absent class members, that over two-thirds of the potential class members were Missouri citizens. The Eighth Circuit reversed. Although the district court was not alone among district courts in the Eighth Circuit in holding that last known addresses could suffice to prove citizenship, the Court of Appeals found more persuasive the Seventh Circuit's general rule that "'a court may not draw conclusions about the citizenship of class members based on things like their phone numbers and mailing addresses.'" (quoting *In re Sprint Nextel Corp.*, 593 F.3d 669, 674 (7th Cir. 2010)). Rather, under the rule that the Eighth Circuit adopted, a plaintiff may meet its burden to prove the application of the local controversy exception only by: (1) providing affidavit evidence or statistically significant surveys showing that two-thirds of the class members are local citizens, or (2) redefining the class as only local citizens. Here, the plaintiffs had failed to provide statistically significant evidence that could demonstrate the proportion of class members who were Missouri citizens. Accordingly, the Eighth Circuit found that the class, as defined, did not satisfy the local controversy requirement.

***Allen v. Boeing Co.*, No. 15-35162, 2015 WL 1881687 (9th Cir. Apr. 27, 2015).** A panel of the U.S. Court of Appeals for the Ninth Circuit (Hawkins, Rawlinson and Callahan, JJ.) reversed the district court's order remanding a putative mass action alleging groundwater contamination and negligent investigation and remediation by the defendants. For over 40 years, Boeing allegedly used hazardous chemicals in its aircraft parts manufacturing plant; in 2002 Boeing retained co-defendant Landau to investigate and remediate the issue. The district court remanded the case under CAFA's single "event or occurrence" exception, but the Ninth Circuit reversed, holding that the exception did not apply to a continuing activity or tort. Such a broad definition of "event or occurrence" would render portions of CAFA redundant and was not supported by the legislative history, which "draws the line between a one-time chemical spill and a continuing course of pollution, contamination, or conduct that occurs over a period of years."

***Jordan v. Nationstar Mortgage LLC*, 781 F.3d 1178 (9th Cir. 2015).** A panel of the U.S. Court of Appeals for the Ninth Circuit (Wallace, Smith, Jr. and Watford, JJ.) reversed the district court's order awarding attorneys' fees to the plaintiff and remanding the class action to state court because defendant Nationstar's removal was untimely under 28 U.S.C. § 1446(b). On April 3, 2012, the plaintiff sued Nationstar in Washington state court alleging six causes of action, including violations of the FDCPA. Over two years later, the plaintiff served discovery responses indicating that monetary damages were expected to exceed $25 million. The next day, Nationstar filed a notice of removal to federal court under CAFA. The district court remanded the action to state court, holding that the notice of removal was untimely because the initial complaint triggered federal question jurisdiction under the FDCPA, and "the relevant removal date is the date on which the case itself becomes removable, rather than the date on which the case first becomes removable under CAFA." The defendant appealed the remand order, and the Ninth Circuit reversed. The Court of Appeals focused on the U.S. Supreme Court's recent holding in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014), and "Congress's intent to strongly favor the exercise of federal diversity jurisdiction

of class actions with interstate ramifications," in holding that a case becomes removable for purposes of Section 1446 when the CAFA ground for removal is actually disclosed. Because the notice of removal was timely, the Court of Appeals determined that the putative class action was properly in federal court.

***In re Darvocet, Darvon, & Propoxyphene Products Liability Litigation*, No. 2:11-md-2226-DCR, 2015 WL 858937 (E.D. Ky. Feb. 27, 2015) and 2015 U.S. Dist. LEXIS 65212 (E.D. Ky. May 15, 2015), appeal pending.** Judge Danny C. Reeves of the U.S. District Court for the Eastern District of Kentucky denied a motion to remand to state court individual cases that had been removed to federal court under CAFA's mass action provision and transferred to his court as part of a multidistrict litigation proceeding and subsequently recommended that those individual cases be returned to the federal district courts from which they were transferred (the courts that the cases were originally removed to from state court). With respect to remand to state court, CAFA's mass action provision permits removal of individual cases where the monetary relief claims of 100 or more persons are proposed to be tried jointly based on common questions of law or fact. The court reasoned that because, before removal to federal court, the plaintiffs had proposed that the cases be coordinated "for all purposes" under California law, the plaintiffs had proposed a joint trial. Accordingly, removal under CAFA's mass action provision was proper.

***Long v. State Farm Insurance*, No. 2:13-cv-786, 2015 U.S. Dist. LEXIS 62735 (S.D. Ohio May 13, 2015).** Magistrate Judge Norah McCann King of the U.S. District Court for the Southern District of Ohio recommended denying a defendant's motion to remand a putative class action because the court allegedly lacked subject matter jurisdiction. The defendants had originally removed the action from state court by showing that the asserted class claims satisfied the requirements for CAFA subject matter jurisdiction. After removal, however, the parties stipulated to the voluntary dismissal of the class claims (and all but one of the individual claims). The defendant seeking remand to the state court argued that the federal court lacked subject matter jurisdiction over the remaining claim because that claim did not meet the $75,000 amount-in-controversy requirement for ordinary diversity jurisdiction and CAFA subject matter jurisdiction was no longer available. The court rejected this argument, noting that the determination of federal jurisdiction is made at the time of removal and the later resolution of some claims does not serve to divest the court of jurisdiction.

***Vasquez v. Blue Cross of California*, No. CV-15-2055-MWF (AGRx), 2015 WL 2084592 (C.D. Cal. May 5, 2015).** Judge Michael W. Fitzgerald of the U.S. District Court for the Central District of California refused to remand a class action asserting claims for invasion of privacy, negligence and violations of California's Unfair Competition Law and Data Breach Act for allegedly failing to secure the information of current and past Blue Cross customers, resulting in a breach and theft of personal information by third parties. The court found that minimal diversity existed because the class was not confined to California citizens but also included participants in a "guest member" program "through which Anthem Blue Cross offered membership to insureds of other Blue Plans who are temporarily residing in California" but live permanently in another state. While the complaint did not state what damages were being sought, the defendants demonstrated that the amount-in-controversy requirement was met because the proposed class consisted of all California residents who are current or former Anthem Blue Cross members, estimated between 3.1 and 13.5 million people. The plaintiffs sought to recover restitution, injunctive and declaratory relief, statutory and consequential damages, special and general damages, and attorneys' fees. According to the court, even assuming that the class only encompassed 3.1 million people, each of whom received a small recovery of $1.62 in restitution, the $5 million amount in controversy would be satisfied. Further, the court noted that the costs associated with complying with the requested injunctive relief should also be factored into the calculus, which further weighed against remand.

***Waters v. Electrolux Home Products, Inc.*, No. 5:13CV151, 2015 WL 1914616 (N.D. W. Va. Apr. 27, 2015).** Judge Frederick P. Stamp, Jr. of the U.S. District Court for the Northern District of West Virginia denied the plaintiffs' motion to remand their case to state court, holding that the defendant had demonstrated the requisite amount in controversy. The plaintiffs alleged that the defendant's front-load washing machines were defective and unfit for their essential purpose. In its notice of removal, the defendant asserted that CAFA's amount-in-controversy requirement was met because the plaintiffs' request for injunctive relief would cost the defendant $50 million insofar as it would require shutting down the factory that makes the machine. The defendant, Electrolux, also argued that the total compensatory damages at stake were more than $3.8 million. The plaintiffs responded that the defendant's argument as to the cost of injunctive relief failed because the plaintiffs had not demanded that the factory be shut down, but rather that Electrolux fix the machines in West Virginia, which would likely only cost $20 per machine. The court found that the "injunctive relief may not be as broad as the defendant has suggested but certainly is not as narrow as the plaintiffs have suggested." The court concluded that "a fairly conservative view of the possible injunctive relief, given the plaintiffs' requests in the complaint, would be more than $4,202,220.00." In reaching this conclusion, the court found it proper to rely on the number of washing machines sold to retailers and distributors in West Virginia. The plaintiffs

argued that it was speculative to rely on such data because the class only included people who actually owned the washing machines for personal use. The court rejected this argument, explaining that retailers and distributors only buy machines that they can then resell to consumers. Therefore, the court held that the measurement could properly be used as an estimate of how many machines would fall within the plaintiffs' purported class. According to the court, given the amount of injunctive relief (over $4 million) and compensatory relief (approximately $3.8 million), the defendant had met its burden in proving by a preponderance of the evidence that the amount in controversy exceeds $5 million. The motion to remand was therefore denied.

***Lucas v. Breg, Inc.*, No. 15-cv-258 BAS (KSC), 2015 WL 1843028 (S.D. Cal. Apr. 22, 2015).** Judge Cynthia Bashant of the U.S. District Court for the Southern District of California denied remand of a class action brought on behalf of consumers of certain BREG Polar Care products. After the complaint was amended three times before one state judge, and following a trial in a related case involving millions of consumers of the same products, the parties stipulated to transfer the case to the court that decided the related case. The new judge denied the defendants' demurrers and ruled against the defendants on a number of discovery issues. On February 2, 2015, the defendants received a response to a request for admissions confirming that the plaintiffs were seeking in excess of $5 million, and on February 6, 2015, the defendants removed the case to federal court. Judge Bashant found that the initial and first amended complaints were not removable because they were limited to California consumers and thus lacked diversity of citizenship, and the expanded nationwide classes in the second and third amended complaints sought replacement cost damages "far short" of the $5 million required for removal. The court rejected the plaintiffs' argument that the result of the trial in the related case meant the defendants knew millions of consumers were injured and more than $5 million in ill-gotten gains was at issue because the time limits of Section 1446(b) are based on what is specified in "the four corners of the paper served on the defendant." In other words, the defendants were first put on notice that the amount in controversy exceeded $5 million when they received the response to interrogatories, and the removal was therefore timely. Judge Bashant noted that "[a]lthough this [c]ourt shares the plaintiffs' concern that the defendants may well be forum shopping — choosing to remove after adverse rulings appear to be forthcoming from the state court judge — this is the cost the plaintiffs have assumed by filing an indeterminate pleading."

***Parrish v. Range Resources Corp.*, No. CIV-14-01283-M, 2015 WL 1516424 (W.D. Okla. Apr. 1, 2015).** The plaintiffs initiated a putative class action on behalf of royalty owners of gas wells in Oklahoma, alleging that the defendants unlawfully deducted certain fees from royalty payments. After the defendants removed to federal court, Chief Judge Vicki Miles-LaGrange of the U.S. District Court for the Western District of Oklahoma denied the plaintiffs' motion to remand. In assessing the amount in controversy, the court explained that "the removing party is entitled to present its own estimate of the stakes; it is not bound by the plaintiffs' estimate in the complaint." The court rejected the plaintiffs' argument that the requisite amount in controversy was lacking because they specifically limited their damages to less than $5 million. As the court explained, the plaintiffs had not distinguished between leases that allow for deduction of fees and leases that do not, which allowed the defendants to estimate potential damages based on both types of leases in the aggregate. Because the plaintiffs had not established that recovering more than $5 million is "legally impossible," the court denied the motion to remand.

***Tucker v. Papa John's International, Inc.*, No. 14-cv-0618-SMY-PMF, 2015 WL 1042137 (S.D. Ill. Mar. 6, 2015).** Judge Staci M. Yandle of the U.S. District Court for the Southern District of Illinois denied the plaintiff's motion to remand his case to state court, holding that the defendants had properly removed the case under CAFA. The named plaintiff originally filed his class complaint in the Third Judicial Circuit for Madison County, Illinois, alleging violations of the Illinois Consumer Fraud Act and breach of contract. The defendants timely removed the case to federal court, asserting that the court had jurisdiction under CAFA. In support of their notice of removal, the defendants filed a declaration of their senior tax director setting forth actual damages totaling $582,088.27, which included money collected over a 10-year period. The defendants further estimated the injunctive and declaratory relief requested by the plaintiff at a value approaching $3 million, relying primarily on future cost savings for consumers. The defendants finally stated that punitive damages calculated at a 9-1 ratio alone would satisfy CAFA's $5 million jurisdictional requirement, but that with injunctive and declaratory relief included, a multiplier of 2.51 would bring the total amount in controversy above $5 million. Following removal, the plaintiff moved to remand, arguing that the defendants had improperly calculated actual damages by extending what should be a three-year statute of limitations under the Illinois Consumer Fraud Act to 10 years. In addition, the plaintiff argued that he had not sought punitive damages in his complaint, and that even if the court did consider them in determining the amount in controversy, the defendants had improperly calculated them at the upper end of the constitutional limit. The court rejected these arguments, explaining that the plaintiff did not contest the evidence supporting the defendants' estimates. Because the defendants had put forth factual evidence to demonstrate that it was legally possible for damages in the case to exceed $5 million, the court found CAFA removal proper.

***Allen v. Wilson*, No. CV 14-9686-JGB (AGRx), 2015 WL 846792 (C.D. Cal. Feb. 26, 2015); *Baker v. Fresenius USA, Inc.*, No. CV 14-9698-JGB (AGRx), 2015 WL 846854 (C.D. Cal. Feb. 26, 2015); *Casidsid v. Fresenius USA, Inc.*, No. CV 14-9702-JGB (AGRx), 2015 WL 847102 (C.D. Cal. Feb. 26, 2015).** Judge Jesus G. Bernal of the U.S. District Court for the Central District of California denied motions to remand three related actions brought in California Superior Court alleging product liability claims resulting from the use of the defendants' dialysis treatment products. Numerous similar cases had been coordinated in a judicial council coordinated proceedings (JCCP) action in March 2013. From April to October 2014, the plaintiffs in all three of the instant actions sought and were granted coordination with the existing JCCP action, so that the total number of plaintiffs in the coordinated cases exceeded 100 plaintiffs. The defendants removed all three actions on December 18, 2014. Judge Bernal found that the plaintiffs' petitions to coordinate their actions "before one judge for all purposes" in the JCCP action was a proposal to try them jointly as a mass action under CAFA. Judge Bernal rejected the plaintiffs' reliance on the parties' stipulation to hold four separate "bellwether" trials in the JCCP action because "'claim preclusion' as to the remaining plaintiffs can be enough to qualify the exemplar or bellwether trial as a joint trial" and in any event, "what matters is the proposal." Judge Bernal found the removals timely because they occurred 30 days after *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218, 1220 (9th Cir. 2014) (discussed in the Spring 2015 edition of the *Chronicle* at 19-20), which reversed pre-existing precedent regarding petitions for coordination under CAFA, "chang[ing] the law so as to render removable a previously non-removable case."

***Burton v. Trinity Universal Insurance Co.*, No. CV 14-242-M-DWM, 2015 WL 774262 (D. Mont. Feb. 24, 2015).** The plaintiff brought claims against several insurance companies asserting a scheme to deny insured Montanans appropriate benefits through wrongful collection of subrogation funds and challenged the removal under CAFA for failing to meet the amount-in-controversy requirement of $5 million. Judge Donald W. Molloy of the U.S. District Court for the District of Montana denied the plaintiff's motion to remand. The court held that the defendants showed by a preponderance of the evidence that the amount-in-controversy requirement was met, based on the $1.2 million in compensatory damages at issue, punitive damages at a ratio of 4-1 and projected attorneys' fees calculated at the Ninth Circuit's benchmark of 25 percent of recovery of both compensatory and punitive damages. The court noted that the injunctive relief sought by the plaintiff did not implicate future recovery because it addressed only past subrogation practices and recovery of past subrogation funds and thus did not factor into the amount in controversy.

Decisions Granting Motions to Remand/Finding No CAFA Jurisdiction

***Faust v. Maxum Casualty Insurance Co.*, No. 2:14-cv-674-FtM-29DNF, 2015 U.S. Dist. LEXIS 48897 (M.D. Fla. Apr. 14, 2015).** Judge John E. Steele of the U.S. District Court for the Middle District of Florida remanded a putative class action brought by the plaintiff, alleging that the defendant insurance company breached the terms of his insurance policy by refusing to pay submitted mileage expenses incurred on trips to and from a medical provider. The defendant removed the case to federal court under CAFA and the plaintiff moved to remand, arguing that the $5 million amount in controversy had not been satisfied. Because the plaintiff had not pleaded a specific amount of damages being claimed, the court assessed the evidence proffered by the defendant to determine whether the amount in controversy had been established by a preponderance of the evidence. In support of removal, the defendant claimed that the jurisdictional minimum was easily satisfied because the class seeks "twice the service charge paid"; "the policy at issue provides for $5,000 of benefits" and there are "thousands of class members." However, as the court explained, the value of the claim at issue — not the policy limit set forth in an insurance contract — determines the amount in controversy. The court was persuaded by the plaintiff's proffer that a reasonable mileage rate for travel to and from the doctor is approximately $0.56 per mile; thus, an insured would have to drive approximately 9,000 miles to reach the $5,000 policy limit, which "seeme[d] unlikely." Because the defendant submitted no evidence other than the insurance policy itself, the court concluded that it had failed to carry its burden with respect to the amount in controversy and therefore remanded the case.

***Wilmoth v. Celadon Trucking Services, Inc.*, No. 1:14-cv-2082-WTL-MJD, 2015 WL 1537209 (S.D. Ind. Apr. 6, 2015).** Judge William T. Lawrence of the U.S. District Court for the Southern District of Indiana remanded a putative class action alleging breaches of lease agreements between the defendant, a transportation company, and the plaintiffs, a class of independent owner/operators of trucks. Under the lease agreement, the parties agreed that the defendant could withhold compensation for a driver for, among other things, charges and deductions authorized by the driver. The plaintiffs' complaint, originally filed in Indiana state court, alleged that the defendant withheld more money from the class members' compensation than the defendant actually paid for fuel purchases, thus breaching the lease agreement. The plaintiffs alleged that the defendant owed them a total of $3,805,836, plus prejudgment interest in the amount of $1,721,423.64. The defendant thereafter removed to federal court, asserting that the actual damages and prejudgment interest should be aggregated

and, therefore, that the damages exceeded CAFA's $5 million amount-in-controversy requirement. The plaintiffs then moved to remand to state court, arguing that prejudgment interest cannot be considered in determining whether the action satisfies CAFA's $5 million jurisdictional threshold. The court agreed, holding that prejudgment interest cannot be considered in calculating the amount in controversy for purposes of CAFA. Because the actual damages at issue did not exceed CAFA's $5 million threshold, the court found that it lacked subject matter jurisdiction over the case and that removal was improper.

***Carlson v. United Services Automobile Association,* No. 4:15-cv-6 (CDL), 2015 U.S. Dist. LEXIS 40557 (M.D. Ga. Mar. 30, 2015).** Judge Clay D. Land of the U.S. District Court for the Middle District of Georgia remanded a purported class action filed by the plaintiff, alleging that the defendant insurance company breached the terms of an insurance contract by denying a claim for diminution in value after the plaintiff's vehicle was damaged by a flood. The defendant removed the case under CAFA and the plaintiff moved to remand. The court granted the motion on the ground that the defendant had failed to prove by a preponderance of the evidence that the amount in controversy exceeded $5 million. The plaintiff alleged that "[u]nder no circumstances would the total amount of relief, including both equitable relief and monetary damages, exceed $5,000,000.00" and argued that the court should consider the limitation in finding that the amount-in-controversy requirement had not been satisfied. The court recognized that the U.S. Supreme Court, in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), had instructed courts to "ignore" such a limitation in evaluating the amount in controversy. Nonetheless, the court still found that the amount in controversy had not been established, reasoning that while the defendant had proffered evidence that more than 900 policyholders had experienced losses caused by water damage during the class period, there was no evidence of the amount of potential diminution-in-value claims for these policyholders. In so doing, the court rejected the defendant's argument that it should extrapolate the value of all potential claims based on the plaintiff's allegation that his diminution-in-value claim was worth $9,750. As the court explained, "it would be sheer speculation to assume that all diminution claims are worth $9,750" and the court thus refused to "assume that every potential class member had a new car that was worth as much as or more than [the plaintiff's vehicle.]"

***King v. Mueller*, No. 3:14-1641, 2015 WL 1345174 (M.D. Pa. Mar. 25, 2015).** Judge Malachy E. Mannion of the U.S. District Court for the Middle District of Pennsylvania granted the plaintiffs' motion for remand, finding that CAFA's "local controversy exception" applied. The plaintiffs brought this action against their employers, the operators of McDonald's franchises, in state court, alleging a violation of Pennsylvania's Wage Payment and Collection Law and unjust enrichment. A putative class action was filed against the same defendants a year earlier in the same state court. The defendants in the instant case removed the case to federal court pursuant to CAFA, and the plaintiffs sought remand on the ground that the local controversy exception applied. The only issue before the district court was whether an "other class action" asserting the same or similar allegations against any of the defendants had been filed in the preceding three years. If so, the local controversy exception would not apply. Applying Third Circuit precedent, the district court held that the other class action pending in state court was not another class action "as contemplated" under the local controversy exception. The court determined that "the instant case [was] simply not the kind of case contemplated under CAFA" because it was one of two cases originally filed in the same court and was a truly local controversy uniquely affecting northern Pennsylvania. The requirements of the local controversy exception were therefore met, and the court granted the plaintiffs' motion to remand.

***Turk v. United Services Automobile Association,* No. C14-5878 RBL, 2015 WL 1249177 (W.D. Wash. Mar. 18, 2015).** Judge Ronald B. Leighton of the U.S. District Court for the Western District of Washington remanded an action on behalf of Washington policyholders claiming that USAA failed to pay "loss of use" damages when their vehicles were not usable following an accident because CAFA's $5 million amount-in-controversy requirement was not met. The plaintiff argued that the average loss of use (reflected by the cost to rent an alternate vehicle) was $35 per day, and the average loss for the approximately 5,000 (or 6,000) class members was four days, or $140. The defendants submitted a declaration contending the class consisted of more than 18,000 members and that the damages at issue, injunctive relief and attorneys' fees would total more than $5 million. The court agreed with the plaintiff that USAA's estimated class member numbers were exaggerated, because they did not exclude insureds with rental car coverage in their policies, and that treble damages and attorneys' fees could not be included in the amount in controversy because the complaint was for breach of contract and did not reference any statute "that even theoretically provides for an award of treble or punitive or exemplary damages" or attorneys' fees. Regarding the injunctive relief, the court found that while "'$0' is too little to attribute to the value of injunctive relief in a case claiming that the current practices are, at least, a breach of the insurance contract[,] … at some point, the value or cost of such an effect on claims practice is … purely speculative" and reduced the estimated value of $1.45 million by 20 percent.

The Class Action Chronicle

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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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