

2014 YEAR IN REVIEW – CLASS ACTION LITIGATION

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MEET THE AUTHORS

THAD BEHRENS is Chair of the firm's Class Action Defense practice. He has successfully defended companies, directors and officers in securities class actions, derivative suits, M&A litigation, and proxy contests. In 2014, he again scored major victories for his clients, including a dismissal in the Delaware Chancery Court of a shareholder derivative suit involving an exploration and production company, and a partial summary judgment for the National Football League in a consumer action arising from Super Bowl XLV. Thad is a past president of the Dallas Federal Bar Association, and has been recognized as a *Texas Super Lawyer*.



DAN GOLD is a partner in the firm's class action and securities and shareholder litigation practices. In 2014, among other matters, he obtained a denial of class certification and voluntary dismissal of the remaining individual claims in a putative class action arising out of the collapse of a hedge fund, successfully resolved his clients' counterclaims for attorneys' fees in a fiduciary duty and breach of contract case, and played a leading role in obtaining partial summary judgment for the NFL. In December 2014 Dan was honored as Young Attorney of the Year by the Cardozo Society of the Attorney's Division of the Jewish Federation of Greater Dallas.



NICHOLAS EVEN is Chair of the Securities Litigation group. He currently represents the Board of AT&T, Inc. in shareholder litigation pending in Texas state court. In 2014, among multiple shareholder litigation matters in Texas, Delaware and Maryland, he represented a special committee of directors of Hastings Entertainment in a class action and derivative suit, successfully arguing against an injunction of its planned merger and then obtaining a dismissal. He also successfully advocated for a zero fee award to plaintiffs' counsel in a merger-related class action against FirstCity Financial in Texas state court. He is AV® Peer Review Rated Preeminent by *Martindale-Hubbell® Law Directory*.



CARRIE HUFF is a partner with more than 25 years of experience in class action, shareholder and fiduciary litigation. A major part of her practice is advising attorneys on ethics issues, and in 2014, Carrie became an assistant general counsel of the firm. She also has continued to represent the trustees of family trusts involved in a high-profile, multi-court dispute, and in 2014, secured favorable rulings by the Fifth Circuit affirming the comprehensive settlement of the dispute. Carrie is AV® Peer Review Rated Preeminent by *Martindale-Hubbell® Law Directory*.



JONATHAN PRESSMENT has served as a trusted advisor and counsel to numerous Fortune 500 companies and organizations who have come to recognize that, at a relatively young age, Jon has successfully represented some of the world's most recognized businesses, institutions and individuals in some of their most complex civil litigation matters — including class actions. Most recently Jon served as outside counsel to the National Football League in connection with a series of Super Bowl and Conference Championship related putative class actions.



TAMARA DEVITT is a partner in the firm's labor and employment practice group and she specializes in wage and hour class action litigation. She has litigated numerous wage and hour class and representative actions in state and federal courts, including claims for misclassification, unpaid overtime, meal and rest periods, and off-the-clock work. Tamara recently obtained partial decertification in a wage and hour class action in California state court on behalf of a newspaper publisher, leading to a favorable class-wide settlement of all claims. Tamara was recognized in *Best Lawyers in America* in 2015.



GEORGE W. BRAMBLETT, JR. has been involved in high stakes litigation with significant experience in securities and shareholder litigation. He was named in *Best Lawyers of America* for Commercial Litigation, Securities Law, and "Bet-the-Company" Litigation in 2009-2014. He was named *Best Lawyers' Dallas Litigation Lawyer of the Year* for 2013. He has been recognized by *Chambers USA* as a leading practitioner for General Commercial Litigation. In 2013, he was awarded the Luther (Luke) H. Soules Award for Outstanding Service to the Practice of Law by the Litigation Section of the State Bar of Texas.



SPECIAL THANKS to the following attorneys and staff for their contributions and assistance: David Dodds, Emily Westridge Black, Christopher Quinlan, Phong Tran, William Marsh, and Kathy Gutierrez.

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Clients and Friends,

Welcome to the inaugural issue of Haynes and Boone's Class Action Litigation Year in Review.

Many commenters predicted the death of class actions after the Supreme Court's defense-friendly decisions in *AT&T v. Concepcion*, *Wal-Mart v. Dukes*, and *Comcast v. Behrend*. Like Mark Twain's death those reports have been greatly exaggerated. The plaintiffs' bar keeps filing class actions and surveys consistently find that class actions are among the biggest worries for in-house counsel.

This inaugural Class Action Litigation Year in Review focuses on key federal court decisions issued this year on class action issues. It does not attempt to catalogue every case, but rather, the focus is on a big picture overview of key cases and trends on issues that cut across all types of class actions.

Like the class action landscape, Haynes and Boone's Class Action Defense Practice Group spans across substantive practice areas and industries. We have extensive experience defending all types of class and collective action lawsuits, including consumer, environmental, healthcare, employment, securities, and antitrust litigation. After obtaining denials of class certification in 2013 in significant cases for the National Football League and BP Products North America, 2014 was another busy and successful year for our group. Among other matters, we defeated class certification and obtained a walkaway victory in a case brought by investors in a collapsed hedge fund seeking over \$1 billion in damages; we successfully advocated for a zero fee award in a class action challenging a public company merger and defeated a request for preliminary injunction in another M&A case; and we continued to defend the NFL in putative class action litigation related to multiple Super Bowls, just last month winning dismissal of a highly-publicized case challenging the NFL's distribution of tickets to Super Bowl XLVIII. Lawyers in our group also participated in a rare class action trial, using our expertise to help represent a class seeking to reform the Texas foster care system.

We hope you enjoy this 2014 Class Action Litigation Year in Review. If you have any questions about the issues covered in this 2014 Review, or about our practice, please let us know. We look forward to working with our friends and clients in 2015.

Thad Behrens, Chair

Dan Gold, Partner

Haynes and Boone Class Action Defense Practice Group

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I. CLASS ACTION FAIRNESS ACT

Congress enacted the Class Action Fairness Act of 2005 (CAFA) to lower the diversity jurisdiction requirements for class and mass actions that potentially implicate national or multi-state issues. Under CAFA, parties may remove a case to federal court based on minimal diversity when the action joins the claims of more than 100 persons and the aggregate amount in controversy exceeds \$5 million. However, removal under CAFA is limited when the allegations and parties are primarily local. In 2014, there were several decisions that impacted CAFA, and generally those decisions favored defendants and broad application of federal jurisdiction.

JURISDICTION DETERMINED AT TIME OF REMOVAL

Federal courts consistently held in 2014 that federal jurisdiction is determined at the time of removal, and as a result, subsequent changes causing a suit to no longer meet the requirements of CAFA removal do not defeat jurisdiction. In *Rea v. Michaels Stores, Inc.*, 742 F.3d 1234 (9th Cir. 2014), plaintiffs argued that following removal plaintiffs had made a binding waiver of all damages in excess of \$5 million. They also argued that the class as certified was so much smaller than the originally proposed class that relief over \$5 million would be legally impossible. The Ninth Circuit rejected these arguments and held that the post-removal developments could not affect the appropriateness of the district court's decision to remand.

In *Hoffman v. Nutraceutical Corp.*, 563 Fed. Appx. 183 (3d Cir. 2014), the Third Circuit held that the fact that a proposed class could not be certified, and as a result, only a single claim for \$200 would survive could not preclude jurisdiction under CAFA. The Third Circuit found that if the class had been certified, it would have put more than \$5 million in controversy. That circumstance supported removal at the time, and the court deemed arguments based on the subsequent denial of class certification as without merit. In *Grawitch v. Charter Commc'ns, Inc.*, 750 F.3d 956 (8th Cir. 2014), the Eighth Circuit came to a similar conclusion that subsequent dismissal for failure to state a claim cannot

retroactively render removal under CAFA improper where the plaintiffs' complaint claimed damages in excess of the threshold. A claim's later dismissal is not sufficient evidence that it failed to meet the amount in controversy requirement at the time it was removed.

Even if an individual's claims are later severed from a class or mass action and proceed separately, the federal court maintains jurisdiction if it existed at the time of removal. In *Louisiana v. American Nat'l Prop. & Cas. Co.*, 746 F.3d 633 (5th Cir. 2014), the Fifth Circuit reversed the district court's decision to remand individual cases that had been severed from a class action properly removed under CAFA.

These cases highlight the rule that if the jurisdictional requirements under CAFA are met at the time that the case is removed, then jurisdiction is definitively established and subsequent factual or procedural changes cannot undermine it.

REMOVAL WITHIN THIRTY DAYS

While removal under CAFA is generally subject to a thirty day time limit, that limitation will not run until it is apparent from the plaintiffs' complaint or subsequent papers that removal is appropriate.

In *Rea*, discussed above, the Ninth Circuit held that a defendant could remove a case under CAFA more than thirty days after the filing of a complaint where the complaint was not removable under the controlling precedent when it was filed but later became so due to a change in the law. The *Rea* plaintiffs waived the right to recover any sums in excess of \$5 million, and at the time they did so, such waivers were considered valid and generally precluded federal jurisdiction under CAFA. However, the Supreme Court's subsequent decision in *Standard Fire*, discussed below, reversed this precedent and defendants immediately removed to federal court. The court held that the thirty-day removal period was not triggered with the filing of the complaint because removal based on that document was only apparent much later.

In addition, only when the bases for removal are apparent from the plaintiffs' complaint or the plaintiffs' subsequent documents will the thirty-day requirement begin. *Romulus v. CVS Pharmacy, Inc.*, 770 F.3d 67 (1st Cir. 2014). In *Romulus*, the First Circuit held that despite the fact that defendants had access to the information that eventually showed that the potential damages were greater than \$5 million when plaintiffs first filed their complaint, defendants' thirty-day time limit did not begin until plaintiffs provided them with that information. The complaint did not make it apparent that the \$5 million threshold was met, and the court refused to force defendants to choose between investigating and building plaintiffs' case for them on the one hand and waiving the right to remove on the other.

While prompt removal is generally advisable, courts may permit defendants in certain cases to remove under CAFA well after thirty days from the filing of the complaint.

AMOUNT IN CONTROVERSY

In *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014) the Supreme Court held that plausible allegations that the amount in controversy exceeds the CAFA threshold suffice to support removal under CAFA. Parties seeking removal need not provide evidence that the jurisdictional threshold is met unless and until the opposing party contests the removal.

Additionally, courts will not delve into the merits of the underlying claims that support damages exceeding the jurisdictional threshold. In *McDaniel v. Fifth Third Bank*, 568 Fed. Appx. 729 (11th Cir. 2014) the Eleventh Circuit reversed a district court decision remanding to state court where the plaintiffs' punitive damages claims were necessary to meet the \$5 million threshold but also unlikely to prevail. The critical question is not whether the plaintiff will recover more than \$5 million, "it is enough to show that he *could*." Likelihood of eventual success is irrelevant.

BURDEN OF PROOF FOR LOCAL CONTROVERSY EXCEPTION

Federal courts also expressed reluctance to accept plaintiffs' claims that cases should be remanded to state court under the local controversy and

discretionary exceptions. In *Myrick v. Wellpoint, Inc.*, 764 F.3d 662 (7th Cir. 2014) and *Mayer v. Verizon New Jersey, Inc.*, 2:13-cv-03980 (D.N.J. 2014), the Seventh Circuit and district of New Jersey each determined that plaintiffs had failed to meet their burden to show that two-thirds or more of plaintiffs were residents of the forum state. In *Mayer*, the plaintiffs relied solely on the statement of an ex-defendant employee that purchasers were generally New Jersey residents, but in *Myrick*, plaintiffs had more substantial evidence. There, the insurance policy in question was only marketed to Illinois residents. Nonetheless, the Seventh Circuit distinguished between residency and citizenship and chided the plaintiffs for failure to support their claim with any statistical analysis.

ATTEMPTS TO AVOID CAFA REMOVAL THROUGH STRATEGIC PLEADING

Plaintiffs' counsel commonly structure complaints in an effort to avoid CAFA jurisdiction. In 2014, federal courts considered the efficacy of various methods of avoiding CAFA jurisdiction and in many instances found that removal was appropriate despite plaintiffs' efforts.

CAFA removal not always dependent upon remedies sought

The reverberations of the Supreme Court's 2013 decision in *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013) were felt in 2014. In *Standard Fire*, the Court held that because a pre-class certification disclaimer of all damages in excess of the statutory threshold cannot bind all members of the putative class, it cannot preclude removal under CAFA. Citing *Standard Fire*, the Seventh Circuit in *Johnson v. Pushpin Holdings, LLC*, 748 F.3d 769 (7th Cir. 2014), held that the fact that plaintiffs explicitly sought damages of only \$3.5 million in their complaint was not determinative as to whether the \$5 million threshold was met. As in *Standard Fire*, the plaintiffs could not commit to waive claims for the class pre-certification. The Seventh Circuit accordingly reversed the district court decision and held that the lower court erred by failing to analyze whether the claims could have supported relief in excess of \$5 million.

Even seeking only declaratory relief can be insufficient to avoid CAFA jurisdiction. In *South Florida Wellness v. Allstate Ins. Co.*, 745 F.3d 1312 (11th Cir. 2014), the

Eleventh Circuit held that the declaratory relief sought by plaintiffs met the \$5 million threshold because it could serve as the basis for subsequent litigation that could result in damages of over \$68 million. This holding directly addressed the efficacy of a structural mechanism whereby plaintiffs can largely avoid CAFA removal by trying every issue but damages in state court. If widely adopted, *South Florida Wellness* would substantially limit plaintiffs' ability to avoid federal jurisdiction for factual and legal determinations that then serve as the basis for large litigation and substantial settlements.

Coordination among related cases may impact CAFA removal

In order to avoid CAFA removal, plaintiffs' counsel may elect to bring multiple suits each containing less than 100 plaintiffs. However, when plaintiffs' counsel then attempts to coordinate those related cases, courts must assess how much coordination can occur before the cases are de facto consolidated, resulting in a joint trial and permitting CAFA removal. Last year's decisions highlighted the distinction between consolidation for pre-trial purposes only, and consolidation for all purposes.

In *Parson v. Johnson & Johnson*, 749 F.3d 879 (10th Cir. 2014), the Tenth Circuit held that eleven essentially identical actions, each having less than 100 plaintiffs (although cumulatively having 650 plaintiffs) must be remanded to state court despite the fact that they had all been filed before the same judge and were consolidated for pre-trial purposes. According to the Tenth Circuit, the fact that each case was to be tried before the same judge did not undermine the plaintiffs' ability to manage the structure of their respective cases, nor did it establish the subject matter jurisdiction of the federal court.

In contrast, in *Romo v. Teva Pharm. USA, Inc.*, 731 F.3d 918 (9th Cir. 2014) and its companion case, *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218 (9th Cir. 2014) the Ninth Circuit sitting en banc held that plaintiffs had effectively created a mass action for CAFA purposes when they invoked a California procedural mechanism that allowed plaintiffs to coordinate forty actions that each had almost 100 plaintiffs for "all purposes." In permitting CAFA removal and refusing to remand, the Ninth Circuit distinguished all-purpose coordination from consolidation for pre-trial purposes only.

CIVIL ENFORCEMENT ACTIONS

In 2014, federal courts considered whether civil enforcement actions and similar proceedings could qualify as either mass or class actions and be removed to federal court under CAFA. In both instances, the court held that CAFA did not apply.

In *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), the Supreme Court held that for the purposes of determining whether a suit is a mass action under CAFA, courts cannot look to the unnamed real parties of interest behind a state's civil enforcement action. In *Hood*, defendants argued that Mississippi's enforcement action was on behalf of more than 100 individual citizens that bought defendants' products in Mississippi. As a result, defendants asserted, Mississippi's claim was in fact a joinder of those individual claims and qualified as a mass action. Although the Fifth Circuit agreed, the Supreme Court did not and held instead that in order to qualify as a CAFA mass action there must be 100 or more named plaintiffs – unnamed parties in interest will not suffice.

The Ninth Circuit similarly held in *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117 (9th Cir. 2014), that an action under California's Private Attorneys General Act of 2004 (PAGA) does not fit the CAFA definition of a class action. Under PAGA, private citizens can bring a case seeking civil penalties against companies that violate the California Labor Code, both for violations that directly affected the plaintiffs and for violations directed towards other employees. Citing the Supreme Court's decision in *Hood*, the court held that PAGA is essentially a civil enforcement action. Although a suit under PAGA resembles a Rule 23 class action suit and can result in payments to many parties, it has important differences including the lack of a notice requirement to class members, class members' inability to opt out, and class members' ability to pursue additional claims based on the same conduct. As a result, a suit under PAGA is not sufficiently similar to a Rule 23 class action suit to warrant removal under CAFA.

Together, *Hood* and *Baumann* effectively restrict the ability of defendants to remove based on the unnamed parties in interest in actions other than Rule 23 class actions or their state analogues. These holdings are particularly impactful where a government body attempts to vindicate the rights of its citizens either on its own or through private citizens. Defendants cannot remove such cases to federal court as class or mass actions.

II. CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS

Plaintiffs and some courts continue to question and challenge class action waivers in arbitration agreements despite a series of Supreme Court decisions upholding their validity. In 2014, we saw a number of interesting cases addressing efforts to avoid class action waivers and issues regarding how such provisions are interpreted.

The U.S. Supreme Court made a brief foray back into dealing with issues of class action waivers in *CarMax Auto Superstores California, LLC, v. Fowler*, 134 S. Ct. 1277 (2014) — a California court of appeals case involving the validity of class action waivers in employment arbitration agreements. Following the granting of certiorari, the Court immediately vacated the state court order, and remanded the decision for further reconsideration in light of *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). *CarMax* involved the enforceability of California’s “Gentry Rule” — under which class action waivers in employment arbitration agreements are unenforceable “if class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration.” California’s Gentry Rule is based in large part on the “effective vindication doctrine”— which was specifically disavowed in *American Express*. The U.S. Supreme Court’s immediate decision to vacate and remand *CarMax* suggests a similar fate for California’s Gentry Rule.

In *Sheffer v. Samsung Telecomms. Am., LLC*, No. CV-13-3466-GW (AJWx), 2014 U.S. Dist. LEXIS 17885 (C.D. Cal. Jan. 30, 2014), a California federal judge ordered two putative class actions to arbitrate claims arising out of allegations that Samsung falsely advertised the amount of memory on its Galaxy S4 smartphones. The arbitration agreement in the Samsung phone’s warranty agreement gave customers 30 days to opt out without requiring the return of the phone or paying a fee. The court noted the lengthy grace period and penalty-free opt out clause to distinguish the case from others in which there was no mutual assent. In seeking arbitration, Samsung argued that the plaintiffs could have easily opted out of the arbitration clause, but failed to do so. The plaintiffs

argued that there was no mutual assent because the arbitration clause was inconspicuously placed in the warranty booklet. The court rejected the plaintiffs’ argument, finding Samsung’s arbitration clause was clearly labeled and bolded in the warranty booklet. Although the arbitration provisions were located near the back of 50 page and 101-page operation manuals, “the fact that the warranty’s arbitration clause is contained in a larger document or collection of documents provided with a consumer good does not invariably render that provision unenforceable.”

In *Opalinski v. Robert Half Int’l, Inc.*, 761 F.3d 326 (7th Cir. 2014), the Third Circuit addressed the issue of whether a court, rather than an arbitrator, should decide if an arbitration agreement authorizes classwide arbitration. The Third Circuit became the second circuit to decide this issue, joining the Sixth Circuit to hold that courts should decide this “substantive” question of arbitrability. The court noted that determining “gateway” questions of arbitrability, such as whether parties are bound by an arbitration clause, are tasked to a court, but procedural questions are presumptively for an arbitrator to decide. Because deciding the availability of classwide arbitration necessarily implicates the type of claims and whose claims an arbitrator decides, the court concluded that making such a determination is presumptively a “gateway” matter that courts must resolve. This decision is likely welcomed news to corporate defendants because having a court decide the question of classwide arbitration allows defendants to seek de novo appellate review of such a decision, which is not available if the arbitrator makes the call.

In *Sharpe v. Ameriplan*, 769 F.3d 909 (5th Cir. 2014) the Fifth Circuit addressed the question of how to harmonize language from multiple agreements in deciding the enforceability of arbitration clauses. At issue in *Sharpe* was how to reconcile dispute resolution language from an original agreement — providing for mediation followed by litigation — with a subsequent agreement that modified those terms with a mandatory arbitration clause. The Fifth Circuit reversed a district court’s order compelling arbitration for the claims of

three plaintiffs. In finding the subsequent arbitration clause unenforceable, the court noted that the original agreement, as provided, could only be amended by written agreement executed by all parties. Because this was not done, the original agreement language providing for mediation followed by litigation survived the subsequent attempt at modification. According to the court, this “detailed two-tiered plan” could also not be reconciled with the revised mandatory arbitration clause.

The *Sharpe* case is essentially a lesson about contract drafting. To effectuate a modification to an existing agreement, whether the modification involves an arbitration clause or not, the drafter must abide by any provisions in the existing agreement that govern how that agreement can be amended or modified. The drafter should also identify what specific provisions in any prior agreements are modified by the subsequent modification.

In *Department of Enforcement v. Charles Schwab & Co.*, FINRA No. 2011029760201 (Apr. 24, 2014), the Financial Industry Regulatory Authority (FINRA) — the self-regulatory organization that regulates brokerage firms and exchange markets — also addressed significant arbitration questions in 2014. The FINRA Board of Governors overruled an earlier hearing panel decision that found class action waivers enforceable in investor arbitration agreements.

In October 2011, Charles Schwab sent amendments to customers that included a waiver that required customers to arbitrate their claims disputes on an individual basis and prevented arbitrators from consolidating more than

one party’s claims. FINRA’s Department of Enforcement challenged this provision. The hearing panel found that Charles Schwab’s waiver violated FINRA rules by eliminating the ability for customers to participate in judicial class actions, but found that the Federal Arbitration Act preempted those rules. The hearing panel, however, found Schwab in violation of FINRA rules governing the power of arbitrators to consolidate claims, which the FAA did not preempt.

FINRA itself appealed the decision. On review, the FINRA Board of Governors overruled the hearing panel decision to hold that the FAA does not preclude FINRA’s enforcement of rules that limit the language in arbitration clauses. The board rejected Schwab’s primary argument that FINRA lacked authority to establish arbitration rules because Congress did not grant the SEC (which oversees FINRA) such power. The board, however, upheld the hearing panel’s ruling that Schwab’s waiver violated FINRA arbitration rules regarding consolidating claims. Following the board’s decision, Schwab agreed to pay a fine of \$500,000 and remove the violative language from its customer account agreements.

The FINRA ruling serves as a warning to the financial industry that FINRA will closely scrutinize any attempt to circumvent FINRA rules regarding arbitration. Although the ruling is a firm statement underscoring the ability of FINRA to enforce its own rules, the ruling is unlikely, however, to signal any change to the ubiquity of mandatory arbitration clauses.

III. STANDING AND MOOTNESS

This year, a pair of certiorari petitions highlighted a circuit split regarding whether plaintiffs have standing to pursue damages for alleged statutory violations when they have not suffered concrete harm. A third certiorari petition deals with whether Article III standing requirements apply to each member of a class certified under Rule 23. There were also a number of other important rulings regarding standing in class action cases and whether Rule 68 offers of judgment will moot a plaintiff's claim.

IS ACTUAL HARM REQUIRED TO ESTABLISH ARTICLE III STANDING, OR DOES INJURY-IN-LAW SUFFICE?

Certain federal statutes — including the Fair Credit Reporting Act (“FCRA”), the Electronic Fund Transfer Act (“EFTA”), and the Employee Retirement Income Security Act (“ERISA”) — create private rights of action and provide for awards of statutory damages to individuals impacted by statutory violations. There is a split among the circuits regarding whether statutory damages (or “injury-in-law”) may constitute the “injury-in-fact” required to establish Article III standing. An injury-in-fact is “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The Second and Fourth Circuits have held that plaintiffs do not have standing unless they have suffered a concrete injury-in-fact — the deprivation of a statutory right (and entitlement to statutory damages) is insufficient. *See, e.g., Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112 (2d. Cir. 2009) (alleging ERISA violations); *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013) (same). In contrast, the Sixth, Seventh, and Ninth Circuits have held that injury-in-law is sufficient to confer standing. *See, e.g., Beaudry v. Telecheck Servs., Inc.*, 579 F.3d 702 (6th Cir. 2009) (alleging FCRA violations); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006) (same); *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014) (alleging FCRA violations). The Eighth Circuit has held as well, in some cases. *Charvat v. Mutual First Fed. Credit Union*, 725 F.3d 819 (8th Cir. 2013) (alleging EFTA violations); but see *Wallace v. ConAgra Foods, Inc.*,

747 F.3d 1025 (8th Cir. 2014). In *Wallace*, the court declined to decide the “difficult constitutional question” whether Congress can confer standing by creating a statutory cause of action requiring no showing that the plaintiff was actually harmed, and held that in drafting the Class Action Fairness Act of 2005 (CAFA), Congress intended the term “cases” to incorporate the Supreme Court’s “well-known” injury-in-fact requirement. In *Wallace*, the court ordered plaintiffs’ case remanded to state court because they had not alleged that they were actually injured by the defendant’s allegedly deceptive marketing of Hebrew National hot dogs as kosher.

The Fifth Circuit took a modified approach in *Mabary v. Home Town Bank*, 771 F.3d 820 (5th Cir. 2014). In that case, the plaintiff sought statutory damages arising from defendant’s alleged failure to post a notice regarding fees externally on ATM machines, in violation of the EFTA. The defendant argued that the plaintiff did not have standing to bring the claim because she failed to allege an injury-in-fact. The Fifth Circuit disagreed, and found that the plaintiff had suffered a concrete injury, albeit a “small” one. (Interestingly, the plaintiff did not plead actual injury, but claimed standing by virtue of her statutory cause of action.) The court noted that certain statutes – including those aimed at consumer protection – authorize statutory damages “for violations that cause so little measureable injury that the cost of proving up damages would exceed the damages themselves.” Here, the court held, the plaintiff was injured because she was not provided the information she needed to “decline a transaction before investing the time needed to initiate it.” (One judge on the three judge panel vigorously dissented to the majority’s finding of standing based on a “theory of its own devising.” The dissenter opined that plaintiff lacked standing because, “even assuming that the delayed-notice theory is viable in the abstract,” it is too speculative or conjectural to rise to the level of injury-in-fact. Moreover, the judge found that injury-in-law is insufficient to confer standing because “Congress’s creation of a cause of action can make an injury legally cognizable, but it can’t make a non-injury justiciable in an Article III court.”)

The circuit split on this important issue was brought

before the U.S. Supreme Court twice this year. In March 2014, the Court denied the petition for writ of certiorari in the first case, *Charvat v. First Nat'l Bank of Wahoo*, No. 13-679, which arose from the Eighth Circuit and involved alleged violations of the EFTA. However, the Court appears to be actively considering the certiorari petition in the second case, *Spokeo, Inc. v. Robins*, No. 13-1339, which arose from the Ninth Circuit and involves alleged violations of the FCRA. The Ninth Circuit found that the plaintiff had not suffered concrete injury, but held that injury-in-law was sufficient to confer standing. Specifically, the Ninth Circuit noted that the “creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right” and held that “alleged violations of [plaintiff’s] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III.” In October 2014, the Supreme Court invited the U.S. Solicitor General to weigh in on whether it should grant the certiorari petition. Many have seen the invitation as an indication that the Court will grant review on this case.

MUST EACH PUTATIVE CLASS MEMBER HAVE ARTICLE III STANDING?

Another currently pending petition for certiorari, in *Carpenter Co. v. Ace Foam, Inc.*, No. 14-577, invites the Supreme Court to weigh in on whether the Article III standing requirements apply to each member of a class certified under Rule 23. In *Carpenter*, the plaintiffs alleged that they were injured by an illegal price-fixing scheme orchestrated by the defendants, producers of flexible foam and other foam products. The district court certified two classes of plaintiffs, direct purchasers and indirect purchasers, and the Sixth Circuit affirmed. In their certiorari petition, the defendants allege that the certification was improperly granted because some of the putative class members had not suffered an injury and therefore lacked Article III standing.

The plaintiffs’ experts testified that “all or nearly all class members suffered an antitrust impact that could be proven with common evidence.” The district court accepted this opinion and, relying on *Kohen v. Pacific Investment Management, Co.*, 571 F.3d 672 (7th Cir. 2009), held that “includ[ing] persons who have not been injured by the defendant’s conduct ... does not preclude class certification” if “nearly all class members suffered injury.” In their petition, the defendants highlighted a circuit split among the courts regarding whether each class member must have Article III standing. Although the

Sixth and Seventh Circuits have adopted the “nearly all” standard, other circuits, including the Second, Eighth and Ninth, have held that “no class may be certified that contains members lacking Article III standing.” See, e.g., *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779 (8th Cir. 2013). (The defendants also argued against certification because the plaintiffs’ experts’ analysis showed that most of the class members had not suffered an injury. For example, the expert for the direct purchaser class alleged that there was an antitrust impact on 99 percent of sales, but defendants retorted that the expert’s study showed that, for the majority of the putative class members, “the claimed impact of the alleged conspiracy was not statistically different from zero.”)

The petition is now fully briefed, and several prominent organizations, including the Chamber of Commerce and Dow Chemical Company, have filed amicus curiae briefs.

ARE SPECULATIVE INJURIES SUFFICIENT TO ESTABLISH STANDING?

In the wake of last year’s U.S. Supreme Court opinion in *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013), this year a number of courts addressed whether and when speculative injuries (including increased risks of harm) are sufficient to establish Article III standing. In *Clapper*, the plaintiffs challenged a provision of the Foreign Intelligence Surveillance Act that authorizes surveillance on a showing that the government seeks “foreign intelligence information” and the targets are “reasonably believed to be located outside the United States,” rather than requiring a showing of probable cause that the target is an agent of a foreign power. The plaintiffs alleged that they had incurred expenses and suffered inconvenience trying to secure communications with overseas parties that the government may have targeted for surveillance. The Supreme Court found that the plaintiffs lacked standing because it held that — even if there was an objectively reasonable likelihood that plaintiffs’ communications would be acquired — the injury was too speculative. According to the Court, there were too many “ifs” involved before an injury came to pass and “a highly attenuated chain of possibilities does not satisfy the requirement that threatened injury must be certainly impending.”

Applying *Clapper*, a number of courts found that plaintiffs alleging speculative or future harm lacked standing. For example, the First Circuit affirmed the dismissal of a putative class action in *Kerin v. Titeflex*

Corp., 770 F.3d 978 (1st Cir. 2014), because it found that “the alleged risk of harm is too speculative to give rise to a case or controversy.” The plaintiff in that case alleged that the natural gas tubing installed at his home was defective because it could cause fires if hit by lightning, although he conceded that the tubing complied with applicable regulations. The plaintiff’s tubing had not caused a fire, but he argued that the allegedly defective tubing subjected him to an increased risk of future harm from lightning strikes. The First Circuit found that he did not allege facts that would allow the court to estimate the alleged risk posed by the tubing. Accordingly, the court held that the plaintiff did not have standing because the plaintiff “failed to meet his burden of pleading that the risk of a lightning fire” caused by the tubing “is anything but remote.”

Many courts considering data breach cases found that plaintiffs lacked standing under *Clapper*. For example, in *In re Science Applications Int’l Corp. (SAIC) Backup Tape Data Theft Litig.* (“*In re SAIC*”), No. 12-347, 2014 U.S. Dist. LEXIS 64125 (D.D.C. May 9, 2014), the U.S. District Court for the District of Columbia dismissed 31 of 33 plaintiffs from a consolidated class action against three government defendants and SAIC resulting from a September 2011 data breach for a lack of Article III standing. The data breach occurred when a thief broke into a car belonging to an SAIC employee and stole several data tapes containing the personal information and medical records of 4.7 million members of the U.S. military and their families enrolled in Tricare health care. Citing *Clapper*, the court held that 31 of the plaintiffs in that case lacked standing because they were unable to show an actual injury or imminent harm from the data breach.

Analogizing to *Clapper*, the court in *In re SAIC* held that the loss of data itself was not enough to confer standing on the plaintiffs, nor was an increased risk of harm. The court emphasized that the majority of the plaintiffs’ injuries were purely speculative — the identity of the thief is unknown, the location of the plaintiffs’ information is unknown, and it is unlikely that an average criminal would have the requisite technology to access the data given the format in which it was stored. Only two of the 31 plaintiffs were able to establish standing: one plaintiff allegedly received a letter about a loan for which he never applied, while the other plaintiff claimed she received unsolicited telephone calls targeted at a specific condition in her medical records.

Similarly, a federal district court in *Galaria v. Nationwide Mut. Ins. Co.*, No. 2:13-cv-118, 2014 U.S. Dist. LEXIS 23798

(S.D. Ohio Feb. 10, 2014), dismissed the plaintiffs’ claims for lack of standing when they alleged (1) increased risk of identity theft or fraud; (2) increased cost to mitigate increased risk; (3) loss of privacy; and (4) deprivation of the value of their personally identifiable information as the result of a data breach. The plaintiffs had provided their personal information to the defendant in the process of obtaining insurance, and their information was later compromised as a result of a breach suffered by the defendant. Nonetheless, the court held that the plaintiffs’ speculative injuries did not satisfy the requirements of Article III.

The district court in *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F.Supp.2d 942 (S.D. Cal. Jan. 21, 2014), however, reached the opposite conclusion on similar facts. In that case, the plaintiffs alleged that their personal information (including credit card information) was exposed to hackers who breached Sony’s computer network, exposing them to an increased risk of harm. Sony argued that the allegations were insufficient under *Clapper* because none of the plaintiffs alleged that their information was “actually accessed by a third party,” but the court found that plaintiffs were not required to plead actual access and that their allegations were sufficient to establish standing at the motion to dismiss stage.

In another much-discussed case this year, the court in *In re LinkedIn User Privacy Litig.*, Case No. 5:12-cv-3088, 2014 U.S. Dist. LEXIS 42696 (N.D. Cal. Mar. 28, 2014), held that a putative class action plaintiff had standing to sue under California’s Unfair Competition Law following a 2012 breach suffered by LinkedIn. The plaintiff alleged that she purchased a premium membership from LinkedIn, but did not receive the benefit of her bargain because LinkedIn promised to secure her personal information and failed to do so. The plaintiff further alleged that she relied on LinkedIn’s promise to secure her information when she purchased the premium membership and would not have purchased the membership had she known that LinkedIn would not protect her information. The court held that these allegations were sufficient to confer Article III standing on the plaintiff.

WHEN DO OFFERS OF JUDGMENT MOOT A PLAINTIFF’S CLAIMS?

In *Stein v. Buccaneers Ltd. P’ship*, No. 13-15417, 772 F.3d 698(11th Cir. 2014) the Eleventh Circuit held that a Rule 68 offer to a named plaintiff does not moot a class

action even if the offer precedes a class certification motion, if the named plaintiff is diligently pursuing the class's claims. The plaintiffs in *Stein* brought a class action suit alleging that the Buccaneers Limited Partnership (the "Buccaneers") had violated the Telephone Consumer Protection Act ("TCPA") by sending them unsolicited faxes advertising tickets to National Football League games. They sought statutory damages of \$1,500 per violation. Shortly after the suit was filed, the Buccaneers served each named plaintiff with a Rule 68 offer of judgment for full relief of their individual claims (commonly called a "pick off"). When the plaintiffs did not accept the offers, the Buccaneers filed a motion to dismiss for lack of jurisdiction, arguing that the unaccepted offers rendered the case moot.

The district court granted the motion to dismiss, but the Eleventh Circuit reversed on the basis of two alternative holdings: *First*, the court held that unaccepted Rule 68 offers do not moot a plaintiff's individual claims. Rule 68 provides that "[a]n unaccepted offer is considered withdrawn" and "[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs." Citing to the Supreme Court dissent in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), the court held that a Rule 68 offer cannot moot a plaintiff's claims because "a case becomes moot only when it is impossible for a court to grant any effectual relief," but when a plaintiff rejects a Rule 68 offer, "her interest in the lawsuit remains just what it was before." (In *Maier v. J.C. Penney Corp.*, 2013 U.S. Dist. LEXIS 84246 (S.D. Cal., June 13, 2013), a district court in the Southern District of California also relied on *Genesis* to reach the same conclusion in another TCPA case.)

Second, and alternatively, the court held that even if a Rule 68 offer moots a plaintiff's individual claims, it does not preclude the plaintiff from pursuing claims on behalf of the class – even if a motion for class certification has not yet been filed. The court relied heavily on *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030 (5th Cir. 1981), a binding opinion issued by the Fifth Circuit before the Eleventh Circuit was split from it, in its analysis. In *Zeidman*, the court held that a named plaintiff with mooted individual claims could represent a class because otherwise defendants would "have the ability by tender to each named plaintiff effectively to prevent any plaintiff in the class from procuring a decision on class certification." Unlike the *Stein* case, however, the *Zeidman* plaintiffs' claims were not mooted until after they had filed a motion to certify the class. The *Stein* court held that the timing of the Rule 68 offer was

immaterial, and that "[w]hat matters is that the named plaintiff acts diligently to pursue the class claims." (The Fifth Circuit adopted the same approach in *Mabary v. Home Town Bank*, 771 F.3d 820 (5th Cir. 2014), and held that, even when a rejected Rule 68 offer is made before the class certification motion is filed, a plaintiff is not precluded from proceeding with class claims.)

With the *Stein* decision, the Eleventh Circuit has adopted the position taken by the Third, Fifth, Ninth and Tenth Circuits. Indeed, this year the Ninth Circuit indicated in *Sultan v. Medtronic, Inc.*, No. 12-57072, 2014 U.S. App. LEXIS 20021 (9th Cir. Oct. 20, 2014), that a named plaintiff may accept a Rule 68 offer and continue to serve as a class representative, so long as the plaintiff retains some "personal stake" and does not release "any and all [of his] interests" in the claims. The Seventh Circuit, in contrast, held in *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011), that a named plaintiff cannot represent a class if the defendant tenders the Rule 68 offer before the motion to certify is filed. In *Stein*, the Eleventh Circuit criticized this approach as likely to "produce unnecessary and premature certification motions in some cases and unnecessary gamesmanship in others." (Even the Seventh Circuit seems to have concern about its approach, noting in *Scott v. Westlake Fin. Servs.*, 740 F.3d 1124 (7th Cir. 2014), that "there are reasons to question our approach to the problem," but declining to address the issue because the appellee did not raise it. In that case, the Seventh Circuit reversed the dismissal of a putative class action because the defendant's Rule 68 offer did not satisfy the named plaintiff's entire demand.) Given the circuit split (and unless the Seventh Circuit reverses course), the issue may be ripe for consideration by the Supreme Court.

Although not in the context of Rule 68 offers, the Eastern District of Michigan (which lies in the Sixth Circuit) held this year that a putative class action could not proceed when the named plaintiffs' claims had been mooted prior to class certification in *Hadley v. Chrysler Group, LLC*, 2014 WL 9889632 (E.D. Mich. March 13, 2014). In that case, the plaintiffs alleged that Chrysler had failed to timely repair airbag defects on three models of cars that had been recalled (allegedly because the necessary repair parts were unavailable). However, before the class was certified, the named plaintiffs were notified that the parts were available to repair their model of car. The court found that this mooted their individual claims and that they could not proceed with the class's claims.

IV. ASCERTAINABILITY

In addition to the requirements for class certification set out in Federal Rule of Civil Procedure 23(a), courts require that membership in a putative class be ascertainable. This means that members of a proposed class must be “readily identifiable” by reference to “objective criteria.” *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). While not every member of the class needs to be identified in order for the class to be certified, the proposed method of ascertaining membership in the class must be administratively feasible. A defendant must challenge “ascertainability” of the class in response to a motion for class certification or potentially forfeit the argument. See *American Copper & Brass, Inc. v. Lake City Indus. Products, Inc.*, 757 F.3d 540, 545 (6th Cir. 2014). Increasingly, courts are focusing on the ascertainability requirement at the class certification stage.

ASCERTAINABILITY REQUIRES A PROPOSED METHOD TO IDENTIFY CLASS MEMBERS

To demonstrate ascertainability of the class, the named plaintiff representing the putative class must provide a method by which members of the class can be identified. In *Sethvanish v. ZonePerfect Nutrition Co.*, 2014 WL 580696 (N.D. Cal. Feb. 13, 2014), the court denied plaintiff’s motion for class certification because the plaintiff failed to provide a method for ascertaining class membership. The proposed class included all people who purchased ZonePerfect Bars in the United States on or after September 14, 2007. The plaintiff argued that the class definition alone was sufficient because it allowed for identification of class members through objective criteria. However, the court stated it was “unclear” how the plaintiff intended to determine who purchased ZonePerfect bars during the proposed class period or how the plaintiff intended to “weed out” inaccurate or fraudulent claims. Without any proposed method to identify class members, the court could not find the proposed class ascertainable.

Likewise, in *Martin v. Pacific Parking Sys., Inc.*, 583 Fed. Appx. 803 (9th Cir. 2014), the Ninth Circuit affirmed the

denial of class certification because the named plaintiff failed to provide a feasible method to ascertain class members. The plaintiff brought claims on behalf of a class of individuals who used personal credit cards to purchase parking at a local beach. The parking permits allegedly printed with credit card expiration dates in violation of the Fair and Accurate Credit Transactions Act. The plaintiff specifically excluded business credit cards from the class definition. On appeal, the Ninth Circuit affirmed the denial of class certification because the plaintiff had not demonstrated how it would be administratively feasible to determine which individuals used personal cards or business cards. The Ninth Circuit also noted that it was not clear from the record that the plaintiff provided an administratively feasible manner in determining whether individuals met other aspects vital to class membership, such as whether the individual actually received a parking permit with a printed expiration date or whether the individual suffered identity theft. Apart from the feasibility of making such determinations, the Ninth Circuit stated “[m]ost importantly, [the plaintiff] has pointed this court to no place in the record where he proposed even a general plan to the district court in making these determinations.”

ASCERTAINING CLASS MEMBERS BY CUSTOMERS’ RECEIPTS

As the Ninth Circuit indicated in *Martin*, ascertainability requires the method used to identify class members be feasible. In *Karhu v. Vital Pharm.*, 2014 WL 815253 (S.D. Fla. Mar. 3, 2014), the court denied a motion for class certification because the plaintiff did not propose a feasible or realistic method of identifying individuals in the putative class. The plaintiff brought a class action on behalf of all consumers who purchased a dietary supplement named Meltdown during a set time period because the supplement allegedly was not effective for its advertised purpose of “burning fat.” The court in *Karhu* noted that because Meltdown was a relatively small purchase, it was less likely that purchasers retained their receipts. Thus, relying on receipts to ascertain members of the class would not be helpful in

identifying class members either. In contrast, other courts have permitted plaintiffs to rely on customer receipts for relatively small purchases in establishing ascertainability of the class. For example, in *Ebin v. Kangadis Foods Inc.*, 2014 WL 737960 (S.D.N.Y. Feb. 25, 2014), the class administrator proposed three ways to identify class members, one of which was for individuals to present receipts of purchase for the product central to the claims in the case. The defendant argued that it was not realistic to believe that proposed class members kept receipts of the transactions because the purchases at issue were relatively small. The court acknowledged the issues in relying on customer records, but held “the ascertainability difficulties, while formidable, should not be made into a device for defeating the action.”

Even though courts are sometimes skeptical of the ability to ascertain class members through customer records of smaller purchases, when the customer has reason to retain the receipt or other records, courts may be more amenable to the notion. In *Nieberding v. Barrette Outdoor Living, Inc.*, 302 F.R.D. 600 (D. Kan. 2014), the named plaintiff sought class certification for claims alleging that guardrails sold by the defendants included defective plastic brackets. The plaintiffs suggested that membership in the class could be ascertained by requiring that class members submit a claim form with proof of purchase (receipt, photos, etc.), which was required by the manufacturer defendant’s warranty program. The court found the proposed method reasonable. Moreover, the court was not receptive to defendant Home Depot’s argument that because Home Depot did not keep records of who purchased the railing system, the class was not ascertainable. The court summarized Home Depot’s argument as proposing “that a retailer who sells defective products could immunize itself from class certification by merely choosing not to keep records of the people who bought the defective product.” The court noted that because class recovery was the only “realistic” option in these type cases and sellers will not always maintain records, alternative methods to identify class members must be permitted.

ASCERTAINING CLASS MEMBERS THROUGH RECORDS OF DEFENDANTS OR THIRD-PARTIES

Some plaintiffs have found success referencing records maintained by the defendant that aid in identifying class

members to establish ascertainability. In *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240 (N.D. Ill. 2014), the named plaintiffs sought class certification for telemarketing calls made by the defendants in violation of the Telephone Consumer Protection Act (TCPA). The plaintiffs received from the defendants a list of 930,000 unique telephone numbers that the defendants called and suggested class members could be ascertained by reference to the list. The defendants argued the list did not identify who subscribed to the telephone line and uncovering the identity of each subscriber would “be onerous and costly.” The plaintiffs responded that the ascertainability requirement did not entail identifying every class member by name at the class certification stage. Moreover, the plaintiffs had access to the information necessary to identify class members, and this satisfied the ascertainability requirement. The court agreed with the plaintiffs and held that the identities of members of the class were sufficiently ascertainable by reference to the list.

The plaintiff in *Ades v. Omni Hotels Mgmt. Corp.*, 2014 WL 4627271 (C.D. Cal. Sept. 8 2014) successfully referred to a list of phone numbers and telecommunications databases maintained by Omni and records provided by third-party wireless carriers to establish ascertainability. The plaintiffs alleged that Omni recorded calls made to its toll-free numbers without informing the callers in violation of the California Invasion of Privacy Act. In order to qualify for the class, the caller had to be physically located in California at the time of the call. Plaintiffs suggested that location could be determined objectively through records of the wireless carrier. Omni argued that the records of wireless carriers might not be produced or could be inaccurate. The court stated that it did “not find a lack of ascertainability to defeat class certification here” because the potential class members could “show that they fit in the class definition through the records identified by the plaintiffs.”

However, the court in *Karhu v. Vital Pharm.*, 2014 WL 815253 (S.D. Fla. Mar. 3, 2014) (discussed above), rejected the plaintiff’s suggestion of relying on the defendant’s sales data to identify members of the proposed class who had purchased the dietary supplement in question. The court found that this method was not realistic because the defendant made sales to distributors and retailers, and did not maintain records showing who purchased the product at retail. Reference to the defendant’s records would not yield

any useful information about members of the class, making plaintiff's proposed method of ascertaining class membership infeasible.

Plaintiffs also are not always able to obtain defendants' records containing information about putative class members because the records have been lost or destroyed. In *Donaca v. Dish Network, LLC*, 2014 WL 623396 (D. Colo. Feb. 18, 2104), the plaintiff attempted to certify a class of individuals for calls made by telemarketers on behalf of Dish Network in violation of the TCPA. However, the plaintiff could not identify a single phone number apart from his own that received a call. All of the defendants' records that could have aided in identifying potential class members were lost or destroyed. The plaintiff argued that because he could not identify any other source that could ascertain the identities of potential class members, the court would reward the defendant for destroying the records by denying certification of the class. The court stated that even if the defendant intentionally destroyed the records, a proposition for which the plaintiff had not shown any evidence, the court could not fix the inherent ascertainability problem of the proposed class.

Even if records that help identify class members exist, the records may not provide sufficient information to establish ascertainability. In *Sterritt v. The Clorox Co. (In re Clorox Consumer Litig.)*, 301 F.R.D. 436 (N.D. Cal. 2014) the plaintiffs looked to records maintained by third-party retailers to identify class members. The plaintiffs brought claims against Clorox for false and misleading advertising about the Clorox product Fresh Step. The plaintiffs reached out to third-party retailers for records of Fresh Step purchases that would help the plaintiffs ascertain members of the class. Only five retailers provided any information, and the supplied information provided enough to identify only a small portion the class. The court found that the plaintiffs' evidence demonstrated there was no administratively feasible method for ascertaining who belonged to the class.

In *EQT Production Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (discussed above), the Fourth Circuit overturned a district court's decision to certify a class because the records the plaintiffs used to establish membership in the class were outdated and presented significant administrative hurdles in actually identifying individuals in the class. The dispute underlying the class claims involved ownership of

mineral interests. The district court defined the classes to include all persons, and their successors-in-interest who the defendants had identified in ownership schedules filed 20 years prior with the Virginia Gas and Oil Board. While the district court correctly concluded that some class members could be identified by reference to the ownership schedules, ownership had changed hands since that time. The district court noted that ownership could be determined by reference to local land records, but the Fourth Circuit did not think the local land records would readily identify current owners due to title-defect issues and heirship disputes. The Fourth Circuit held that this was a "significant administrative barrier to ascertaining the ownership classes." The plaintiffs argued that these determinations could be made on the back-end of the litigation, but the Fourth Circuit disagreed, stating that without an estimate of the number of successors-of-interest, the court could not perceive who would be bound the litigation.

ASCERTAINING CLASS MEMBERS THROUGH CLAIMS FORMS OR AFFIDAVITS

Some plaintiffs have attempted to establish ascertainability by suggesting class members submit claim forms or affidavits attesting to membership in the class. In *Stewart v. Beam Global Spirits & Wine, Inc.*, 2014 WL 2920806 (D.N.J. June 27, 2014), the court rejected such a method for claims involving the purchase from defendants of alcoholic beverages. One of the defendants argued that the method would make it "impossible to determine class membership without [engaging in] significant inquiry," making class certification improper. Similarly, another defendant contended that the "only way to ensure Defendants their due process rights would be to allow individualized fact-finding and mini-trials as to every single absent class member's claim." Apart from the fact that plaintiff suggested that putative class members only submit affidavits to ascertain their membership, the court stated that the plaintiffs failed even to provide what details proposed class members would provide in the affidavits, such as dates of purchase, quantity, cost, etc. Those details would be necessary to ascertain if the member belonged to the class.

V. NUMEROSITY

Class certification is only appropriate where “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). This numerosity requirement is not often at issue because most class actions are brought on behalf of large groups. Decisions in 2014, however, serve as a reminder that numerosity cannot not be taken for granted and must be proven by plaintiffs with evidence.

Mullis v. Mountain State Univ., Inc., No. 5:12-3158, 2014 U.S. Dist. LEXIS 40686 (S.D. W. Va. Mar. 27, 2014) illustrates that a plaintiff’s speculation about the size of the putative class will not suffice to meet the numerosity requirement. The named plaintiff attended an online educational program that required her to attend a clinical externship to graduate, but there were no externship sites within a three-hour drive of her location. She brought a putative class action on behalf of similarly situated students and asserted “[t]here can be little question that the class of students proposed here, which numbers in the hundreds, meets the numerosity requirement.” The court took a different view. Reviewing evidence submitted by the defendant, the court concluded that “Plaintiff’s mere speculation does not meet her burden, and she has provided no meaningful evidence that refutes the evidentiary support for a much more modest estimation of the size of the proposed class.” That uncertain class size, along

with other factors such as the ability to identify putative class members and the not insubstantial size of the claims, meant that the plaintiff has not shown that joinder was impracticable. Similarly, in ***Spread Enters., Inc. v. First Data Merchant Servs. Corp.***, 298 F.R.D. 54 (E.D.N.Y. Feb. 22, 2014), the court concluded that “the Plaintiff’s estimate concerning the size of the Class [wa]s speculative” because the evidence was “over-inclusive” and did not acknowledge that many of the persons “that the Plaintiff assumes would be Class members might not actually share the Plaintiff’s breach of contract claim for [a] host of reasons.”

In re Parkcentral Global Litig., 2014 U.S. Dist. LEXIS 121571 (N.D. Tex. Aug. 25, 2014) — a case in which Haynes and Boone represented the defendants — reminds us that the touchstone for numerosity is the practicability of joinder, not just the size of the putative class. The putative class in *Parkcentral* consisted of around 112-130 investors in a hedge fund that collapsed during the financial crisis. The court found that joinder was practical because the investors could easily be identified, were sophisticated and had substantial damages claims, and had all interacted with the Dallas-based fund. The court accordingly denied class certification for failure to show numerosity under Rule 23(a), and further found that the requirements of Rule 23(b) were not met.

VI. ADEQUACY

Another requirement for class certification is the requirement that “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This “adequacy” requirement is often overlooked, but two cases in 2014 reflect that courts may be taking a hard look at whether the plaintiffs have carried their burden of proving their adequacy to serve as class representatives.

In ***In re Kosmos Energy Ltd. Secs. Litig.***, 2014 U.S. Dist. LEXIS 36365 (N.D. Tex. Mar. 19, 2014), the plaintiffs sought certification in a putative securities class action. The only adequacy evidence submitted by the plaintiff was a declaration containing what the court viewed as “little more than formulaic, boiler-plate assertions.” The court found the declaration insufficient, particularly in

light of deposition testimony submitted by the defendants, of fulfilling plaintiffs’ burden to “produce actual, credible evidence that the proposed class representatives are informed, able individuals, who are themselves--not the lawyers--actually directing the litigation.”

Diaz v. Res. Credits Sols., Inc., 297 F.R.D. 42, 52 (E.D.N.Y. 2014) involved a similar failure to provide actual evidence of adequacy. As a consequence, the court “denie[d] the Plaintiff’s motion for class certification without prejudice with leave to renew upon the submission of proof that the Plaintiff (1) understands her role as a class representative; (2) is knowledgeable about this action; and (3) has no known conflicts of interest with any of the potential class members.”

VII. PREDOMINANCE

In class actions in which damages are sought, plaintiffs typically seek certification pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, which requires a court to find “that the questions of law or fact common to class members predominate over any questions affecting only individual members.” FED. R. CIV. P. 23(b)(3). As in prior years, federal case law in 2014 continued to develop the contours of the predominance requirement.

PLEADINGS INSUFFICIENT TO ESTABLISH PREDOMINANCE

The Supreme Court made clear in 2011 that “Rule 23 does not set forth a mere pleading standard.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). In 2014, the Seventh Circuit applied this principle to the predominance requirement and reversed class certification in a case because the trial court had erred by “treat[ing] predominance as a pleading requirement.” *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1086 (7th Cir. 2014). It was not enough that the plaintiffs had intended to rely on common evidence and a single methodology to prove injury and damages. *See id.* “[I]f intentions (hopes, in other words) were enough, predominance, as a check on casting lawsuits in the class action mold, would be out the window.” *Id.* The Seventh Circuit stated that the district judge should have “investigated the realism of the plaintiffs’ injury and damage model in light of the defendants’ counterarguments, and to that end should have taken evidence.” *Id.*

HOW CAN EVIDENTIARY PRESUMPTIONS ASSIST IN PROVING PREDOMINANCE?

In 2014, the Supreme Court in *Halliburton Co. v. Erica P. John Fund* addressed the proof requirements for the fraud-on-the-market presumption of reliance, which is the means by which plaintiffs typically attempt to satisfy the predominance requirement in class actions alleging federal securities fraud. *See* 134 S. Ct. 2398 (2014).

By way of introduction, a plaintiff’s reliance on the defendant’s misrepresentation is an essential element in private federal securities fraud claims. However, requiring direct proof of reliance in class actions alleging securities fraud would make individual issues of reliance overwhelm the common ones, thereby making it impossible to satisfy the predominance requirement. In 1988, the Supreme Court in *Basic Inc. v. Levinson* considered this dilemma and held that investors could prove reliance in a federal securities fraud class action by invoking a presumption that the price of stock, traded in an efficient market, reflects all public, material information — including material misstatements. *See Basic*, 485 U.S. 224, 246-47. In such a case, anyone who buys or sells the stock at the market price may be considered to have relied on the misstatements. *See id.* at 247. The Court in *Basic* also held that a defendant could rebut this presumption in a number of ways, including by showing that the misstatements did not actually affect the stock’s price. *See id.* at 248.

The Supreme Court in *Halliburton* reaffirmed *Basic*’s presumption of reliance. *See Halliburton*, 134 S. Ct. at 2407-13. Notwithstanding that the “efficient capital markets” hypothesis on which the *Basic* presumption is based “may have ‘garnered substantial criticism since *Basic*,’” the Court was not persuaded that there had been “the kind of fundamental shift in economic theory” that could justify overruling *Basic*. *See id.* at 2410.

The Court also addressed the proof requirements for invoking (and defeating) the *Basic* presumption. First, the Court declined to require a plaintiff to prove that a defendant’s misstatement actually impacted the stock price to invoke the presumption. *See Halliburton*, 134 S. Ct. at 2413-14. The Court observed that such a modification of the *Basic* presumption “would radically alter the required showing for the reliance element of the Rule 10b-5 cause of action.” *See id.* at 2414. Moreover, the Court held that a defendant’s proof of the lack of a price impact is not limited to the merits stage; rather, a defendant can defeat the *Basic* presumption at the class certification stage by proving “that the misrepresentation did not in fact affect the stock price.” *See Halliburton*, 134 S. Ct. at 2414-17.

In sum, *Halliburton* does not change longstanding federal securities class action practice whereby plaintiffs attempt to satisfy their burden of proving the predominance requirement of Rule 23(b)(3) by proving the prerequisites for invoking the *Basic* presumption of reliance. However, *Halliburton* clarifies that defendants can attempt to defeat plaintiffs' invocation of the *Basic* presumption through evidence that an alleged misstatement did not actually affect the market price of the stock.

Halliburton was not the only federal case in 2014 that discussed the use of a presumption to prove predominance. In *Ortega v. Natural Balance, Inc.*, a federal district court in California certified a class involving California statutory consumer protection claims against a manufacturer of a dietary supplement based on a presumption under California case law that "a plaintiff can trigger a rebuttable presumption of reliance and causation as to absent class members if the defendant's alleged statements were material and made to the entire class." 300 F.R.D. 422, 429 (C.D. Cal. 2014). The district court found that "[p]laintiffs have presented a strong case that they will be able to rely on the presumption of reliance and causation" and concluded that common issues predominated. *Id.* at 428-29.

However, in another case also involving California statutory consumer protection claims, the Ninth Circuit in *Berger v. Home Depot USA, Inc.*, affirmed the denial of class certification on the plaintiff's claims against Home Depot notwithstanding that one of these claims did not require proof of reliance and the other was subject to a California class-wide presumption — referenced in *Berger* as an "inference of reliance" — if the misrepresentations were made to the entire class. See 741 F.3d 1061, 1068-70 (9th Cir. 2014). The plaintiff had not alleged that each of the class members were exposed to Home Depot's alleged deceptive practices or allegedly misleading statements. See *id.* at 1069-70. Also, the plaintiff's common law claim for unjust enrichment required proof of injustice, which necessarily rested on individualized determinations. See *id.* at 1070. Accordingly, the Ninth Circuit held that the trial court had not abused its discretion in denying certification because the record did not show that common questions predominated over individual issues in any of the plaintiff's claims. See *id.* at 1069-71.

DOES PREDOMINANCE REQUIRE A CLASS-WIDE DAMAGES METHODOLOGY?

In *Comcast Corp. v. Behrend*, the Supreme Court held that the predominance requirement was not met in a proposed antitrust class action in which the plaintiffs' damages model did not attempt to identify the damages attributable to the plaintiffs' only viable theory of liability. See 133 S. Ct. 1426, 1433-35 (2013). Following *Comcast*, federal courts agree that Rule 23(b)(3) predominance requires that a plaintiff's measure of damages match its theory of liability. See, e.g., *In re Cablevision Consumer Litig.*, 2014 WL 1330546, at *13 (E.D.N.Y. Mar. 31, 2014) (granting certification when plaintiffs' measure of damages was *directly linked to their theory of liability* and was capable of measurement on a class-wide basis); *Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097, at *12 (N.D. Cal. Jan. 7, 2014) (denying certification in part because plaintiff had not met her burden of showing a class-wide method of awarding relief *consistent with the plaintiff's theories of liability*).

Federal courts differ, however, as to whether *Comcast* requires a class-wide damages methodology, and whether, absent such a methodology, a class can be certified on issues limited to liability. See, e.g., *Haskins v. First Am. Title Ins. Co.*, 2014 WL 294654, *15 (D.N.J. Jan. 27, 2014) ("There is disagreement among the parties . . . and certainly among the courts within the Third Circuit, as to whether or not this 'damages on a classwide basis' language is merely dicta or binding precedent"). Two federal court decisions from 2014 support the use of class certification on issues limited to liability in cases where predominance is not established on issues related to damages. First, in *In re IKO Roofing Shingle Prods. Liab. Litig.*, the Seventh Circuit rejected the district court's interpretation of *Comcast* as requiring commonality of damages as an indispensable prerequisite to certification. See 757 F.3d 599, 603 (7th Cir. 2014). The Seventh Circuit found that the plaintiffs' two damage theories matched their theory of liability, as *Comcast* requires. *Id.* Although one of the plaintiffs' two damage theories would require buyer-specific hearings, it nevertheless would not be difficult to frame liability issues amenable to class-wide resolution. *Id.* The Seventh Circuit thus vacated the district court's denial of class certification and remanded to the district court to apply the correct legal standard in deciding whether to certify a class. *Id.* at 603-04.

Second, in *Fort Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co.*, a district court in the Southern District of New York found that the proposed class met the predominance requirement for liability purposes, but not for ascertaining class-wide damages. See 301 F.R.D. 116, 140-42 (S.D.N.Y. 2014). The court concluded that a class on the issue of the defendants' liability would "materially advance the disposition of the litigation as a whole" and therefore certified a class only as to liability. See *id.*

The Supreme Court in 2014 declined discretionary review of three class certification decisions in which the Court potentially could have clarified the scope of its holding in *Comcast*. See *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013), *cert. denied sub nom. Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014); *Cobb v. BSH Appliances Corp.*, No. 13-80000, 2013 WL 1395690, at *1 (9th Cir. Apr. 1, 2013), *cert. denied sub nom. BSH Home Appliances v. Cobb*, 134 S. Ct. 1273 (2014). In the *Whirlpool* and *BSH Appliances* cases, the petitioners requested the Court to consider, among other issues, whether Rule 23(b)(3) predominance can be satisfied when the class members' injuries or damages cannot be proven on a class-wide basis. Also, in the *Whirlpool* and *Sears* cases, the petitioners requested the Court to consider, among other issues, the related question of whether predominance can be satisfied when most class members did not experience the alleged defect. Following the Supreme Court's denial of discretionary review in *Whirlpool*, the case proceeded to trial before a federal jury in the Fall of 2014 and resulted in a verdict for the defendants.

Another petition for certiorari on these two issues is currently pending in *Carpenter Co. v. Ace Foam, Inc.*, No. 14-577. The petition is fully briefed, and practitioners are hoping that the Supreme Court's decision will provide discretionary review to provide federal circuit and district courts with guidance on these recurring issues.

MATERIAL VARIATIONS OF STATE LAW IN MULTI-STATE CLASS ACTIONS

Two federal cases from 2014 illustrate how multi-state classes asserting state law claims can fail the Rule 23(b)(3) predominance requirement.

First, in *Grandalski v. Quest Diagnostics Inc.*, the Third Circuit affirmed a New Jersey federal district court's denial of class certification as to the plaintiff's state law consumer fraud claims in a purported nationwide class action. See 767 F.3d 165, 179-84 (3rd Cir. 2014). In *Grandalski*, the plaintiff sought certification of several proposed classes in a case asserting state law consumer fraud and unjust enrichment claims arising from a medical testing company's alleged overbilling of patients. See *id.* at 177-78. The Third Circuit concluded, under New Jersey choice of law principles, that the laws of the putative class members' home states applied to their state law claims. See *Grandalski*, 767 F.3d at 180-83. Also, while "grouping similar state laws together and applying them as a unit" may in some cases be "a permissible approach to nationwide class action litigation," the Third Circuit agreed with the district court's finding that the plaintiffs had failed to provide a sufficient analysis describing how the grouped state laws might apply to the facts of the case. See *id.* at 183-84. Thus, it was not an abuse of discretion for the district court to find that "class litigation involving dozens of state consumer fraud laws was not viable and that common facts and a common course of conduct did not predominate." *Id.* at 184.

Similarly, in *Holt v. Globalinx Pet LLC*, a federal district court in California held that material differences in the laws of the states potentially governing the nationwide putative class members' claims precluded a finding of predominance, thereby warranting the denial of class certification. See 2014 WL 347016, at *4-8 (C.D. Cal. Jan. 30, 2014). The court observed that "when the causes of action . . . are based on state statute or common law, material differences in state law across the jurisdictions covered by the class may 'compound the disparities' among class members from different states and reveal that a proposed class fails to satisfy the predominance requirement." *Id.* at *4.

AFFIRMATIVE DEFENSES THAT REQUIRE AN INDIVIDUALIZED INQUIRY

As demonstrated in *In re Google Inc. Gmail Litig.*, 2014 WL 1102660 (N.D. Cal. Mar. 18, 2014), affirmative defenses that require an individualized inquiry will likely preclude a finding of predominance. In *Google*, the plaintiffs brought claims on behalf of several purported classes and subclasses and alleged that Google had intercepted e-mails of users of Gmail accounts over

several years, in violation of federal and state anti-wiretapping laws. *Id.* at *1. The federal district court found that individualized questions as to whether the purported class members consented to the interceptions, “which will likely be Google’s principal affirmative defense,” were likely to overwhelm any common issues. *Id.* at *21. Accordingly, the court denied class certification on predominance grounds. *Id.*

The court observed that whether a proposed class of educational users expressly consented to Google’s interception of their e-mail would require individualized inquiries. See *Google*, 2014 WL 1102660, at *14-15. Specifically, express consent is usually a question of fact, where a fact-finder must interpret the express terms of any agreements to determine whether they adequately notified individuals regarding the interceptions. *Id.* at *15. Given that “Google had no single policy that required all Google Apps Administrators to provide the same disclosures to end users,” the “end users received vastly different disclosures depending on with which educational institution they were affiliated.” *Id.*

In addition, whether the members of the other proposed classes impliedly consented to Google’s interception of their e-mail would likewise require individualized inquiries. See 2014 WL 1102660, at *16-18. The court discussed the “panoply of sources” from which email users could have learned of Google’s interceptions, including from various Google sources or from other media sources. *Id.* at *17-18. Because “[a] fact-finder, in determining whether Class members impliedly consented, would have to evaluate to which of the various sources each individual user had been exposed and whether each individual ‘knew about and consented to the interception’ based on the sources to which she was exposed,” the court determined that these individualized inquiries would overwhelm any common questions. *Id.* at *18.

OVERLAP BETWEEN ASCERTAINABILITY, STANDING AND PREDOMINANCE

As discussed above, before considering the requirements of Rule 23, most federal courts require a class action plaintiff to prove that the proposed class is ascertainable based on objective criteria. *In re Hulu Privacy Litig.*, 2014 WL 2758598 (N.D. Cal. June 16, 2014), underscores that a plaintiff’s failure to meet the

ascertainability requirement can likewise result in a finding of no predominance. In *Hulu*, the plaintiffs brought claims under the Video Privacy Protection Act (“VPPA”) on behalf of a purported class of registered users of hulu.com who at least once during the class period had watched a video on hulu.com having used the same computer and web browser to log into Facebook in the previous four weeks using default settings. See *id.* at *2. The plaintiffs alleged that, by virtue of Hulu’s computer code, a ““c_user cookie” containing the class members’ “personally identifiable information” and viewing activity was sent to Facebook, in violation of the VPPA. See *id.* at *2-12. The district court denied class certification because the plaintiffs did not meet the ascertainability or predominance requirements. See *id.* at *13-16, 20-22.

Specifically, the critical inquiry turned on which “c_user cookie[s]” were sent to Facebook, which depended on “a number of variables (including whether the user remained logged into Facebook, cleared cookies, or used ad-blocking software).” *Id.* at *14. Thus, the only means of identifying class members was through self-reporting affidavits, which the court rejected since the information needed to establish class membership was not of the type that could reliably be verified through such affidavits. See *id.* at *15-16. Given these issues, the court concluded that the plaintiffs had failed both the ascertainability and the predominance requirements. See *id.* at *13-16, 20-22.

In contrast to *Hulu*, the Third Circuit in *Grandalski v. Quest Diagnostics Inc.*, observed that “[p]redominance and ascertainability are separate issues.” 767 F.3d 165, 184 n.5 (3rd Cir. 2014). The trial court denied certification of the plaintiff’s unjust enrichment claims because it found both the predominance and ascertainability requirements were not satisfied. See *id.* at 184-85. On appeal, the Third Circuit affirmed the denial of certification on those claims even though the trial court had conflated ascertainability with predominance. See *Grandalski*, 767 F.3d at 184-85. Specifically, while an ascertainability analysis is supposed to focus on whether objective records could readily identify class members, see *id.* at 184 n.5, the district court had misunderstood ascertainability as focusing on the individualized proof required to show an unjust enrichment claim, as an obstacle to class certification. See *id.* at 185. Although the district court’s analysis was more appropriately considered under a predominance analysis, the Third Circuit agreed with the district court that the individual inquiries required to

adjudicate an unjust enrichment claim in *Grandalski* were incompatible with class certification. See *id.*

A California federal district court's opinion in *Butler v. Mattel, Inc.*, 2014 WL 764514 (C.D. Cal. Feb. 24, 2014), demonstrates that a lack of standing as to all class members can preclude a finding of predominance. In *Butler*, the plaintiffs raised several claims for product defects and misrepresentations arising from the "dangerous propensity" of the Fisher-Price Rock 'N Play Sleeper to grow mold. *Id.* at *1. However, there was no evidence that the mold growth was "'actual or imminent' in all cases, a majority of cases, or even in a significant percentage of cases." *Id.* at *2. The court determined that many of the proposed class members likely did not have standing to raise the class claims, and whether or not a particular class member had standing was an individual issue that was not amenable to class treatment. *Id.* This individual issue predominated over

any common questions "as it is impossible to award class wide relief without consideration of standing." *Id.* *Butler* stands in contrast with the Sixth Circuit's recent holding that class members who purchased a washing machine with a defective propensity to grow mold were subject to a common injury at the point of sale — even those who had not yet experienced a mold problem — by paying a premium price for a defective machine. See *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 857 (6th Cir. 2013). Thus, the Sixth Circuit held that the predominance requirement had been met and affirmed the district court's grant of class certification. See *id.* at 861.

The takeaway from these cases is that the lack of classwide standing among all of the putative class members may preclude a finding of predominance, and the presence of classwide standing will depend on whether there is a classwide injury.

VIII. SUPERIORITY

In addition to the predominance requirement, a class can only be certified under Rule 23(b)(3) if "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This "superiority" requirement overlaps with other Rule 23 elements, particularly whether common issues predominate.

An issue related to superiority that has recently received separate attention is whether and how an out-of-court reimbursement process should be considered by a court in analyzing class certification. Some courts have reasoned that a class action, with the need for attorneys' fees and various other costs, is not superior to a defendants' voluntary reimbursement or refund program. *E.g. Pagan v. Abbott Labs., Inc.*, No. 10-CV-4676, 2012 WL 5289622, at *13 (E.D.N.Y. Oct. 20, 2012); *Daigle v. Ford Motor Co.*, Civ. No. 09-3214, 2012 WL 3113854, at *5-6 (D. Minn. July 31, 2012); *Webb v. Carter's Inc.*, 272 F.R.D. 489, 504-05 (C.D. Cal. 2011). The Seventh Circuit, in contrast, has held that such a program is not relevant to superiority because it is not another method of "adjudicating the controversy," but that a plaintiff's pursuit of a class action despite other out-of-court options may demonstrate a failure to

adequately represent the putative class. *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011).

The case law on this issue continued to be mixed in 2014. In *Turcios v. Carma Labs*, 296 F.R.D. 638 (C.D. Cal. 2014) the court was "unconvinced that a class action is superior in this case" where the defendant "already offers consumers a full refund of the amount paid for the product for any reason." In contrast, some courts expressed concern that the plain language of Rule 23(b)(3) did not permit a comparison of a class action to private methods of resolution. *Algarin v. Maybelline LLC*, 2014 U.S. Dist. LEXIS 65173 (S.D. Cal. May 12, 2014) ("The Court questions the appropriateness of comparing such a private method of resolution. ... Although the Court is mindful of cases which have considered whether the class action is superior to other 'non-judicial' methods of handling the controversy, the Court is wary of stepping outside the text of Rule 23(b)(3)."); *Forcellati v. Hyland's Inc.*, 2014 U.S. Dist. LEXIS 50600 (C.D. Cal. Apr. 9, 2014) ("We decline to take this approach, as it does not comport with the plain language of Rule 23, which directs courts to consider other available methods of adjudication.").

IX. RULE 23(f) INTERLOCUTORY APPEALS

Federal Rule of Civil Procedure 23(f) allows parties to seek a discretionary, interlocutory appeal of an order granting or denying class certification. In 2014, two decisions from the Seventh Circuit addressed the scope of that rule.

In *Driver v. AppleIllinois, LLC*, 739 F.3d 1073 (7th Cir. 2014) the Seventh Circuit considered the standard for 23(f) appeals in the context of modifications to a class certification order. The court denied a defendant's second Rule 23(f) petition following a change in the class definition. Writing for the panel, Judge Posner stated "that to justify a second appeal from an order granting or denying class certification the order appealed from must have *materially* altered a previous order granting or denying class certification." The court noted that a legitimate basis for granting a Rule 23(f) petition is that deciding the appeal would clarify class action law. Although the court concluded that the modification to the class definition was a material alteration to the class certification order, the defendant's Rule 23(f) petition did not challenge the modified class definition. Rather, it challenged unrelated issues that were ruled on three years earlier. According to the court, "There is no reason why [an alteration to the class definition] should open the door to an interlocutory appeal unrelated to the alteration." Following *Driver*, litigants may have only one opportunity to challenge a class certification order under Rule 23(f). Successive Rule 23(f) appeals are not likely to be entertained by an appellate court unless there has been a "material alteration" to the prior certification order.

Shortly after *Driver* was decided, the Seventh Circuit again addressed the right to an interlocutory appeal under Rule 23(f). In *Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities, Inc.*, 747 F.3d 489 (7th Cir. 2014), the Seventh Circuit denied a defendant's Rule 23(f) motion because the appeal did not challenge the appropriateness of the class certification order. Plaintiffs in *Arnold Chapman* charged Defendants with sending unsolicited fax advertisements in violation of the Telephone Consumer Protection Act's (TCPA) "junk fax" prohibition. Following the district court's class certification grant, the defendants petitioned under Rule 23(f) seeking an interlocutory review of that order. In rejecting the petition, the Seventh Circuit rejected the defendant's principal argument that only owners of the fax machines had standing to sue under the TCPA because no ownership requirement is suggested in the language of the statute. The court pointed out that this standing argument does not address the appropriateness of class certification and cannot be the basis of a Rule 23(f) interlocutory appeal. The court therefore denied defendant's leave to appeal under Rule 23(f). *Chapman* serves as a reminder to class action litigants that an interlocutory appeal is not an absolute right under Rule 23(f). Rather, the rule gives courts discretion to reject interlocutory appeals, especially where — as in *Chapman* — the petition addresses tertiary matters unrelated to the appropriateness of a class certification order.

X. SCRUTINY OF CLASS ACTION SETTLEMENTS

Under Rule 23(e), a class action settlement must be “fair, reasonable, and adequate” to gain court approval. One noticeable trend in 2014 is increasing judicial scrutiny of class action settlements. This trend bears watching by plaintiffs and defendants, both of whom have an interest in structuring settlements that will hold up to scrutiny and obtain court approval.

In *Newman v. Americredit Fin. Servs., Inc.*, No. 11cv3041, 2014 U.S. Dist. LEXIS 15728 (S.D. Cal.] Feb. 3, 2014), a California federal district court rejected a proposed \$8.5 million settlement because, among other things, the settlement failed to meet fairness requirements. Class members allegedly received calls to their mobile phones using autodialing equipment or a prerecorded voice message from Americredit in violation of the Telephone Consumer Protection Act.

The court found that the proposed settlement raised fairness issues for a myriad of reasons. First, the proposed settlement compensated all class members similarly despite the fact that some class members that opened accounts with Americredit may have consented to receiving calls, thus negating liability. The court found it difficult to evaluate class member recovery because it was unclear which of the 2,805,501 mobile phone numbers identified by Americredit consisted of class members with accounts. And it was unknown which of the numbers were called by an automated dialer or a prerecorded voice, which is necessary for claim processing and notice. These shortcomings consequently made it difficult to verify a claim’s validity. Second, the court was concerned that the proposed settlement prevented class members from opting out as a group. The court explained that it “is not inclined to approve limitations on the members’ right to opt out” or “approve a settlement which makes it unnecessarily burdensome to submit a claim or opt out.” Third, the proposed settlement was unfair for requiring that any motion for attorneys’ fees be filed concurrently with the motion for final settlement approval. Because objections are usually addressed in the motion for settlement approval, this schedule would require

objections to the fee motion to be filed before the fee motion itself is filed. Finally, termination provisions in the proposed settlement raised fairness issues. One termination provision allowed Americredit to terminate the settlement if claims exceeded a certain number. Another provision allowed the parties to terminate “upon mutual agreement of the [parties].”

The myriad number of fairness issues raised by the proposed settlement in *Newman* highlights the importance in (1) specifically delineating how claims are processed such as between differently situated class member; (2) not creating obstacles for class members to opt out; (3) allowing a mechanism for class members to raise objections to attorney’s fees; and (4) avoiding arbitrary termination clauses in settlement agreements.

The Seventh Circuit also addressed fairness issues in *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014). The *Eubank* plaintiffs brought products liability and consumer protection claims for alleged defective windows. After several years of litigation, the district court approved a settlement it valued at \$90 million and awarded \$11 million in attorneys’ fees.

On appeal, the Seventh Circuit rejected the settlement as “inequitable — even scandalous” because of glaring conflicts of interests, one-sided terms, and a gross overvaluation of the settlement’s value to class members. Writing for the panel, Judge Posner pointed to a number of red flags that the district court failed to uncover. First, the settlement bound all class members to a single nationwide class despite the fact that the district court previously certified two separate classes. This was propounded by the fact that a class representative was the father-in-law to the lead class counsel — a conflict of interest Judge Posner deemed “palpable.” Even more glaring, the state board disciplinary committee recently recommended that the lead counsel be suspended 30 months for repeated misconduct.

Judge Posner also took issue with a number of one-sided terms. He noted that class counsel would receive their entire fee award up front while class member awards remained contingent. Further, only class representatives that approved the settlement would be awarded compensation for their role, making any opposition to the settlement unlikely. Further, Judge Posner was concerned with a “kicker clause” which provided that any reduction in attorneys’ fee award would revert back to the defendant, rather than to class members.

Finally, the claims process was structured to discourage claims. For example, claim forms were as long as 13 pages long and required “a slew of arcane data”; the settlement notice was divided into 27 sections, with a number of subsections. Moreover, some claimants would only be entitled to an extended warranty and up to half would receive only a coupon discount on a future window purchase. Because of these factors and the paltry number of claimants, Judge Posner valued the actual settlement at no more than \$8.5 million — a far cry from the district court’s \$90 million valuation. In light of the foregoing, the appellate panel rejected the settlement, removed class counsel from the case, and replaced the class representatives.

The *Eubank* decision is essentially a lesson in what not to do in negotiating class action settlements. The egregious circumstances and settlement terms that Judge Posner identifies underscore the importance of (1) structuring the claims process so as to encourage, rather than discourage, claims; (2) avoiding one-sided settlement terms; and (3) avoiding the appearance of any impropriety between the parties and counsel in the case.

In *George v. China Automotive Sys., Inc.*, No. 11 Civ. 7533(KBF), 2014 WL 173417 (S.D.N.Y. Jan. 15, 2014), the Southern District of New York addressed a proposed settlement class after the court had denied class certification. The court had denied class certification because the plaintiffs failed to show predominance, but the parties later settled the case and proposed a settlement class. In rejecting the settlement agreement, the court reiterated the general rule: when determining whether a class can be certified for settlement purposes, a Rule 23 analysis is required. The *George* decision reinforces the general

requirement that a class action settlement will not be approved — even if the terms are favorable to the class — if the class fails to meet the Rule 23 requirements for certification.

In *In re Trans Union Corp. Privacy Litig.*, 741 F.3d 811 (7th Cir. 2014), the Seventh Circuit affirmed the use of an unusual settlement feature that allowed Trans Union to reimburse itself for post-settlement claims by drawing money from the settlement fund. Under the terms of the settlement, a \$75 million fund was created for class members’ claims. Any funds remaining after two years would be distributed among some 450,000 class members. An unusual feature of the settlement preserved the right for certain class members to bring individual lawsuits. Trans Union, however, was authorized to draw money from the settlement fund to reimburse itself for these individual claims.

Following settlement approval, enterprising lawyers managed to gather over 100,000 claims from qualified class members. The lawyers filed thousands of individual lawsuits in jurisdictions with the lowest filing fee. Trans Union quickly settled these claims and sought reimbursement from the settlement fund. Class counsel objected to reimbursement on the ground that these high-volume filings were prohibited “Aggregated Actions” under the settlement. The district court rejected this argument because each claim was filed separately on behalf of just one plaintiff.

On appeal, the Seventh Circuit affirmed. Agreeing with the district court, the Seventh Circuit explained that although the Class Action Fairness Act (CAFA) treats mass actions as class actions for purposes of federal jurisdiction, “the meaning agreed upon by the parties and approved by the district court is the one that counts.” Additionally, Trans Union had no duty to assert defenses because “the settlement gave Trans Union complete discretion to fold even a winning hand.”

Following *Trans Union*, litigants should be aware of the potential utility of using reimbursement terms to settle post-settlement claims by class members, but be wary of the dangers of allowing class members to retain the ability to file individual claims. *Trans Union* is also a reminder that in construing settlement terms, mutually agreed upon contractual definitions of key terms control over related statutory definitions.

XI. ATTORNEYS' FEES IN CLASS ACTION SETTLEMENTS

In 2014, courts issued a number of decisions affecting the ability of class counsel to collect attorneys' fees in class action settlements. A common theme of these decisions: Funds not paid to class members in a common fund settlement do not benefit the class and generally are not an appropriate benchmark for assessing the reasonableness of attorneys' fees to be awarded to class counsel. Thus, attorneys' fees awarded through a common fund will be closely scrutinized where the total value of the fund includes certain benefits not realized by class members, such as *cy pres* awards and coupon settlements, or where only a limited number of class members submit recoverable claims.

CERTAIN SETTLEMENT TERMS TRIGGER CLOSE JUDICIAL SCRUTINY

In *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014), the Seventh Circuit rejected a proposed class action settlement because the attorneys' fee award was based on a total settlement value that included benefits not actually realized by class members. Under the terms of the proposed settlement, class members would receive \$10 coupons while class counsel received approximately \$1 million. Of the 16 million potential class members, only 5 million were provided notice. Of those 5 million, only 83,000 submitted claims for the \$10 coupons, yielding a total possible payout of \$830,000. The district court determined the total value of the settlement to be \$4.1 million, comprising the \$1 million in negotiated attorneys' fees, \$830,000 in coupons, and roughly \$2.2 million in administrative costs. Because the requested attorneys' fee was approximately one-fourth of the total settlement value, the district court approved the settlement.

On appeal, the Seventh Circuit rejected this settlement as unreasonable. Judge Posner, writing for the court, emphasized that in determining the reasonableness of attorneys' fees in a proposed settlement, "the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation." According to Judge Posner, the district court failed to correctly analyze the

issues. First, the district court "incorrectly treated every penny of administrative expenses as if it were cash in the pockets of class members." Although these costs were part of the settlement, they were not part of the benefit received by class members and therefore should not have been included in determining the total settlement value. Second, the district court unjustifiably assumed that a \$10 coupon is worth \$10 to every recipient. The coupons would expire in six months and could not be sold for face value. The coupons did not permit change for purchases less than \$10 and many coupons would be lost or unused. Consequently, it was error for the district court to fix an ultimate value of the settlement before the redemption period ended without attempting to estimate the actual value of the \$830,000 in coupons to the class as a whole.

Just two months after *Redman* was decided, the Seventh Circuit and Judge Posner again addressed the appropriate amount of attorneys' fee in a common fund case. In *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), the Seventh Circuit rejected a settlement that awarded \$1.93 million in attorneys' fees and \$865,284 to the entire class, calling the settlement "a selfish deal between class counsel and the defendant [that] disserves the class."

In calculating fees, the district court valued the total settlement at \$20.2 million, which reflected the "maximum *potential* payment that class members could receive." The \$20.2 million figure was comprised of \$14.2 million for class members, \$4.5 million in attorneys' fees, and \$1.5 million in notification costs. Out of the \$14.2 million, only \$865,284 was awarded to the class due to a sparse number of claimants. Although the district court awarded only \$1.93 million out of the \$4.5 million fee request, the entire \$4.5 million figure was still included in calculating the total settlement value due to a "kicker clause" — which stipulated that any court reduction in fees would revert back to the defendant and not the class. Notably, the district court excluded a *cy pres* award of \$1.13 million in the total settlement value.

On appeal, the Seventh Circuit rejected the approved

settlement, explaining that the \$20.2 million figure had “barely any connection to the settlement’s value to the class.” According to Judge Posner, notice and fees were costs, not benefits to the class. Judge Posner referenced *Redman* for the proposition that the “[relevant ratio] is the ratio of (1) the fee to (2) the fee plus what the class members received.” Under this measure, Judge Posner chastised the \$1.93 million award as outlandish because it constituted sixty-nine percent of the actual settlement value. Unlike the Third Circuit in *Dewey* — which held that a court has discretion to discount an attorneys’ fee award to account for *cy pres* — Judge Posner adamantly concluded in *Pearson* that it is improper to include a *cy pres* award in determining the total benefit to the class. Finally, Judge Posner found no justification for a “kicker clause” in class action settlements, calling such clauses “a gimmick for defeating objectors.” Judge Posner concluded that “at the very least there should be a strong presumption of its invalidity.”

Following *Redman* and *Pearson*, any sum that does not benefit class members is unlikely to play a factor in calculating reasonable attorney’s fees in the Seventh Circuit. Moreover, the *Pearson* decision greatly reduces the incentive for kicker clauses or the use of *cy pres* to inflate fees. Indeed, these cases serve as a strong reminder that negotiated terms in class action settlements may not always withstand close judicial scrutiny, especially if the settlement involves coupons or a limited number of claimants.

LODESTAR VS. PERCENTAGE-OF-RECOVERY METHODS

The Seventh Circuit also addressed the use of *ex post facto* considerations in determining an attorneys’ fee award. Because the particular costs and risks of taking on a class action can only be determined prospectively at the time of engagement, courts generally must determine a reasonable attorneys’ fee in class actions based on an *ex ante* analysis. However, in *Americana Art China Co. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243 (7th Cir. 2014), the Seventh Circuit upheld a reduced fee award that was based in part on *ex post facto* considerations. The settlement provided a \$6.1 million fund for class members and a fee award of one-third of the total fund or \$2.03 million. However, only 1,820 out of 28,879 class members submitted claims, yielding a total class recovery of roughly

\$400,000. The remainder less attorney fees would revert to the defendant. In light of the disparate class recovery, the district court rejected the percentage method called for in the settlement agreement and instead awarded \$1.14 million in fees based on the lodestar and a risk multiplier of 1.5.

On appeal, the plaintiffs argued that the court engaged in an impermissible *ex post facto* rationalization in reducing their fee. The Seventh Circuit rejected this argument, explaining that the district court did not consider the ultimate outcome in making its fee determination because “it considered only the lodestar amount submitted by counsel and the risk multiplier warranted by the contingent nature of the case.” The appellate court stated, however, that the district court can and *should* consider the paucity of the class recovery when deciding between using the lodestar method or percentage-of-recovery method. Therefore, it was correct for the district court to choose the lodestar method because it was within the court’s discretion. Following this decision, it appears that *ex post facto* considerations may be used by a court to determine attorneys’ fees, at least to the limited extent of choosing between the different methods in calculating reasonable attorneys’ fees.

In summary, parties to a class action settlement should be mindful of the actual benefit received by class members, in particular the number of class members that will submit claims. Where only a small percentage of class members submit claims, courts may be inclined — or even required — to reduce a negotiated attorneys’ fees to reflect the actual benefit received by class members. Correspondingly, class counsel should be incentivized to create a stream-lined claims process that maximizes the settlement benefits actually received by the class.

In contrast to the Seventh Circuit, the Third Circuit affirmed a large attorneys’ fee award based in part on benefits not received by the class. In *Dewey v. Volkswagen of Am. Inc.*, Nos. 13-1123/1124, 2014 WL 542224 (3d Cir. Feb. 12, 2014), the Third Circuit upheld a \$9.2 million attorneys’ fee award included in a class action settlement. The district court calculated this fee based on a percentage-of-recovery of the total settlement value. This figure was then compared to other courts in the circuit using a lodestar cross-check. The total settlement was valued at \$69.3 million, which included an \$8 million fund to pay reimbursement

claims. The settlement agreement also included a *cy pres* provision, providing that any amounts remaining in the fund after five years would be donated to an approved U.S. research or charitable institution. Notably, at the time the settlement was approved, only \$5 million of the expected \$8 million in claims had been paid.

The appellants, class members who objected to the settlement, argued that the trial court incorrectly calculated the fee award because state law prefers the lodestar method to the percentage-of-recovery method. The Third Circuit rejected this argument, stating that both federal and state law permit the percentage-of-recovery method in class actions involving a common fund. Although the \$8 million fund was not a true common fund — attorneys' fees were paid directly instead of through the fund — the court

held that where the fund and the fee are paid from the same source, such an arrangement amounts to a constructive common fund. Consequently, the court concluded that the trial court correctly applied the percentage-of-fund method to calculate attorneys' fees.

The appellants then argued that the attorneys' fee award should be reduced because the total settlement valuation did not account for the shortfall of claims made against the \$8 million fund. The Third Circuit rejected this argument, noting that district courts have discretion to discount fees to account for a *cy pres* award. Moreover, additional claimants were still free to submit claims against the fund. The court therefore concluded that the district court acted within its discretion in determining the total settlement value and affirmed the attorneys' fee award.